

SOUTH AFRICA / JUDGMENT

Van Der Westhuizen v Van Der Westhuizen and Others (24614/2022) [2024] ZAGPPHC 15 (8 January 2024) [2024] ZAGPPHC 15

COURT
North Gauteng High Court, Pretoria

BEFORE
Nyathi

CASE / FILE NUMBER
24614/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO.
24614/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 04 September 2023

Date: 08

January 2024

Signature: In

the matter between:

LEONARD
FRANCOIS VAN DER WESTHUIZEN
Applicant
and
PIETER
FREDERIK VAN DER WESTHUIZEN
First Respondent
TRACKSTAR
TRADING 20 CC
Second
Respondent
HM
& H EIENDOMME CC
Third Respondent
COMPANIES
AND INTELLECTUAL PROPERTY COMMISSION Fourth
Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] These are two opposed applications for an order winding up the respondents, on the grounds that it is just and equitable, as contemplated in section 81 (1) (d) (iii) of the Companies Act 71 of 2008 (“the Act”)
- [2] The application is brought by the applicant in his capacity as member of the respondents.
- [3] This application was originally brought on an urgent basis on the 24 May 2022 but was removed from the roll at the applicant’s instance, occasioning wasted costs for the respondents. The outcome will be dealt with at the appropriate time.
- [4] The applications are heard simultaneously for convenience due to the facts and surrounding circumstances being intrinsically linked.[1]
- [5] The applicant and first respondent are brothers. The second and third respondents are family-owned businesses which the brothers are running, having inherited them from their deceased father.
- [6] The animosity and conduct as highlighted in the affidavits filed of record has created substantial enmity and has led to a deadlock in respondents' affairs and a breakdown in the confidence and trust between the directors and members. These circumstances thus impel the applicant to seek the winding up of the corporate entities on the grounds aforesaid.

- [7] Section 81 of the Act makes the winding up of solvent companies possible. In the current application the entities are Close Corporations. Section 81 of the Act thus finds application by virtue of section 66 of the Close Corporations Act 69 of 1984 (“CC Act”). The applicant accordingly alleges that it is just and equitable to wind up the corporations as there is a deadlock between the management of the latter, being himself and his brother.
- [8] Section 81 (1) (d) of the Act provides:
- “Winding up of solvent companies by court order*
- (1) A court may order a solvent company to be wound up if –
- (d) the company, 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 the 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;”
- [9] The applicant contends that HM en H EIENDOMME CC (third respondent) equally falls to be wound up on the just and equitable basis since the same parties have interests therein.
- [10] The application is opposed by the applicant’s brother who asks the Court to dismiss the application and grant relief as per his counter application.
- [11] The applicant had raised several points in limine, but his Counsel submitted that he was not persisting therewith. The applicant also sought condonation for the late filing of its replying affidavit and heads of argument. This was not opposed by the respondents and condonation was accordingly granted. The court further granted the application to hear both applications simultaneously.
- [12] The relationship between the two brothers is and has always been discordant and fraught with difficulties that date back to their late father’s lifetime. This is common cause from both brothers’ versions.[2]

- [13] The applicant alleges that the first respondent is involved in “highly questionable” and/or “fraudulent transactions” which are not in the interest of the applicant as a fellow director and shareholder or Trackstar (second respondent) itself. The specific complaint seems to revolve around a property transaction in Khatu, which has become a massive bone of contention. The applicant alleges that he has been sidelined and excluded from the impending sale of the property.
- [14] The applicant alleges that he has been locked out of Trackster’s banking facilities since 2018. The first respondent is in the meantime misappropriating and wasting Trackster’s assets to its detriment.
- [15] The applicant’s founding affidavit is replete with allegations detailing incidents evincing acrimony, obstructiveness and autocratic conduct on the part of the first respondent. The applicant further details incidents where attempts at mediation were made with no success.
[3]
- [16] The applicant has annexed correspondence detailing his attempts to break the deadlock with his brother.
- [17] The applicant alleges that there are no factual disputes between him and the first respondent. To the extent that there may be a dispute, it may only be on what needs to be done with the two entities, namely second and third respondents.
- [18] The first respondent contends that the submission that the parties are deadlocked is qualified because de facto there is an agreement between the brothers.
- [19] In its counter application the first respondent suggests that mediation in terms of the Close Corporation Act is a possibility.
- [20] The first respondent acknowledges that attempts at mediation were made but that a transfer of a member’s interest never formally materialized.
- [21] Adv. Kriel on behalf of the first respondent submitted that section 36 of the Close Corporations Act provides alternatives to summary liquidation in the event of a deadlock. Section 36 of the Close Corporations provides for the cessation of membership by order of court on application. This suggestion, without more, is in my view, meaningless.
- [22] The first respondent emphasized that the legacy of their father is very important to him. He concluded that the suggested relief is the best scenario for the court to exercise its discretion and dismiss the application and grant his counter application.
- [23] The “deadlock” principle was enunciated in the matter of *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA); where the court held that this 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. 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" . . . The destruction of the relationship may result in literal deadlock, ie where the factions hold equal voting power in general meeting, in which event winding-up must ordinarily inevitably ensue . . . but it is not necessary to establish literal deadlock: it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement between the members . . .

