
SOUTH AFRICA / JUDGMENT

Niland v Huntershill Safari CC and Another (5622/2015) [2016] ZAECGHC 102 (12 October 2016) [2016] ZAECGHC 102

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

5622/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 5622/2015

DATE HEARD: 18/08/2016

DATE DELIVERED: 12/10/2016

In the matter between

BRUCE DESMOND NILAND

APPLICANT

and

HUNTERSHILL SAFARI CC

1st RESPONDENT

CK 2004/021856/23

GREGORY ERNEST HARVEY

2ND RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] On 16 April 2016 a provisional winding up order was granted against the first respondent (Huntershill) in terms of s 67 of the Close Corporations Act 69 of 1984, read with s 81 (1) (d) of the Companies Act 71 of 2008. The applicant (Niland) now seeks a final order.
- [2] The winding up order was sought on the basis that it would be just and equitable to do so as provided for in s 81 (1) (d) (iii) of the Companies Act.

Background

- [4] The following appeared to be common cause or not in dispute. Niland is a professional hunter. Prior to meeting Harvey he was employed as a professional hunter and farm manager. His duties included the marketing of safaris and the conducting of hunting operations. Niland and Harvey met in 2003 when Harvey approached Niland to assist in the establishment of a hunting

business to be conducted on a property known as Wildschutsberg, owned by Harvey. Niland commenced employment with Harvey as a professional hunter and farm manager. Niland was involved in the development of Wildschutsberg, which included the building of roads, dams, fences and lodges. When Wildschutsberg was sufficiently appropriately developed, Huntershill commenced business

with Harvey and one Bartlett as members. Clients of Huntershill were accommodated in lodges owned by Harvey and the game they hunted was owned by Harvey.

- [5] Niland lived on Wildschutsberg and during 2004 met his future wife who joined him there. Later that year they moved to nearby Quarrelbrook Farm, also owned by Harvey. Niland and his wife married in 2006. Niland and Harvey became friends and Harvey promised to make Niland a partner in Huntershill, or, as far as Niland could recall, Harvey offered him a share in Huntershill.

Niland purchased a 49% member's interest in Huntershill on 27 January 2010. He and Harvey also signed an association

agreement. Clauses of the association agreement relevant to this application are:

"5. POWER OF MEMBERS TO BIND THE CORPORATION

5.1 The members shall have the power to represent the Corporation in its dealing with Third Parties provided that both members agree to such dealing. All dealings with third parties shall be by mutual consent of the members thereof.

Should any member deal outside of his mandate aforesaid and bind the Close Corporation then at the election of the other member such dealing may be ratified or not and if not the member so dealing without the other member's consent will be personally liable for such obligation to the Close Corporation or to the other member, as the case may be.

9. PRE-EMPTION PROVISIONS

9.1(i) None of the members shall be entitled under any circumstances to sell, transfer or otherwise dispose of his equity without first making an offer by means of a written notice to sell his equity to the remaining member based on the following:

9.1(ii) In the event of BRUCE DESMOND NILAND wishing to sell, transfer or dispose of his equity in the Close Corporation (to be interpreted in its widest sense) the following shall apply:

- (a) In the event of him so wishing to sell, transfer or dispose of his equity within 10 (TEN) years of date of signature hereof the value of his equity under such circumstances shall be his monetary contribution over the period he was a member of the Close Corporation up to and including the date upon which the offer is made as referred to in paragraph 9.2 hereof less any payments made to him by the Close Corporation (for purposes hereof Goodwill will not be taken into consideration and also not the value of his loan account in the Close Corporation): or
- (b) In the event of him so wishing to sell, transfer or dispose of his equity after 10 (TEN) years of date of signature hereof the value of his equity under such circumstances shall be the monetary contribution made by him over the period he was a member of the Close Corporation up to and including the date upon which the offer is made as referred to in paragraph 9.2 hereof less any payments made to him by the Close Corporation or the value of his equity as defined in paragraph 1.3.4 hereof, whichever is the greater.

9.1(iii) In the event of GREGORY ERNEST HARVEY wishing to sell, transfer or dispose of his equity in the Close Corporation the following shall apply:

- (a) the value of his equity shall be the monetary contributions made by him over the period he was a member of the Close Corporation up to and including the date the offer is made as referred to in paragraph 9.2 hereof less any repayments made to him by the Close Corporation plus the amount outstanding to the credit of his loan account at any time together with accrued interest thereon and such Goodwill as may attach to the Close Corporation at the time.

