

SOUTH AFRICA / JUDGMENT

Norval NO v Square One Power Solutions (Pty) Ltd (24831/05) [2006] ZAGPHC 41 (2 May 2006)

[2006] ZAGPHC 41

COURT

High Courts - Gauteng

BEFORE

S Weiner

CASE / FILE NUMBER

24831/05

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IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) CASE NO. 05/24831 In the matter between: LUTHER NORVAL N.O. Applicant and SQUARE ONE POWER SOLUTIONS (PTY) LTD Respondent JUDGMENT The applicant applies for the winding up of the respondent under section 344(h) and section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973 ("the Act"). The applicant, as trustee of the Norval Family Trust (the trust), is a shareholder of the respondent being the owner of 2 000 ordinary shares in the share capital of the respondent. The trust acquired these shares pursuant to a shareholders agreement ("the agreement") signed on 30 August 2000. The respondent is a subsidiary of a company styled Square One Solutions Group Ltd ("Square One") whose shares are listed on the Johannesburg Stock Exchange. Square One acquired 50% plus 1 share of the issued share capital of the respondent in terms of the agreement. The applicant contends that it was intended by the parties that the respondent would operate along the lines of an incorporated partnership. He relies, inter alia, for this proposition on clause 16.1.1 of the agreement which states that "the relationship between them shall be governed by the principles of the utmost good faith as such principles are understood in the context of a partnership." However, this must be read in context, more particularly with clause 16.2 of the agreement which reads as follows: "The parties record that it is not their intention to form a partnership by entering into this agreement." The applicant applies to wind up the respondent on two grounds, firstly that it is just and equitable, and secondly, that the respondent is unable to pay its debts. The second ground, according to what is stated on the papers, appears to be a subsidiary ground. The applicant's contentions relating to the fact that it is just and equitable to wind up the respondent, are based on the following complaints that the applicant has: a. He did not receive financial statements in respect of the respondent company. b. He has not been invited to annual general meetings. c. He is in the dark as to the financial state of the respondent. d. The trust has not been issued with a share certificate. e. It is apparent according to the applicant that "the respondent has something to hide". The applicant accordingly states that the

relationship between the respondent and the trust has deteriorated beyond any possibility of repair. In this regard, he points to the fact that the applicant in pursuance of this deterioration launched urgent proceedings against him for the procurement of an interdict. He states that the application was “largely inconclusive” and that although the respondent obtained a temporary interdict against him, the matter “died a natural death”. He states further that the application was “misconceived, was borne of malicious intent and should never have been pursued”. He states that he did not elect to contest the matter that the litigation is indicative of the poor management of the respondent. For these reasons the applicant states that it is being unlawfully excluded from the business affairs of the respondent, and therefore it is just and equitable that the respondent company be wound up. The authorities are clear that, although the applicant is a member, the court must consider whether it ought to interfere at all bearing in mind the power of the general meeting and the basic principle that each member is bound by the decision of the majority lawfully taken even if adverse to his interests. See *Sammel v President Brand Gold Mining Company Ltd* 1969 (3) SA 629A at 678. Thus the mere loss of confidence in the management of the company’s affairs with the result that one is outvoted in the general meeting or otherwise, is not sufficient to entitle the applicant to an order; loss of confidence must be justifiable, that is, it must be found on conduct by the directors or the members which is fraudulent or otherwise wrongful, oppressive or unfair. See *Moosa N.O. v Mavjee Bhawan (Pty) Ltd* and another 1967 (3) SA 131(T) at 137. In addition the conduct must not be wholly unconnected with the administration of the company’s affairs. See *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282W at 291. As *Nestadt J* said in *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178(W) at 183: “The court should not permit section 344(h) to become a launching platform, at the instance of the minority shareholders, for the unwarranted interference in the internal management of the company acting within its powers.” It appears that the applicant is attempting to rely upon the “deadlock principle” which would be applicable in the case of a “domestic” company, that is a company with a small membership or as the applicant is attempting to contend in this case, a company which would operate as a partnership. In this regard I refer to what is stated above in regard to the clauses relating to the concept of partnership in the agreement. The deadlock principle is derived from *rein Yenidje Tobacco Company Ltd* [1916] 2 SA 426(SCA). This principle is “founded on the analogy of a 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. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company’s affairs. 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, in the same way as, if they were partners, they could claim dissolution of the partnership”. Per *Trollip J* (as he then was) in the *Moosa* case (supra) at 137 – 138. The court is however enjoined in exercising its jurisdiction based upon the application of the “deadlock principle” not to disregard the fact that, qua members, the parties have acquired those rights and assumed those obligations which membership of a company entails. An applicant for liquidation must show that such deadlock is in fact affecting the running of the company and that there is no longer a reasonable possibility of the company operating its business properly as a result of such ‘deadlock’. The applicant failed to take the court into its confidence in disclosing the true circumstances surrounding the

