

SOUTH AFRICA / JUDGMENT

Ntshangase v Ziyaphenduka Promotions & Entertainment CC (34285/15) [2016] ZAGPPHC 934 (9 November 2016) [2016] ZAGPPHC 934

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

34285/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 34285/15

DATE:

9 November 2016

PRUDENCE

NOLWAZI

NTSHANGASE Appellant

v

ZIYAPHENDUKA

PROMOTIONS &
ENTERTAINMENT CC

(REGISTRATION NUMBER:

1999/043990/23) Respondent

JUDGMENT

MABUSE J:

- [1] This is an application for the provisional winding-up of the respondent.
- [2] This application is brought on the basis that the Respondent is insolvent or it is just and equitable that the Respondent be

wound-up. In respect of the second ground it is contended that the relationship between the Applicant and the former husband has broken down. It is important to point out that the Respondent opposes the application on the basis that the relief that the Applicant seeks is incompetent and furthermore that there are alternative remedies available to the Applicant. It is furthermore contended by the Respondent that it would not be just and equitable to liquidate the Respondent.

- [3] The Applicant in this matter is a female business woman who resides at 10 [...], Mbombela, Mpumalanga. The respondent is a closed corporation duly incorporated and registered in terms of the Close Corporation laws of this country. The physical address of the Respondent is 12 [...], Mbombela, Mpumalanga. The registered address of the Respondent is care of** Nkosi & Partners Business Accounts. Their physical address is No. 12 NBS Building, Mbombela.
- [4] The respondent has two members. The Applicant herein is one member while the other member is one Mahlomola Lazarus Kgapane ("Kgapane").

They each hold 50% members interest in the respondent. The said Kgapane was the Applicant's husband. They divorced on 15 October 2013 in terms of a final decree of divorce granted by this Court on the said day Kgapane is not part of those proceedings. It is contended by the Applicant that she and the said Kgapane had a total breakdown in communication and decision taking even before they were finally divorced. After their divorce the situation became worse and they have not had any members meetings for at least twelve months. Due to this the Respondent is not in a position to make proper decisions and to carry on with the business and market it properly as was the case whilst the marriage endured.

- [5] The off-shoot of this paralyses of the functions of the Respondent is that Kgapane neglects or refuses to service the loan of R4 million that the Respondent obtained in order to establish a guest house and dwelling in Burgersfort in Limpopo Province.
- [6] In support of the allegation that the Respondent is insolvent, the Applicant states that the Respondent has the assets which have been set out in a document marked Annexure '4' attached to the Applicants founding affidavit and debts amounting to R7,024,000.00. It needs to be pointed out that the value of the assets has not been worked out. The value of certain items, immovable and movables are contained in the Respondent's annual financial statements for the year ending on 28 February 2014. A copy of these financial statements is

attached to the founding affidavits as Annexure 'D'.

- [7] The application for winding-up of the Respondent is opposed by the said Respondent which has, for that purpose, delivered an answering affidavit deposed to by Kgapane.
- [8] In defence and apart from the merits, the Respondent raised a point in limine on the basis of which it sought the dismissal of the Applicant's application. The Applicant alleged in her papers that there was a deadlock between the members of the Respondent and that the relevant deadlock has resulted in the Respondent being unable to trade in a profitable and proper business manner.
- [9] It is contended by the Respondent that in such a case the Applicant should have sought an order in terms of s 49 of the Close

Corporations Act that the other 50% member of the Respondent be authorised to purchase the Applicant's 50% membership for a fair

value or for a value to be determined by an independent auditor. As a consequence of the Applicant's failure to follow the provisions of the said s 49, there has been a material non-joinder of the other 50% member of the Respondent.

- [10] In the answering affidavit the Applicant has denied the allegation by the Respondent that the other 50% member should have been joined. There is, in my view, no merit in this denial. It is as clear as crystal that the other 50% member, Mr. Kgapane, is not a party this proceedings and that he should have been joined as a party in this matter in the light of serious allegations made against him. It was imperative that it should have been done in view of the fact that he was at the centre of the Applicant's dissatisfaction and the reasons why the Applicant seeks the liquidation of the Respondent.
- [16] In the answering affidavit of the Respondent, which was deposed to by Mr. Kgapane as indicated earlier, he made it particularly clear that he made that affidavit on behalf of the Respondent and not in his capacity as a 50% member of the Respondent. Accordingly this application is flawed inasmuch as it fails to join the other member of the Respondent as a party to the proceedings. In view of the order I am about to make it is unnecessary to consider the merits of the application. In the result the point in limine raised by the Respondent against the application is upheld.

In the result, I make the following order:

The application is accordingly stayed until the applicant has joined Mahlomola Lazarus Kgapane in the proceedings.

P. M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:

Adv. JP van den Berg

Instructed by:

Messrs Doman Weitz Attorneys

C/o Fabricius & Engelbrecht

Counsel for the respondent: Adv.

J Schoeman

Instructed by: Shapiro

& Haasbroek Inc

Date Heard: 9

June 2016

Date of Judgement: 9

November 2016

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