9.2 The offer notice shall be irrevocable for a period of 60 (sixty) days after it has been received and shall state the price required for the equity and the terms of payment. The offer notice shall not contain any other terms and conditions, save for a condition that the Offerer requires to be released from any suretyship obligation he

may have signed in respect of any of the corporation's agreement and the normal warranties and restraints which may be required by a member who may purchase such equity.

9.3 The remaining member shall be entitled, within the offer period, to accept the offer provided that he shall be obliged to acquire the whole and not part only of the equity being offered, and such acceptance shall be communicated to the Offerer in writing.

9.4 A member may not sell, transfer or otherwise dispose of his interest without having first offered such interest to the other member at any price lower than the price contemplated in Paragraph 9.1 hereof. Such selling member shall be obliged to offer his member's interest to the remaining member and allow him a period of 60 (sixty) days within which to accept such offer. Should the remaining member not accept the offer, then and under such circumstances the selling member will be entitled to sell his member's interest and loan account to a third party.

18. SPECIAL CONDITION

18.1 In the event of BRUCE DESMOND NILAND selling, transferring or otherwise disposing of his member's interest in the Close Corporation he shall not for a period of 3 (three) years after the date of sale either as principle (sic), agent, partner, representative, shareholder, director, employee, consultant, adviser, financier, or any other in similar capacity, directly or indirectly be associated or concerned with, interest or engaged in any firm, business, company or other association of persons which carries on business or activity similar to the business currently carried by Huntershill Safaris CC and may also not have any contact with the clients of Huntershill Safaris CC as same may appear on its database or otherwise, at the time, for the said period of time.

18.2 BRUCE DESMOND NILAND agrees that the restraints imposed upon him in terms of this clause are reasonable as to subject matter, area and duration and are reasonably necessary in order to preserve and to protect the Goodwill of the business of the purchaser."

[6] Harvey ran the business and administrative side of Huntershill while Niland was the hunter and safari guide. Niland remained as an employee of Harvey as his farm manager at Wildschutsberg.

[7] Niland left Harvey's employment on 14 July 2014. The parties' accounts of events relating to their relationship

prior to and after this date differed in several respects. It is convenient to deal with their evidence in two stages: events prior to and including 14 July 2015 and events which occurred thereafter.

Events prior to and including 14 July 2015

[8] According to Niland in early 2013 he and Harvey agreed that Huntershill should purchase a taxidermy business. However

Harvey purchased it for himself. Prior to this transaction Huntershill referred clients to another taxidermy business and

received commissions for such referrals. After Harvey purchased the taxidermy business Huntershill's clients were referred to Harvey's taxidermy business. This business was not successful and Harvey sold it and agreed with the purchaser that

Huntershill would not receive a commission for clients which were referred. Harvey stated that it was never agreed that Huntershill would purchase the taxidermy business, and that he and Niland agreed that he, Harvey, would purchase it. Huntershill

would then earn commission from referrals to the business. The business failed because Niland failed to comply with his obligation

to assist with the management of the business.

[9] During April 2013 Niland learned from Harvey's wife that Harvey was involved in a relationship with Niland's wife and had been since 2011. According to Niland Harvey asked for forgiveness and said that Niland was a brother to him. Harvey denied asking for forgiveness and said that it was apparent that Niland had forgiven him and Mrs Niland and that the matter had been resolved within a few months. Thereafter Niland requested that he and his family should move to Huntershill's property in Bedford. Harvey agreed but the move did not take place. Niland and Harvey each said that the other had changed his mind. During January 2014 Harvey requested that Niland's wife move to Queenstown. According to Niland Harvey wanted to try to save his marriage and according to Harvey he wanted to assist his children in recovering from his divorce. (Harvey and his wife were divorced in March 2015.) Mrs Niland moved to Queenstown with their minor children but returned during September 2014, with Harvey's consent.

[10] Niland said that during January 2015 Ms Debbie Bell, who was employed by Harvey and was staying at Wildschutsberg with Harvey, spread the story of the affair to a number of people and Harvey did not rebuke or discipline her. At this time Niland was trying to restore his marriage and to put the affair behind him. Harvey said that Bell was a friend who was assisting at Wildschutsberg while he was overseas. Harvey denied the allegation that she spread the story of the affair and that he had not rebuked her, and said that the allegation was hearsay.

[11] According to Niland, Harvey made renewed advances towards Mrs Niland and in the presence of one Charl Hooper told Niland that the relationship had been ongoing for eight years. He made remarks about the way Mrs Niland looked at him and touched him without Niland seeing her do so. The next day Harvey said he had no recollection of making these remarks and said that he had been drunk. Harvey denied these allegations.