interdict application

that was launched by the respondent against the applicant, his wife and a close corporation of which the applicant and his wife were members. The applicant in his personal capacity did oppose the application but despite same, the applicant and his wife were found to have acted unlawfully and an interdict was granted against them interdicting and restraining them from approaching, contacting or soliciting or in any other way touting the applicant's customers for a period of eight months. It appears that the deterioration in the relationship between the applicant and the respondent may in fact be partially due to the applicant's own conduct, and it is trite that when an applicant relies on section 344(h) of the Act it must come to court with "clean hands". That is he must not himself be wrongly responsible for or have connived at bringing about the state of affairs which he asserts results in it being just and equitable to wind up the company. See *Wackrill v Sandton International Removals* (supra) at 292. Section 347(2) of the Act provides that, even if the court was satisfied that the applicant had established a case for winding up and it was obliged to grant the application, the court is entitled to refuse a winding up order if it is satisfied that some other remedy is available to the applicant, and that they are acting unreasonably in seeking that the company is wound up instead of pursuing that other remedy. In such a situation, the respondent would have an onus to prove that some other remedy is available and that the applicant is acting unreasonably. In the present case, it is my view that the applicant has not established the basis for a winding up on the ground that it would be just and equitable. The complaints which he alleges are not those which would fall within the "deadlock" principle. He has other remedies which he can pursue. The applicant's second ground of winding up is based upon the fact that the respondent is unable to pay its debts. In this regard the respondent sought to file a supplementary affidavit dealing with its financial position. The applicant opposed the introduction of this affidavit and I ruled that I would not have regard to such affidavit and the matter would continue on the affidavits that had already been filed. The applicant, in seeking the winding up on the grounds that the respondent is unable to pay its debts, relies upon an e-mail from the respondent's managing director dated 15 August 2005 addressed to all of the respondent's staff stating that the respondent was running at a loss of R900 000.00 and that costs exceeded income by R150 000.00 per month. The applicant states that the respondent has not chosen to explain its financial position in a satisfactory manner and the appropriate inference that it is unable to pay its debts falls to be drawn. The respondent contends that the e-mail sent out to its staff was "an example of typical rationalisation sent out by companies on a daily basis". It further states that the company is on a rationalisation drive but by no means insolvent or facing liquidation. Furthermore it states that one of the reasons that it is seeking to rationalise is partly due to the conduct of Norval and the losses he caused at the Bloemfontein branch which was the reason for the interdict being granted against him. It further refers to the e-mail in which it is said "we have a shortfall of R150 000.00 per month in terms of our GP target and cash flow is extremely tight. We will need a lot of team

work to assist us in closing this gap.”(my emphasis).The respondent states thatthe shortfall related to its GP target and thatit is and has always been able to meet its commitments and pay its debts, and that the business is now trading profitably on a monthly basis. The applicant relies on certain hearsay evidence in regard to rumours of an inability to payits debts but no such proof was placed before the court by the applicant.A company’s inability to pay its debts may be proved in any manner. Failure to pay on demand,a debt which is due,would constitute such evidence in that a company which is not in financial difficulties ought to be able to pay its way from its current revenue or readily available resources.SeeRosenbach & Co (Pty) Ltd / Singh’s Bazaars (Pty) Ltd1962 (4) SA593D at 597 perCaney J. However, other facts may afford such proof, e.g. that a number of creditors have sued the company for payment of monies due to them, that assets of the company have beenattachedor are being sold in execution orthat a negotiable instrument has been dishonoured.However, the applicant has not provided proof of any of these aspects.The contents ofthe e-mail is thesoleevidence upon which it relies and in my view this is insufficient to show that the company is unable to pay its debts.Accordingly, in my view the applicant has failed to show that the company falls to bewound up either in terms of section 344(h) of the Companies Act,or in terms of section 345 of the Companies Act.Accordingly the application is dismissed with costs.S WEINERAJDate of Judgment :02 MAY 2006

