

SOUTH AFRICA / JUDGMENT

Sheer and Others v Buddy Whiteman Engraving CC and Another (21/34078) [2022] ZAGPJHC 521 (5 August 2022) [2022] ZAGPJHC 521

COURT

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

21/34078

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 21/34078

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

NO

05/08/2022

In

the matter between:

DAVID
SHEER
First Applicant
BRIAN
LEONARD SHEER
N.O.
Second Applicant
DAVID
SHEER
N.O.
Third Applicant
And
BUDDY
WHITEMAN ENGRAVING CC
First Respondent
JONATHAN
ARNOLD GLAJCHEN
Second Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time

for hand-down is deemed to be 10h00 on the 05th of August 2022.

DIPPENAAR J:

- [1] The applicants seek the winding up of the first respondent ("Swatco"), a close corporation in which the first applicant and the second respondent each hold a 50% membership interest. The first respondent trades under the name "Swatco" and operates in the firearm and gunsmithing industry. It further operates a shooting range. The second and third applicants are the trustees of the Dave Sheer Family Trust ("the trust") which acquired the first applicant's claims based on his loan account against Swatco by way of cession.
- [2] The trust owns the property from which Swatco's business has been conducted by the first applicant and the second respondent from 2016. No formal lease agreement was ever concluded and whatever notional lease agreement existed was terminated by the trust. The founding papers contain no detailed information on this issue.
- [3] The winding up is sought by the first applicant on just and equitable grounds, either on the basis that Swatco is solvent and it is just and equitable to do so under s 81(1)(d)(iii) of the Companies Act[1] as read with s 66 of the Close Corporations Act[2] or, alternatively on the basis that it is just and equitable to do so and Swatco is insolvent and unable to pay its debts in the ordinary course in terms of s 344(h) of the Old Companies Act[3]. By virtue of s 67 of the Close Corporations Act, the winding up of a solvent close corporation is regulated by Companies Act.

- [4] In the alternative, the first applicant seeks the winding up under s 49 of the Close Corporations Act on the basis that the second respondent is acting in an unfairly prejudicial, unjust or inequitable manner towards him and in circumstances that it is just and equitable to wind up Swatco. Those circumstances are that the first applicant has been frozen out of Swatco's business, has not been furnished with proper access to Swatco's financial documentation and records and that changes were effected to Swatco's financial records in relation to its members' loan accounts and salaries.
- [5] The second and third applicants in a further alternative claim seek the winding up of Swatco in terms of s 69(1)(b) of the Close Corporations Act as read with s 68(c) and 345 of the Old Companies Act as read with Schedule 5, Item 9 of the Companies Act, on the grounds of the inability of Swatco to pay its debts.
- [6] The application is opposed by both Swatco and the second respondent on various grounds. They are that (i) Swatco is neither factually nor commercially insolvent because the loan accounts owing to the first applicant alternatively the trust, are not due and payable;(ii) the first applicant has not made a consistent and meaningful attempt to comply with his fiduciary duties to Swatco; (iii) the first applicant has remedies at his disposal to renew his involvement in Swatco's business and he should pursue those remedies rather than a winding up; (iv) winding up is not the only option and it makes no sense to wind up a commercially solvent entity.
- [7] The applicants challenged the authority of Michael Saltz attorneys to represent Swatco by way of a r 7 notice. In response thereto, a resolution was provided of Swatco, signed by only the second respondent. The authority issue remains in dispute.
- [8] The respondents in turn contended that the second and third applicants had not demonstrated their authority to act on behalf of the trust and challenged the locus standi of the trust in the present application.
- [9] A distinction is to be drawn between the first applicant's application and the alternative grounds advanced and the alternative

claim of the second and third applicants. It is apposite to deal with first with the application of the first applicant.

Does Michael Saltz attorneys have the authority to represent Swatco?

- [10] It is common cause that the first applicant and the second respondent hold an equal membership interest in Swatco. The special power of attorney provided by the respondents in answer to the r 7 notice was signed only by the second respondent. No resolution was

provided authorising the second respondent to do so, signed by both the members of Swatco.

- [11] The respondents sought to overcome this difficulty by arguing that no evidence of an association agreement was placed before the

court and that the statutory provisions governing the internal relations between members of a close corporation applies, being ss 46(a) and 46(b) of the Close Corporations Act. It was argued that the very purpose of a winding up application of a close corporation is to deliberately put an end to the carrying on of its business and that the second respondent's statutorily conferred authority to represent Swatco in the carrying on of its business is not restricted and must necessarily extend to all matters affecting the carrying of its business, including litigation fundamentally affecting the ability of Swatco to continue carrying on its business in the future.

[12] In relation to s46(c) of the Close Corporations Act the respondents argued that the second respondent's equal right to assert Swatco's position on its behalf can only be negated by means of a majority vote at a meeting of members, which is not possible, given that there are only two members with equal voting rights.