[12] During May or June 2015 Harvey sent the following sms from an employee's cellphone to Mrs Niland:

"Guida when are u moving? I have to use other people's phones to get a message to you. I want you off the farm. This is from Greg Harvey."

- [13] According to Harvey during 2015 Mrs Niland wanted to renew the relationship. He did not reciprocate and when she persisted, it became necessary to request Niland and his family to find alternative accommodation, either in Tarkastad or Queenstown. Niland agreed that there was a need to move, but did not do so. Harvey therefore, according to him, had to communicate directly with Mrs Niland in order to ask her to leave. She avoided taking his calls and blocked his messages, hence his use of an employee's cellphone.
- [14] Niland said that on 14 July 2015 he told Harvey that he could no longer bear his conduct. Harvey insisted that Niland resign in writing. Niland refused and Harvey demanded that Niland and his family leave the farm. Further, according to Niland, Harvey instructed staff of Huntershill not to communicate with Niland and cut off the water supply to the house where Niland and his family were living, claiming that the pump had broken down. This endured for eight days and Niland and his family then left Wildschutsberg. According to Harvey on 14 July 2015 Niland told him that he was resigning and taking up other opportunities. Niland refused to resign in writing. Harvey denied telling Niland to leave the farm and denied cutting off the water supply.
- [15] According to Niland Harvey informed a number of other persons that he had dismissed Niland from employment for poaching a rhinoceros on the farm. This was false. Harvey denied doing so.
- [16] As a result of the events recounted by Niland in his founding affidavit he maintained that his relationship with Harvey was

dysfunctional, that there was no prospect of any future co-operation between them and that all trust between them was lost. Further, his employment with Harvey was at an end and he was excluded from involvement in the conduct of Huntershill's business because he was no longer permitted to enter the property from which Huntershill's business is conducted.

- [17] Niland also alleged that Harvey controlled Huntershill's finances and had not conducted the business to the best advantage of Huntershill. Hunting packages were marketed at a price which took into account prices Harvey had set for the use of his

accommodation and the game to be hunted. Harvey, so it was alleged, would then unilaterally increase the cost of game thereby

eroding Huntershill's profit margins. For the period 1 March 2015 to 31 July 2015 Huntershill incurred a nett loss of R422 122.00. Harvey responded by saying that Niland had not mentioned one instance where he had objected to the manner in which Harvey had conducted Huntershill's financial affairs and maintained that he had adhered to sound business and accounting practices, overseen by Huntershill's accountants.

Events after 14 July 2015.

- [18] After leaving the farm Niland found employment with one Osborne as a farm manager. Osborne owns or controls Thaba Thala Game Reserve and Safari Hunting Enterprise (Thaba Thala). On the evening of 14 July 2015 Niland wrote the following on his Facebook page:

“This is the hardest message I will write have decided to leave Huntershill safari going on to bigger thinking with my family.”

On 15 July 2015 he wrote:

“Hi Brent & Traci thanks for the support, you guys have been amazing. I will be hunting with a company not far from here. Starting a new hunting company with someone else wasn’t an easy decision but its (sic) for the best.”

- [19] Niland instituted proceedings against Harvey in the CCMA for unfair dismissal. He has also instituted an action relating to the dissolution of a partnership between him and Harvey, and an action for defamation, arising from Harvey’s accusation of poaching.
- [20] After Niland’s departure, Harvey suspected that Niland was breaching his fiduciary duties towards Huntershill and was diverting business from Huntershill to Thaba Thala. Following correspondence between their respective attorneys, by letter dated 27 July 2015 Niland’s attorney stated inter alia that Niland denied engaging in conduct calculated to harm Huntershill and undertook not to do so. Niland further denied canvassing

any of Huntershill’s clients and undertook not to do so.

- [21] During September 2015 Harvey obtained the password to Niland’s Facebook page and accessed the page unlawfully. On 3 December 2015 Harvey was granted an interdict by this court in terms of which Niland was interdicted from, inter alia, breaching his fiduciary duties to Huntershill and competing with the business interests of Huntershill. The judgment of Plasket J is reported as *Harvey v Niland and Others* 2016 (2) SA 436 (ECG). At para [18] of the judgment Plasket J said:

“It is clear from annexure ‘G’[1] that Niland breached his fiduciary duties to Huntershill by seeking to undermine its business in his dealings with its existing clients and by himself competing with it.”