IN THE HIGH COURT OF
SOUTH AFRICA

(
WITWATERSRAND
LOCAL DIVISION)
CASE NO.05/24831
CASE NO.
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In the matter between:	LUTHERNORVALN.O.ApplicantandSQUARE ONEPOWER SOLUTIONS (PTY)LTDRespondent
	LUTHER NORVAL N.O. Applicant and SQUARE ONE POWER SOLUTIONS (PTY) LTD Respondent

JUDGMENT

The applicant applies for the winding up of the respondent under section 344(h) and section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973 ("the Act"). The applicant, as trustee of the Norval Family Trust (the trust), is a shareholder of the respondent being the owner of 2 000 ordinary shares in the share capital of the respondent. The trust acquired these shares pursuant to a shareholders agreement ("the agreement") signed on 30 August 2000. The respondent is a subsidiary of a company styled Square One Solutions Group Ltd ("Square One") whose shares are listed on the Johannesburg Stock Exchange. Square One acquired 50% plus 1 share of the issued share capital of the respondent in terms of the agreement. The applicant contends that it was intended by the parties that the respondent would operate along the lines of an incorporated partnership. He relies, inter alia, for this proposition on clause 16.1.1 of the agreement which states that "the relationship between them shall be governed by the principles of the utmost good faith as such principles are understood in the context of a partnership." However, this must be read in context, more particularly with clause 16.2 of the agreement which reads as follows:

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applicant applies for the winding up of the respondent under section 344(h) and section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973 ("the Act"). The applicant

,

as trustee of the Norval Family Trust (the trust)

is a shareholder of the respondent being the owner of 2 000 ordinary shares in the

share

capital of the respondent. The

trust

acquired these shares pursuant to a shareholders agreement ("the agreement") signed on

30 August 2000

.

The respondent is a subsidiary of a company styled Square One Solutions Group Ltd ("Square One") whose shares are listed on the Johannesburg Stock Exchange.

Square One

acquired 50% plus 1 share of the issued share capital of the respondent in terms of the agreement. The applicant contends that it was intended by the parties that

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“The parties record that it is not their intention to form a partnership by entering into this agreement.”

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The applicant applies to wind up the respondent on two grounds, firstly that it is just and equitable, and secondly, that the respondent is unable to pay its debts. The second ground, according to what is stated on the papers, appears to be a subsidiary ground. The applicant's contentions relating to the fact that it is just and equitable to wind up respondent, are based on the following complaints that the applicant has: a.

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that the respondent is unable to pay its debts.

The second ground, according to what is stated on the papers, appears to be a subsidiary ground. The applicant's contentions relating to the fact that it is just and equitable

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are based on the following complaints that the applicant has:

a.

He did not receive financial statements in respect of the respondent company. b. He has not been invited to annual general meetings. c. He is in the dark as to the financial state of the respondent. d. The trust has not been issued with a share certificate. e. It is apparent according to the applicant that "the respondent has something to hide".

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c.

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d.

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e.

It is apparent according to the applicant that "

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The applicant accordingly states that the relationship between the respondent and the trust has deteriorated beyond any possibility of repair. In this regard, he points to the fact that the applicant in pursuance of this deterioration launched urgent proceedings against him for the procurement of an interdict. He states that the application was "largely inconclusive" and that although the respondent obtained a temporary interdict against him, the matter "died a natural death". He states further that the application was "misconceived, was borne of malicious intent and should never have been pursued". He states that he did not elect to contest the matter that the litigation is indicative of the poor management of the respondent. For these reasons the applicant states that it is being unlawfully excluded from the business affairs of the respondent, and therefore it is just and equitable that the respondent company be wound up. The authorities are