[24] In Henochsberg on the Companies Act 61 of 1973 deals with a literal deadlock with reference to the Yenidje case where the following example of a deadlock is given:

"(e.g. constant quarrelling between the only two shareholders with voting rights as such, who are also the only two directors, leading to a situation where they are not on speaking terms. . .)"[4]

[25] Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and others[5] dealt with an application for the winding-up of a solvent company in terms of s 81 of the 2008 Companies Act, on the grounds that the directors and/or shareholders were in a deadlock, and as an alternate ground for the winding-up, that it was just and equitable to do so.

[26] The court also considered the requirements for a deadlock to exist. In the court a quo, Vermeulen AJ had founded his judgment on the general breakdown of the relationship between the shareholders, and in exercising his discretion whether to liquidate, said that the company was of the kind envisaged in *In re Yenidje Tobacco Company Limited*, that is, in substance, a partnership in the guise of a company. He considered that the company had only four members, each having the right to appoint a director, and that there was accordingly no body of shareholders distinct from the board. Each of the shareholders had the right to participate in the management of the company. The Supreme Court of Appeal considered a definition of the words 'just and equitable' as they appear in the Companies Act of 1973 as well as the Companies Act of 2008.

[27] In the final analysis, the SCA in *Thunder Cats Investments* concluded that the words "just and equitable" were to be interpreted widely, the effect being that there is no closed list of what is meant by 'just and equitable', thus broadening the grounds of winding up to include other cases of deadlock. This accords with the views of Ponnann JA who held in *Apco Africa v Apco Worldwide Inc.* [2008] ZASCA 64; 2008 (5) SA 615 (SCA), that there is no limit to the words just and equitable, and a court is afforded a wide judicial discretion.

[28] In *Kanakia v Ritzshelf* 1004 CC t/a Passage to India and Another 2003

(2) SA 39 (D), the court dealt with an application for the winding-up of a close corporation on the basis that a deadlock existed between

the members, and that it was just and equitable for the close corporation to be wound-up. The court considered the provisions of

the then section 68 of the Close Corporations Act, and the provisions of s 344(h) of the 1973 Companies Act. It concluded that the phrase ‘just and equitable’ involved ‘a conclusion of law for the winding-up, namely justice and equity’.

[29] A further ground for consideration is the “clean hands” principle.[6] The Court is enjoined to assess whether any of the parties contributed, and if so to what extent, to the breakdown leading to the deadlock. In Thunder Cats Investments, the SCA made it clear that “lack of clean hands was not an absolute bar” to deter a court from granting a winding up order. This consideration may in fact spur the court on to eliminate the paralysis and appoint a competent functionary in the person of a liquidator to address the question of where the best interests of the company lie.[7]

[30] Considering the legal principles as set out in the discussion above, the respondents have not proffered any tangible defense of legal substance to counter the application. There is no doubt in my mind that the corporate entities that were bequeathed to the dueling brothers are not functioning as corporate entities, or even partnerships with joint consensual decision-making as intended by the deceased testator.

[31] As was the case in Thunder Cats Investments, I am persuaded that it is just and equitable to make the following order:

- (a) That the second respondent company (Trackstar Trading 20 CC) be and is hereby placed under final winding up.
- (b) That the third respondent company (HM & H EIENDOMME CC) be and is hereby placed under final winding up.
- (c) That the costs of this application be costs in the liquidation.
- (d) That the applicant is ordered to pay the respondents’ costs for the wasted costs of 24 May 2022 on a party and party scale.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 21 February 2023

Date of Judgment: 08 January 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 January 2024.

[1] Whilst the respondent is of the view that the two applications be consolidated, the applicant maintains the position that a

consolidation is not necessary, but that the matters may be considered simultaneously.

[2] Applicant's founding affidavit paras 6 to 11 set out a litany of complaints; Respondent's opposing and founding (counterclaim) affidavit at Para 4.8 "Rightly so, the disputes between the Applicant and I run over several years and at best for the Applicant since 2018."

[3] Founding affidavit, para 8.22.

[4] Henochsberg On the Companies Act, Service Issue 10, 30 September 1999 at 703.

[5] Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and others 2014 (5) SA 1 (SCA).

[6] Also known as the par delictum rule as stated in Jajbhay v Cassim 1939 AD 537.

[7] The SCA in Thunder Cats Investments declared after considering the Canadian judgment of Ruut v Head

(1996) 20 ASCR 160 at 162 cited with approval in Pham Thai Duc v Pts Australian Distributor (Pty) Ltd [2005] NSWSC 98 para 17.

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