- [22] In the interdict application Niland contested the admissibility of annexure ‘G’ on the ground that it had been unlawfully obtained. In his founding affidavit in the present application, deposed to before judgment was delivered in the interdict application, Niland mentioned that Harvey had launched the interdict application but did not disclose that he had been communicating with clients of Huntershill. Niland also disputed that he had competed with Huntershill. In his judgment Plasket J, after setting out details of some of the communications between Niland and Huntershill’s clients contained in annexure ‘G’, stated as follows at para [37]:

“What emerges clearly from annexure ‘G’ is that Niland had set up a hunting business in opposition with Huntershill, had actively sought to entice clients of Huntershill to hunt with him, had provided them with prices and packages, had, in one instance provided advice as to how a client should cancel his hunt with Huntershill and get his deposit back, and had, on more than one occasion, been disparaging of Huntershill and Harvey.”

[23] It was not in dispute that Harvey employed professional hunters in Niland’s place and removed any reference to Niland from Huntershill’s website. Harvey said that it was necessary to employ hunters after 14 July 2015, and that the removal of a reference to Niland on Huntershill’s website was necessary in order to protect Huntershill. Niland alleged that Harvey was offering hunting packages without reference to Niland. Harvey’s response was that Niland could not expect to be privy to business decisions, given his breach of his fiduciary duties. Given Niland’s disassociation from Huntershill, so Harvey stated, it was necessary for him to take decisions to ensure the ongoing operation of Huntershill. However, according to Harvey, if Niland did not succeed in the winding up application he would be able to participate fully in Huntershill’s business affairs.

[24] During October 2015 Niland’s attorney requested a copy of Huntershill’s 2015 financial statements and a schedule of its assets and liabilities. The response of Harvey’s attorney was:

“Information not reasonably required by a member will not be made available. This is to be viewed against the backdrop of your client having openly competed with the CC of which he is a member and accordingly information will be made available bearing in mind that Huntershill Safaris CC will not be disclosing any information which could be to its detriment (in the widest sense).”

[25] An annual general meeting of Huntershill was held on 30 October

2015. Niland’s attorney, who held Niland’s proxy, and a chartered accountant attended the meeting on his behalf. The attorney was not allowed to vote on Niland’s behalf. One of the resolutions taken by Harvey was to evict Niland’s father from Huntershill’s Bedford property. According to Niland Harvey terminated Mr Niland senior’s electricity supply on the property. Harvey said that the eviction had not been carried out but that Huntershill had stopped paying for the supply of electricity.

[26] On 30 October 2015 Harvey’s attorneys wrote to Niland’s attorneys stating, inter alia, that Huntershill had suffered a R400 000.00 loss for the first four months of the financial year, that Huntershill did not have cash in its bank account and that Huntershill was not earning an income as a result of Niland competing with it. Niland was requested to contribute at least R200 000.00 to compensate for the loss, and to contribute R20 000.00 a month to service Huntershill’s mortgage bond. Niland relied on this letter in alleging that Huntershill was commercially insolvent. Harvey denied that Huntershill was commercially insolvent. Huntershill’s accounting officer Mr Alasdair McDonald deposed to an affidavit in which he stated that he had never received any query from either member of Huntershill with respect to the reporting of its financial affairs. He said that the allegation that Harvey had increased

the cost of game causing a reduction in profits was not evidenced in the books of account. With regard to the allegation of commercial insolvency he said that the 2015 financials did not indicate a technically insolvent situation.

- [27] In general Harvey asserted that Niland in his founding papers had not stated the real grounds for seeking the winding up of Huntershill and that he had only brought the application when his breach of his fiduciary duties had been discovered. The affair with Mrs Niland was a contrived ground “of a historical nature”. Harvey maintained that Niland sought the destruction of Huntershill to the advantage of Thaba Thala, Huntershill’s primary competitor, and immunity from a damages claim by Huntershill in the region of R1,5 million. He referred to Niland’s Facebook posts in August 2015 in which he said “I want the company devolved (sic) due to improper motives”, “want to dissolve company and both of us start over no huntershill safaris”, and “if I sell my shares I have 3 year restrained (sic) of trade no hunting so I can’t afford to do that”.
- [28] In his replying affidavit Niland finally acknowledged that he had breached his fiduciary duty to Huntershill but said that after 14 July 2015 he had had nowhere to live and no income. He maintained that the origin of the breakdown of the relationship was the affair between Harvey and Mrs Niland but acknowledged that he and Harvey were “in various measures” at fault. He denied that he was conducting hunting or safari operations on his or Thaba Thala’s behalf and stated that he was still employed by Osborne as the manager of Osborne’s farm, which is 30 kilometres away from Thaba Thala.
- [29] Harvey delivered a supplementary affidavit in which he alleged that Niland was continuing to associate with former clients of Huntershill and was in breach of Plasket J’s order. In support of the allegation he relied on an affidavit from Mr Thobile Spayre who said he was employed at Osborne’s farm and worked under Niland’s supervision. He met a former client of Huntershill there and Niland told him that he, Spayre, would be tracking for that client. This did not materialise. Niland however thereafter told him that the client would be hunting with him. Niland further told him that many former clients of Huntershill would be hunting with him on Thaba Thala. Niland denied these allegations and pointed out that Spayre was now employed by Harvey. In support of his denials, Niland relied on an affidavit from Mr Pieter Boshoff, who stated that he was employed as a professional hunter at Thaba Thala and that Niland at all times had been Osborne’s farm manager and had never acted as a professional hunter while in Osborne’s employ.