clear that, although the applicant is a member, the court must consider whether it ought to interfere at all bearing in mind the power of the general meeting and the basic principle that each member is bound by the decision of the majority lawfully taken even if adverse to his interests. See *Sammel v President Brand Gold Mining Company Ltd* 1969 (3) SA 629A at 678. Thus the mere loss of confidence in the management of the company's affairs with the result that one is outvoted in the general meeting or otherwise, is not sufficient to entitle the applicant to an order; loss of confidence must be justifiable, that is, it must be found on conduct by the directors or the members which is fraudulent or otherwise wrongful, oppressive or unfair. See *Moosa N.O. v Mavjee Bhawan (Pty) Ltd and another* 1967 (3) SA 131(T) at 137. In addition the conduct must not be wholly unconnected with the administration of the company's affairs. See *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282W at 291. As *Nestadt J* said in *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178(W) at 183:

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The authorities are clear that

although the applicant is a member, the court must consider whether it ought to interfere at all bearing in mind the power of the general meeting and the basic principle that each member is bound by the decision of the majority lawfully taken even if

adverse to his interests. See

Sammel v President Brand Gold Mining Company Ltd

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Thus the mere loss of confidence in the management of the company's affairs with the result that one is

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It appears that the applicant is attempting to rely upon the “deadlock principle” which would be applicable in the case of a “domestic” company, that is a company with a small membership or as the applicant is attempting to contend in this case, a company which would operate as a partnership. In this regard I refer to what is stated above in regard to the clauses relating to the concept of partnership in the agreement. The deadlock principle is derived from *reinYenidje Tobacco Company Ltd* [1916] 2 SA 426 (SCA). This principle is “founded on the analogy of a 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. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company’s affairs. 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, in the same way as, if they were partners, they could claim dissolution of the partnership”. Per Trollop J (as he then was) in the *Moosacase* (supra) at 137 – 138. The court is however enjoined in exercising its jurisdiction based upon the application of the “deadlock principle” not to disregard the fact that, as members, the parties have acquired those rights and assumed those obligations which membership of a company entails. An applicant for

liquidation must show that such deadlock is in fact affecting the running of the company and that there is no longer a reasonable possibility of the company operating its business properly as a result of such 'deadlock'. The applicant failed to take the court into its confidence in disclosing the true circumstances surrounding the interdict application that was launched by the respondent against the applicant, his wife and a close corporation of which the applicant and his wife were members. The applicant in his personal capacity did oppose the application but despite same, the applicant and his wife were found to have acted unlawfully and an interdict was granted against them interdicting and restraining them from approaching, contacting or soliciting or in any other way touting the applicant's customers for a period of eight months. It appears that the deterioration in the relationship between the applicant and the respondent may in fact be partially due to the applicant's own conduct, and it is trite that when an applicant relies on section 344(h) of the Act it must come to court with "clean hands". That is he must not himself be wrongly responsible for or have connived at bringing about the state of affairs which he asserts results in it being just and equitable to wind up the company. See *Wackrill v Sandton International Removals* (supra) at 292. Section 347(2) of the Act provides that, even if the court was satisfied that the applicant had established a case for winding up and it was obliged to grant the application, the court is entitled to refuse a winding up order if it is satisfied that some other remedy is available to the applicant, and that they are acting unreasonably in seeking that the company is wound up instead of pursuing that other remedy. In such a situation, the respondent would have an onus to prove that some other remedy is available and that the applicant is acting unreasonably. In the present case, it is my view that the applicant has not established the basis for a winding up on the ground that it would be just and equitable. The complaints which he alleges are not those which would fall within the "deadlock" principle. He has other remedies which he can pursue. The applicant's second ground of winding up is based upon the fact that the respondent is unable to pay its debts. In this regard the respondent sought to file a supplementary affidavit dealing with its financial position. The applicant opposed the introduction of this affidavit and I ruled that I would not have regard to such affidavit and the matter would continue on the affidavits that had already been filed. The applicant, in seeking the winding up on the grounds that the respondent is unable to pay its debts, relies upon an e-mail from the respondent's managing director dated 15 August 2005 addressed to all of the respondent's staff stating that the respondent was running at a loss of R900 000.00 and that costs exceeded income by R150 000.00 per month. The applicant states that the respondent has not chosen to explain its financial position in a satisfactory manner and the appropriate inference that it is unable to pay its debts falls to be drawn. The respondent contends that the e-mail sent out to its staff was "an example of typical rationalisation sent out by companies on a daily basis". It further states that the company is on a rationalisation drive but by no means insolvent or facing liquidation. Furthermore it states that one of the reasons that it is seeking to rationalise is partly due to the conduct of Norval and the losses he caused at the Bloemfontein branch which was the reason for the interdict being granted against him. It further refers to the e-mail in which it is said "we have a shortfall of R150 000.00 per month in terms of our GP target and cash flow is extremely tight. We will need a lot of team work to assist us in closing this gap." (my emphasis). The respondent states that the shortfall related to its GP target and that it is and has always been able to meet its commitments and pay its