[13] The relevant portions of s 46 of the Close Corporations Act provide as follows:

The following rules in respect of internal relations in a corporation shall apply in so far as this Act or an association agreement in respect of the corporation does not provide otherwise:

- (a) Every member shall be entitled to participate in the carrying on of the business of the corporation; (b) subject to the provisions of section 47, members shall have equal rights in regard to the management of the business of the corporation and in regard to the power to represent the corporation in the carrying on of its business; ...
- (c) differences between members as to matters connected with a corporation's business shall be decided by majority vote at a meeting of members of the corporation."

[14] Considering the wording of s 46(c) and on the second respondent's own argument, the decision whether to oppose the winding up application or not, would be subject to a decision by majority vote at a meeting of members. In the present circumstances, there is self-evidently a difference between the members on the issue and no majority vote could be passed, resulting in their being no resolution on behalf of Swatco.

[15] The second respondent cannot avoid the inevitable consequences of an equal membership by unilaterally purporting to act on behalf of Swatco, more so given that the application of the first applicant was not launched by a third party.

[16] The respondents further sought to rely on s 54 of the Close Corporation Act and authority pertaining thereto[4]. The relevant portion of s 54 provides:

"(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

- (2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.”
- [17] S 54(2) does no more than express the usual rules relating to ostensible authority of members to bind a close corporation in relation to third parties[5]. It does not confer any authority on one of the members to represent the close corporation in relation to another member. The authority relied on by the respondents does not assist inasmuch as it relates to the relationship between a member of a close corporation and a third party and deals with s 54 and ostensible authority.
- [18] I conclude that in relation to the first applicant’s application, attorney Michael Saltz does not have the necessary authority to represent Swatco. The application is thus opposed by the second respondent.

Is it just and equitable to wind up Swatco?

- [19] Considering a conspectus of the facts, it is not possible to make a definitive determination on whether Swatco is solvent or insolvent, The second respondent should have put up the necessary financial information on this issue as he is the person with access to that information, bearing in mind that one of the first applicant’s complaints is that he does not have access to such information. As the first applicant has not established that Swatco is insolvent, the application will be considered on the basis that it is solvent. In any event, it is not of great moment whether Swatco is solvent or insolvent, where, as in the present instance, winding up is sought on just and equitable grounds[6].
- [20] Under s68(4) of the Close Corporation Act, a corporation may be wound up “if it appears on application to the court that it is just and equitable that the corporation be wound up”.
- [21] Relevant to the present application, some of the circumstances where a winding up can ensue on just and equitable grounds are (i) where there is deadlock in the management of a company or corporation; (ii) where there is oppression and (iii) in circumstances analogous to the dissolution of partnerships.[7]
- [22] The first applicant’s case is that there is a deadlock in the management of Swatco and that he has been oppressed by the conduct of the second respondent. According to the first applicant their relationship started to deteriorate during 2018 due to differing approaches to the business, culminating in an altercation which occurred between them on 12 January 2021 at the Swatco premises which destroyed any spectre of a relationship between them. It was common cause that a verbal altercation arose during which the second respondent reached for his firearm and alleged that the first applicant had reached for a knife.

- [23] The first applicant complains that he has no access to financial information concerning the Swatco business, and that the nature of payments made to him has changed and constitutes a reduction in a loan account rather than a salary.
- [24] The first applicant's contentions that the second respondent on occasion bypassed the first applicant regarding gunsmithing works, consumed alcohol on the premises, had a furious temper and would frequently shout profanities at him and Swatco staff members, were not disputed.
- [25] The second respondent in turn put the blame for the deterioration in their relationship on the first applicant and accused him of appropriating a corporate opportunity of Swatco pertaining to AK47 rifles, being absent minded and a deteriorating ability to safely handle firearms and having an inability and impaired capacity to contribute to the affairs of Swatco.
- [26] It was not disputed that the first applicant was excluded from the management of the Swatco business during 2020. According to the first applicant, he was "frozen out" of the business by the second respondent. The second respondent, on the other hand, accused the first applicant of adopting a supine attitude and failing to meet his fiduciary duties to Swatco as he withdrew from and did not involve himself in the management of the business. He further criticised the first applicant for failing to take any steps and using remedies at his disposal to renew his involvement in the Swatco business.
- [27] The second respondent admitted a breakdown in the relationship between him and the first applicant but contended that the breakdown was caused by the first applicant and that he has not approached the court with clean hands, thus disentitling him to relief.
- [28] He further contended that there was still a spectre of a relationship in that the first applicant has attended on a daily basis at the shop, interacted freely with staff and customers, still performs some work for Swatco and generally appears unfazed.
- [29] On this basis it was argued that there were various alternative steps which the first applicant should have taken as an alternative to launching winding up proceedings. These steps were: (i) to informally approach the second respondent to discuss his complaints; (ii) meeting with the second respondent and the accountant Mr Roth to do so; (iii) invoking the statutory remedies under s 48 of the Close Corporation Act to convene a members meeting to deal with his position formally; (iv) invoking the statutory remedy under s 49 of the Close Corporations Act based on second respondent's alleged unfairly prejudicial, unjust or inequitable conduct to apply for wide and discretionary just and equitable relief short of winding up or
- (v) to withdraw from Swatco under s 36 of the Act that his membership interest be purchased for a fair value. It was argued that the first applicant's failure to avail himself of the remedy provided under s 36 illustrates that he has not approached the court with clean hands.