Discussion

- [30] As stated at the outset in this judgment, Niland maintained that the relationship of trust between him and Harvey had irreparably broken down to the extent that there is no prospect of co-operation between them in conducting the affairs of Huntershill.
- [31] S 81 (d) of the Companies Act provides as follows:

“(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;”

[32] S 81 (d) was considered in *Thundercat Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2014] 1 All SA 474 (SCA). At paras [15] to

[17] Malan JA stated (footnotes omitted):

“[15] 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 eiusdem 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.

[16] 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 meeting, affected the management of the company could also found a liquidation order on this ground. No doubt these categories remain under the new Act and may be extended.

[17] The word "deadlock" is not always given the same meaning. The reference to deadlock in the previous paragraph and also in section 81(1)(d)(i) and (ii) was described as a case of "complete deadlock", but there is no particular advantage in the introduction of this term. The "deadlock principle", on the other hand, is–

". . . founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. "The "superimposition of equitable considerations" in such a case may justify the dissolution of such a company under the just and equitable provision."

[33] In *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) at para [3] Zulman JA stated:

"At the outset it is important to point out that the onus rested upon the appellant in seeking a final order to satisfy the court, on a balance of probabilities, that it was indeed "just and equitable" finally to liquidate the respondent. Furthermore, the degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere prima facie case need be established whereas the court, before it will grant a final order, must be satisfied on a balance of probabilities, that such a case has been made out by the applicant seeking confirmation of the provisional order."

[34] Further at para [4] Zulman JA said (footnotes omitted):

"An analysis of all of the facts which were before the court a quo when the appellant sought a final order reveals that there were serious disputes in regard to the essential matters that the appellant was required to satisfy the court upon in order to establish that it was "just and equitable" to wind up the respondent.

Furthermore it is important to note that the applicant, who bore the onus, as I have previously mentioned, did not seek an order referring such disputes for the hearing of oral evidence as he might have done (*Kalil and Emphy and another Pacer Properties (Pty) (Ltd)*). In the circumstances the following test enunciated by Corbett JA in the oft referred decision of *Plascon-Evans Paints Limited Van Riebeeck Paints (Pty) Limited* is of application:

"Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary

relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers Winery v Stellenvale Winery (Pty) (Ltd) 1957 (4) SA 234 (C) at 235E–G to B:

‘ . . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.’

. . . It seems to me, however, that this formulation of the general rule particularly the second sentence thereof, requires some clarification, and perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of 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 . . . In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . Moreover there may be exceptions to this 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 merely on the papers. . .”

[35] This onus included establishing on a balance of probabilities that Huntershill is a small domestic close corporation in which there is a particular personal relationship of confidence and trust akin to that which exists between partners.

[36] In *Apco Africa (Pty) Ltd and Another v APCO Worldwide Inc* [2008] ZASCA 64; 2008

(5) SA 615 (SCA) at para [17] Ponnan JA referred to the following passage in *Ebrahimi v Westbourne Galleries and Others*

[1973] AC 360 (HL) at 379b-380b:

“The words [‘just and equitable’] are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of 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. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not . . . entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed

or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

[37] Ponnann JA went on to state at para [18]:

"The cases show that the just and equitable provision is not to be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock. Where there is in substance a partnership, in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding-up of the company under the just and equitable provision....."

[38] In the present matter, the following factors are in my view relevant. Niland was approached by Harvey to assist in the

establishment of Huntershill, and Niland played a part in the development of Wildschutsberg as a safari venue. Niland was

also employed by Harvey and lived with his wife on Harvey's property. In due course Niland and Harvey became friends and Harvey promised to make Niland a "partner" in Huntershill. The association agreement provided that all dealings with third parties were to be by mutual consent. Neither of the members was entitled to dispose of his equity without first offering it to the other member. In the light of these factors, I am of the view that Niland became a member of Huntershill

“on the basis of a personal relationship, involving mutual confidence”. I do not think that the fact that the terms of the association agreement were in some respects more onerous for Niland changes the nature of the relationship. Niland was therefore entitled to seek a winding up of Huntershill on the grounds that it would be just and equitable.