debts, and that the business is now trading profitably on a monthly basis. The applicant relies on certain hearsay evidence in regard to rumours of an inability to pay its debts but no such proof was placed before the court by the applicant. A company's inability to pay its debts may be proved in any manner. Failure to pay on demand, a debt which is due, would constitute such evidence in that a company which is not in financial difficulties ought to be able to pay its way from its current revenue or readily available resources. See *Rosenbach & Co (Pty) Ltd / Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593D at 597 per Caney J. However, other facts may afford such proof, e.g. that a number of creditors have sued the company for payment of monies due to them, that assets of the company have been attached or are being sold in execution or that a negotiable instrument has been dishonoured. However, the applicant has not provided proof of any of these aspects. The contents of the e-mail is the sole evidence upon which it relies and in my view this is insufficient to show that the company is unable to pay its debts. Accordingly, in my view the applicant has failed to show that the company falls to be wound up either in terms of section 344(h) of the Companies Act, or in terms of section 345 of the Companies Act. Accordingly the application is dismissed with costs. S WEINER AJ Date of Judgment : 02 MAY 2006

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It appears that the deterioration in the relationship between the applicant and the respondent may in fact be partially due to the applicant’s own conduct, and it is trite that when an applicant relies on section 344(h) of the Act it must come to court with “clean hands”. That is he must not himself be wrongly responsible for or have connived at bringing about the state of affairs which he asserts results in it being just and equitable to wind up the company. See

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it is my view that the applicant has not established the basis for a winding up

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principle. He has other remedies which he can pursue.

The applicant's second ground of winding up is based upon the fact that the respondent is unable to pay its debts.

In this regard the respondent sought to file a supplementary affidavit dealing with its financial position. The applicant opposed the

introduction of this affidavit and I ruled that I would not have regard to such affidavit and the matter would continue on the affidavits that

had already been

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The applicant,

in seeking

the winding up on the grounds that the respondent is unable to pay its debts

relies upon an e-mail from the respondent's managing director dated 15 August 2005 addressed to all of the respondent's staff stating that the respondent was running at a loss of R900 000.00 and that costs exceeded income by R150 000.00 per month. The applicant states that the respondent has not chosen to explain its financial position in a satisfactory manner and the appropriate inf

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The respondent contends that the e-mail sent out to its staff was “

an example of typical rationalisation sent out by companies on a daily basis

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The respondent states that

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its debts but no such proof was placed before the court by the applicant.

A company's inability to pay its debts may be proved in any manner. Failure to pay on demand a debt which is due

would constitute such evidence in that a company which is not in financial difficulties ought to be able to pay its way from its current revenue or readily available resources.

Rosenbach & Co (Pty) Ltd / Singh's Bazaars (Pty) Ltd

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Caney J. However, other facts may afford such proof, e.g. that a number of creditors have sued the company for payment of monies due to them

, that assets of the company have been

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However, the applicant has not provided proof of any of these aspects.

The contents of

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Accordingly, in my view the applicant has failed to show that the company falls to be

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Accordingly the application is dismissed with costs.

S WEINER

AJ

Date of Judgment :

02 MAY 2006

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/norval-no-v-square-unknown-topic-agphc-2006>

Prepared on 9 October 2026 · Esheria