[30] Against this background it is necessary to consider and apply the relevant legal principles. The “deadlock principle”[8] was enunciated thus in *Moosa NO v Maviee Bhawan (Pty) Ltd and Another*:

“[t]he deadlock principle is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement express, tacit or implied there exists between the members in regard to the company’s affairs a particular 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 of the company’s affairs. If by conduct which is either wrongful or not as contemplated by the arrangement one or more of the members destroy 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”.

[31] These principles were restated by the Supreme Court of Appeal in *Apco Africa (Pty) Ltd v Apco Worldwide Inc*[9] (“Apco”), and in *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others*[10] (“Thunder Cats”).

[32] The second respondent heavily relied on the so called “clean hands” principle, enunciated thus in *Emphy and Another v Pacer Properties (Pty) Ltd*[11] (“Emphy”):

“...[a] petitioner who relies on the just and equitable clause must come to Court with clean hands: if the breakdown between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue. What was said by Lord CROSS appears to me to be consistent with the statement in Lindley on Partnership (supra) that the impossibility must not be caused by the person seeking to take advantage of it. That statement was expressly referred to with approval by BROOME JP in Marshall’s case supra and by MURRAY J in Lawrence’s case supra. IN the judgment in Moosa’s case supra the reference to justifiable lack of confidence as well as the furtherance to the relationship being destroyed by one or more of the members makes it clear, I think, that an applicant who relies upon the just and equitable provision, must not have been wrongfully responsible for the situation which has arisen”.

[33] In *Thunder Cats*[12] it was held that even if the party who sought the winding up was found to be at fault, it was not an absolute bar to success, but

constituted an important factor to consider.

[34] More recently, the Full Court of the Gauteng Local Division in *Barbaglia NO and Others v Noble Land (Pty) Ltd*[13] (“Barbaglia”), after analysis of *Apco* and *Thunder Cats*, expressly declined to follow *Emphy*. In *Barbaglia* it was concluded that any wrongful conduct causing the situation which has arisen was merely a factor to be taken into consideration.

I am bound by that judgment and the principles applied therein.

- [35] As the first applicant seeks final relief, the application must be determined on the basis of the so called Plascon Evans rule[14], being that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred by the applicant, which have been admitted by the respondent, together with the facts averred by the respondent, justify such an order.
- [36] The second respondent's version mutated from the correspondence between the parties' respective legal representatives to his answering affidavit. The correspondence contains various ad hominem attacks on the first applicant which do no more than to illustrate the complete breakdown of trust and co-operation between them. His version cannot however be rejected as palpably false or untenable on the papers[15].
- [37] Here, as in Barbaglia, there are numerous disputes of fact regarding the conduct of respectively the first applicant and the second respondent and who was to blame for the breakdown on their relationship. It is not necessary, nor possible, to resolve the factual disputes on all those issues on the papers.
- [38] However, on a conspectus of the undisputed facts, including those referred to earlier, the conclusion can reasonably be drawn that both the first applicant and the second respondent contributed to the breakdown of their relationship and that its breakdown is not attributable solely to the first applicant. It is not necessary, nor possible, to ascribe blame to each party with any specific degree.
- [39] It was undisputed that the relationship between the parties is analogous to a partnership and is dependent on a particular relationship of trust. In Apco[16], the Supreme Court enunciated the relevant test thus:

"Actual deadlock is not an essential to the dissolution of a partnership. All that is necessary is to satisfy a 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".

- [40] On the undisputed facts, I am satisfied that that the applicant has illustrated that it is impossible for the first applicant and the second respondent to place that confidence in each other which each has a right to expect. The altercation which occurred on 12 January 2021 between them is a vivid illustration of the complete breakdown in the relationship and trust between them.
- [41] Seen against the backdrop of the uncontested facts, the second respondent's argument that a spectre of a relationship remains and the first applicant can involve himself again in Swatco's business and exercise the suggested remedies, is misplaced and without a cogent factual foundation. The correspondence which passed between the parties' respective legal representatives, describes the relationship as "toxic" and raises issues that clearly illustrate that the trust relationship has completely broken down. Their relationship can hardly be described as one of friendly co-operation in the running of the affairs of Swatco. It does not

seem that there is any reasonable hope of Swatco emerging as a functional company in which both the first applicant and the second respondent actively participate in the management.