[39] Further in *Apco Africa* (supra) at para [19] Ponnann JA stated:

“The second, usually called the deadlock principle, is derived from the Yenidje Tobacco Company case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. 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 are entitled to claim that it is just and equitable that the company should be wound up.”

[40] In essence, Niland relied on two causes of the destruction of the relationship: Harvey's affair with Mrs Niland, and Niland's breach of his fiduciary duties towards Huntershill. Niland stressed however that the origin of the destruction was the affair.

[41] Harvey on the other hand contended that the affair had been resolved and the cause of the breakdown was Niland's breach of his fiduciary duties in an attempt to destroy Huntershill. This was Niland's true motive in seeking to have Huntershill wound up.

[42] There was a dispute of fact relating to whether or not the affair remained an impediment to the relationship between Niland and Harvey. This dispute relates chiefly to whether or not Harvey kept the issue of the affair alive to the extent that Niland could not bear his conduct any longer. I think it can be safely said that Niland did not contemplate that his friend and co-member would have an affair with his wife and that the affair obviously constituted a breach of trust.

[43] With regard to disputes of fact in motion proceedings, I refer to what was said by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008

(3) SA 371 (SCA) at para [13]:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of

circumstances all of which needs to be borne in mind when arriving at a decision”.

- [44] I do not intend to spend time on the disputes relating to the taxidermy business and the alleged commercial insolvency. On the application of the Plascon-Evans test I accept Harvey's version. The main dispute is whether or not Harvey's affair with Mrs Niland was a cause of the breakdown in the relationship or whether or not Niland was using it falsely to achieve his own ends.
- [45] The resurrection of the affair on Niland's version began in 2015 when according to him Harvey did not rebuke Bell for spreading the story of the affair, Harvey made renewed advances to Mrs Niland, and Harvey taunted Niland about the affair in the presence of another person. This included describing Mrs Niland's provocative behaviour towards him without Niland witnessing it.
- [46] Harvey's response to the allegation concerning Bell's spreading the story of the affair and his failure to rebuke her was a bare denial and that reference to what Bell was alleged to have said was hearsay. In my view he could have addressed this allegation more fully. It was not in dispute that Bell was staying in the main house on Wildschutsberg and he would have interacted with her and have had knowledge to some extent of her communications. His response to the allegations concerning his taunts about the affair in the presence of Hooper was a bare denial, including a denial that the next day he had said that he had no recollection of what he had said because he was drunk. In my view these allegations were not sufficiently addressed by Harvey. He would have been aware of what interaction, if any, he had with Mrs Niland at that time and whether or not there were opportunities for her to behave in that manner towards him without Niland's knowledge. He would have been able to say whether or not he knew Charl Hooper and whether or not there was ever a conversation between him and Niland in Hooper's presence. Further I am of the view that his explanation for using an employee's cellphone to send a message to Mrs Niland was untenable. If, as he alleged, she was persisting in making advances towards him, despite his lack of reciprocation, why would she avoid his calls and messages? In any event his reason for communicating with her as opposed to communicating with Niland was also in my view untenable. Niland was his friend, employee and co-member and according to him had forgiven him for the affair with Mrs Niland. Harvey's denial of Niland's allegations and his explanation of his conduct in my view did not create a genuine dispute of fact.
- [47] There was a dispute about the events of 14 July 2015. Again, in my view, Harvey did not sufficiently address Niland's

allegations. Although Harvey denied telling Niland to leave the farm, his response to the allegation that he had cut off the water supply and had claimed that the pump had broken down was again a bare denial. He would have had knowledge of the state of the water supply to the house on his own property, whether or not it had been cut off, and what the condition of the pump was. Consequently Harvey did not raise a genuine dispute of fact concerning Niland's allegation in this regard. Significantly Harvey did not deny that Niland and his family remained

on the farm for eight days. Niland's allegation that the water was cut off was consistent with Harvey's hostile message to Mrs Niland to leave and consistent with him having ordered Niland off the farm. All these factors point to a breakdown in the relationship of mutual trust and confidence. It is difficult to imagine how two members could continue to take mutual decisions in relation to Huntershill in such a climate. It is important to remember that Niland's breach of his fiduciary duties occurred after he had left, in other words when the relationship was already severely damaged.

- [48] It follows from my view of Harvey's inadequate response to Niland's allegations concerning the resurrection of the affair and the reasons for Niland and his family leaving the farm, that Niland's version that the affair had effectively destroyed the relationship of mutual confidence and trust can be accepted as substantially true and correct. (See Wightman (*supra*) at para [12].)
- [49] It was submitted that there was no evidence of a dysfunctional relationship affecting the affairs of Huntershill or that Niland had been excluded from the running of Huntershill prior to 14 July 2015. However on Niland's version there were events which led to the confrontation on 14 July 2015 which resulted in Niland and his wife leaving the farm. There was therefore a gradual deterioration in the relationship culminating in the events of 14 July 2015, whereafter Niland played no further role in the affairs of Huntershill.
- [50] What followed was a further severe deterioration in the relationship, caused by Niland's breach of his fiduciary duties towards Huntershill. There was little dispute here. The affidavits reveal an end to the relationship and in my view reveal no prospect of a restoration of mutual confidence and trust. The following factors are significant: Harvey spoke of a damages claim against Niland by Huntershill; Niland has instituted proceedings against Harvey for defamation and in respect of a claim relating to a partnership; Niland has left Wildschutsberg, has found employment elsewhere, and is no longer involved in Huntershill's affairs; Harvey has employed hunters in Niland's place; Harvey removed Niland's name from Huntershill's website and maintained that he was justified in doing so; Harvey was of the view that Niland could not expect to be privy to business decisions because of his breach; Harvey's attorneys did not want to disclose certain information to Niland because of his breach; Niland took Harvey to the CCMA for unfair dismissal; Harvey resolved to evict Niland's father from the property in Bedford and knew that there was no electricity supply there; and Harvey accused Niland of plotting the destruction of Huntershill. In those circumstances it is unrealistic for Harvey to say that Niland could still participate in Huntershill's business affairs.
- [51] As far as the submission that Huntershill can continue to function is concerned, the position is that it cannot function as envisaged in the association agreement or in accordance with a relationship of mutual confidence and trust. No dealings can take place with third parties without the consent of both members. This is what Harvey is admittedly doing. If Harvey is continuing to run Huntershill, he is doing so as if he is the sole member, which he is not. I am therefore of the view that the relationship of mutual trust and confidence is utterly at an

end. The situation is that which was described by Ponnann JA in Apco Africa at para [20]:

“The company was formed for a specific purpose. The internal disputes, mutual disillusionment and distrust and the consequent breakdown of the relationship between the shareholders of the company have paralysed it. This is clear from Arcay's own affidavits and the

facts

in Apco's which it cannot deny. The company is thus in a state of dormancy and, given Apco's assertion that it will no longer refer any work to the company, that state of affairs is unlikely to change. There is thus much to be said for Apco's contention that the *raison d'être* for the company has ceased.”

[52] This brings me to the question of fault. Harvey maintained that Niland had not come to court with clean hands. It is so that he did not disclose in his founding affidavit that he had breached his fiduciary duties, even though at that stage the application before Plasket J had been heard and judgment was still to be delivered. He also denied in his founding affidavit that he had competed with Huntershill. This was dishonest conduct. However fault on his part is not a bar to bringing a winding up application on the grounds that it would be just and equitable.

[53] In *Thundercats* (supra) Malan JA said at para [27] that “lack of clean hands is not an absolute bar”. He went on to say at para [28]:

“As Santow J stated in Ruut v Head:

“As a matter of logic, lack of clean hands could not be an absolute bar, else otherwise for example, where both Partners are equally at fault, neither could obtain a winding-up order. Nonetheless it must be an important factor in the exercise of the court's discretion along with other factors, such as whether the partnership is truly deadlocked.”

A court should thus assess the respective contributions to the breakdown to determine whether it is just and equitable to liquidate. But a party's fault should not necessarily deter a court from winding-up:

“. . . so that the paralysis . . . may be eliminated, a competent functionary (in the person of a liquidator) may be placed in control

of [the company] and that functionary may address the question of where the best interests of [the company] lie . . .”

[54] In view of my finding that the affair with Mrs Niland was a cause of the destruction of the relationship, the parties were, as Niland eventually conceded, both to blame. I repeat that Niland's breach occurred after the affair and after he and his wife, as I have accepted, were ordered off the farm. The bottom line is that, as already mentioned, there is no prospect of restoring the relationship between Niland and Harvey and Huntershill accordingly cannot function. As Ponnann JA said at in Apco Africa at para [29]:

"It is plain that a relationship of trust and integrity between the shareholders is integral to the success of the business of the

company as well as the continuation of that relationship. That much is evident from the nature of the company's business as well as the fact that the parties are all privy to sensitive and confidential information. When one of two partners threatens civil and criminal action, including prosecution for fraud, is it reasonable to suppose that those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass as we have here? Common sense seems to dictate that the answer has to be a resounding 'no'. In those circumstances it seems to me that it is just and equitable that a court should intervene, for plainly this is not what the parties contemplated by the arrangement into which they entered. On the contrary they assumed that each would conduct itself reasonably and with basic courtesy towards the other. Having regard to the fact that the directors and shareholders cannot communicate with each other and that no business of the company can be carried on, one is inclined to the conclusion that, if ever there were a state of deadlock, it exists here. If, as Arcay claims, there was fraud by Kamerling and a calculated design to wreck the company and it can establish that in due course, it will have a remedy in damages. In those circumstances there can be no reason to seek to protect Arcay's rights, as it sought to contend, by sustaining the corporate form."