- [42] Considering all the relevant facts, it can only be concluded that the relationship between the first applicant and the second respondent has irretrievably broken down and that a deadlock exists in relation to the Swatco business, for which the first applicant is not solely responsible.
- [43] It is an unfortunate inevitability that the Swatco employees will lose their employment if a winding up order of Swatco is granted. That, of itself, cannot be a reason not to grant such relief. Both the first applicant and the second respondent have invested substantial amounts in Swatco. If Swatco is solvent, as the second respondent contends, there is a prospect of a substantial recoupment by both parties of their investment.
- [44] In argument, the second respondent's stressed that the first applicant should have rather sought relief under s 36 of the Act, pertaining to the disposal of his membership interest in Swatco. Considering the correspondence which passed between the parties' legal representatives from 12 November 2020 and the various issues and options raised therein, it appears that various possible avenues of settlement were already raised and canvassed between the parties and that no agreement could be reached.
- [45] Significantly, the second respondent did not launch any counter application for relief, including any relief under s 36 of the Act and did not avail himself of the remedies he proposed the first applicant should pursue. Moreover, he put up no facts to enable a conclusion to be drawn that any of the proposed suitable remedies constituted a viable alternative to winding up. The second respondent has simply not placed any information before the court to properly consider the alternatives such as the purchase of the first applicant's shares or the granting of any relief under s163 of the Companies Act[17].
- [46] In exercising a discretion to wind up a solvent company, I have considered, as I must, all these relevant factors collectively and holistically[18]. I conclude that the discretion afforded must be exercised in favour of the granting of relief and that it would be just and equitable to grant a winding up order as the first applicant has no alternative means to appropriately address his complaints[19], considering the history of the matter.
- [47] I am satisfied that the requisite formalities have been met and that a winding up order should be granted.
- [48] In light of the conclusion reached, which is dispositive of the matter, it is not necessary to determine the remaining issues or to make a determination of the alternative claim of the second and third applicants and I make no order in relation thereto.
- [49] The usual order is that the costs of the application be costs in the winding up. In their notice of motion, the applicants sought such an order, save in the event of opposition. The application was unsuccessfully opposed by the second respondent, and no special

circumstances were shown, i.e. real and substantial grounds for opposing, which assisted the court in coming to a decision[20]. In those circumstances it would be inappropriate to mulct Swatco with the costs of the application. I am not however persuaded that a punitive costs order is warranted, as sought by the first applicant.

[50] I grant the following order:

[1] The first respondent be and is hereby placed under final winding up in the hands of the Master of the High Court;

[2] The costs of the application are to be borne by the second respondent.

EF DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING

: 16 May 2022

DATE OF JUDGMENT

: 05 August 2022

APPLICANTS COUNSEL

: Adv. JM Hoffman

APPLICANTS ATTORNEYS : Rothbart Inc

RESPONDENTS COUNSEL

: Adv. AL Roeloffze

RESPONDENTS ATTORNEYS : Michael Saltz Attorneys

[1] 71 of 2008

[2] 69 of 1984

[3] 61 of 1973, applicable under item 9 of Schedule 5 of Act 71 of 2008

[4] J & K Timbers (Pty) Ltd t/a Tegs Timbers v G L & S Furniture Enterprises CC 2005

(3) SA 223 (N)

[5] Northview Shopping Centre ((Pty) ltd v Revelas Properties Johannesburg CC and Another 2010 (3) SA 630 (SCA) para 17

[6] Barbaglia NO and Others v Noble Land (Pty) Ltd (A5041/2020) [2021] ZAGPJHC 85 (24 June 2021)

- [7] Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 350C-I
- [8] Moosa NO v Maviee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T) at 131
- [9]
- [2008] ZASCA 64; 2008 (5) SA 615 (SCA) para 19
- [10] 2014 (5) SA 1(SCA)
- [11] 1979 (3) SA 363 (D) at 369A
- [12] Paras 27-29
- [13] (A5041/2020) [2021] ZAGPJHC 85 (24 June 2021)
- [14] Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A); National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA)
- [15] J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA)
- [16] Para 21
- [17] Knipe and Others v Kameelhoek (Pty) Ltd and Another 2014 (1) SA 52 (FB) para 32
- [18] Apco Africa (Pty) Ltd v Apco Worldwide Inc
- [2008] ZASCA 64; 2008 (5) SA 615 (SCA) para [17]
- [19] Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) at para [116]
- [20] Knipe supra para [51] and the authorities cited therein

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