[55] Harvey applied for a referral to oral evidence on certain disputes of fact and that Niland and Boshoff be subpoenaed to give oral evidence and be cross-examined. The disputes were enumerated as follows:

1. Whether the first respondent is a small domestic corporation in respect of whom principles applicable to dysfunction render it just and equitable that the first respondent be wound up.
2. Whether the management and administration of the first respondent was at the times material to this application dysfunctional at all or to an extent which renders the winding up thereof just and equitable.
3. What conduct or circumstances gave rise to the dysfunction, and whether the applicant or the second respondent were responsible (in each case) for such circumstances or conduct.
4. Whether the applicant or the second respondent was the predominant cause of the dysfunction.

5. The role (if any) played by the applicant in the affairs of the first respondent, both prior to and subsequent to the dysfunction relied upon by the applicant.
6. Whether the applicant withdrew from the affairs of the first respondent and if so, the true reasons for the withdrawal of the applicant from the affairs of the first respondent.
7. What role (if any) was played by the breach by the applicant of his fiduciary duties to the first respondent in the causation of the alleged state of dysfunction in the affairs of the first respondent.
8. What role (if any) was played by the affair between the second respondent and the applicant's wife in the state of dysfunction in the affairs of the first respondent.
9. Whether it is just and equitable that the first respondent be wound up.

Niland opposed the application.

[56] There was no dispute of fact concerning the question of whether or not Huntershill is a small domestic corporation. The history of how Niland and Harvey came to meet, their personal and business relationship up to the time of Niland's acquisition of his membership, their respective roles in Huntershill, and the terms of the association agreement were not in dispute. Whether or not Huntershill was a small domestic corporation was a conclusion to be drawn from the undisputed facts.

[57] The disputes contained in paragraphs 2 – 8 of the application all relate to the cause of the breakdown of the relationship between Niland and Harvey, and particularly whether or not the affair played a part or whether Niland was falsely using the affair as a cause to achieve the destruction of Huntershill. It was submitted that there was only Niland's ipse dixit concerning his reasons for seeking the winding up of Huntershill and he had committed perjury both in this application and in the

interdict application before Plasket J. However Harvey's affair with Mrs Niland was common cause and I have accepted Niland's version that the affair and Harvey's subsequent conduct was a cause of the breakdown in the relationship, having found, on the affidavits, that Harvey's denials did not create a genuine dispute of fact and that his assertions were in some instances untenable. Cross-examination of Niland and Boshoff would not in my view disturb the probabilities on this aspect. Niland's dishonesty in relation to his breach until the breach was discovered, and the breach itself, do not in my view warrant further exploration of Niland's reasons for seeking the winding up of Huntershill. He admitted that he was partially to blame for the destruction of the relationship. There is really no dispute concerning the current state of the relationship between Niland and Harvey. It has broken down to the extent that mutual confidence and trust no longer exists and cannot be restored.

[58] Whether or not it would be just and equitable to grant a final order does not involve a dispute of fact. It is a decision to be taken by the court in the exercise of a wide judicial discretion.

[59] The application for a referral to oral evidence is therefore refused.

[60] The situation is in my view akin to that described by Ponnann JA in *Apco Africa* referred to in para [51] above. There is no prospect of Niland and Harvey conducting the business of Huntershill as was originally

contemplated. They are both to some extent responsible for the current state of affairs. It follows that I am satisfied that Niland has discharged the onus resting on him and that it would be just and equitable for the court to intervene and grant a final order.

[61] The following order will issue:

The provisional order winding up Huntershill Safaris CC is confirmed with costs, including the costs of the application for a referral to oral evidence, such costs to include the costs of two counsel.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv I J Smuts SC, and Adv D H de la Harpe, instructed by Wheeldon Rushmere & Cole, Grahamstown

For the 2nd Respondent: Adv E A S Ford SC, and Adv A G Dugmore SC instructed by Neville Borman & Botha, Grahamstown

[1] Annexure G recorded a number of communications between Niland and clients of Huntershill.

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