SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 30929/2008

DATE: 06-03-2009

In the matter between

D.D.A. PANAYIOTOU Applicant

versus

FULL SWING TRADING 357 CC Respondent

JUDGMENT

MEYER J:

[1] This is the extended return day of a provisional winding up order that was originally issued in this court on 7 November 2008, in terms whereof the respondent close corporation was placed under provisional winding up in the hands of the Master of the High Court.

[2] The applicant holds a 20% interest in the respondent. Messrs Bennett, Wales and Laas each holds a 32,5%, 32,5%, and 5% interest. They oppose the winding up of the respondent. The remaining 10% interest is held by Mr Stefanou.

[3] The applicant's application for the winding up of the respondent is brought under section 68(c), read with section 69(1), of the Close Corporation Act 69 of 1984 ("the Act") and also under section 68(d) of the Act.

[4] Section 68(c) of the Act provides for the winding up of a corporation by a court if it is unable to pay its debts. Section 69(1)(a) provides that a corporation shall be deemed to be unable to pay its debts for the purposes of section 68(c) if a creditor to whom the corporation is indebted for a sum of not less than R200.00 then due, has served on the corporation a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. The applicant relies on such unsatisfied statutory demand upon the respondent for the repayment of his loan account.

[5] It is common cause that the respondent was incorporated on 20 December 2004 for the purpose of holding, as an investment, the business of 'The Spar', which business is defined in clause 2.1.14 of the association agreement which the members concluded on 27 January 2005 as '[t]he Spar Retail Store, including Tops, situated on the corner of 4th Avenue and Main

Road, Melville', and clause 2.1.16 thereof defines 'Tops' as 'the bottlestore situated on the premises.'. Its amended founding statement describes its principal business as 'general trading in all aspects.' The sole members of the Corporation were and presently are Bennett, Wales, Laas, Stephanou and Panayiotou.

[6] Clause 8 of the association agreement *inter alia* provides for the initial capital contributions by members in a total sum of R9,1 million. Clause 8.7 reads:

> 'The Members do hereby agree that in regard to the repayment by the Corporation to each of them their respective contributions, the members shall not be entitled to require or demand repayment of their respective contributions either in whole or in part unless and until a decision regarding such repayment has been taken at a Members' meeting, unless the Corporation is wound up or placed in liquidation by a third party, or by the Members in pursuance of a Members' decision to wind up the Corporation.'

[7] The respondent acquired the business of The Spar as defined in the association agreement ("the Spar business"). It is common cause that the members' contributions in the amount of R9,1 million referred to in clause 8 of the association agreement ('the initial capital contributions) was required by the respondent to acquire the Spar business. The respondent, however, procured a loan from ABSA Bank in the sum of approximately R4,8 million. As a result thereof the members' initial capital contributions were reduced to:

Bennett:	R 1, 848, 865.00
Wales:	R 1, 848, 865.00
Applicant:	R 788, 000.00
Laas:	R 237, 500.00
Stephanou:	R 910, 000.00.

[8] It is undisputed that the Spar business continually required further injections of capital from the members. Clause 17 of the association agreement provides for the provision of further loans to the respondent by *inter alia* its members. Certain additional capital contributions would bear interest at a rate equivalent to the prime rate and be repayable before any other loan accounts are repaid and upon such date/s as may be agreed upon between the Corporation and the Member concerned. As at 31 May 2008, the loan account balances, which balances include the initial capital contributions plus the additional capital contributons, were as follows:

Bennett:	R 3, 415, 176.80
Wales:	R 3, 304, 687.35
Applicant:	R 1, 267, 670.00
Laas:	R 505, 287.71
Stephanou:	R 15, 458.85.

[9] The members eventually resolved to sell the Spar business in order to cut their mounting losses. A sale of the Spar business was ultimately concluded with Wild Goose Trading CC ("the purchaser") for the sum of R 8,5 million plus an additional amount of R 2 million for its stock. A resolution authorizing the respondent to dispose of the Spar business was taken on 28 February 2008. The purchaser has paid an aggregate sum of R10, 516, 964.39. Only the final instalment in respect of stock in the sum of R321, 219.11 is still to be collected from the purchaser.

[10] It is common cause that the members received certain repayments of their loan accounts. The repayments, on the respondent's version, were only in respect of the additional capital contributions. It is common cause that, as at 5 August 2008, the applicant received repayment of the sum of R480,

617.00. This payment, according to the respondent, reduced the balance outstanding in respect of the applicant's loan account to the sum of R787, 052.90, which amount forms part of his initial capital contribution. Bennett and Wales only received part payment of their additional capital contributions and all the members' initial capital contributions have not been repaid.

[11] It is common cause that no resolution or decision regarding the repayment of the members' initial contributions has been taken at a members' meeting as is required in terms of clause 8.7 of the association agreement. The applicant was accordingly not entitled to require or to demand repayment of his initial capital contribution and his statutory demand upon the respondent related to a debt that was and is not due and payable. The onus upon the respondent is merely to show that the indebtedness on which the applicant relies is *bona fide* disputed on reasonable grounds. (See: *Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD)* at p 980 A-B). Such onus has been discharged in respect of the applicant's claim for payment of the outstanding balance of his loan account.

[12] Section 69(1)(c) of the Act provides that a corporation shall be deemed to be unable to pay its debts for the purposes of section 68(c) if it is proved to the satisfaction of the court that the corporation is unable to pay its debts. Section 69(2) enjoins a court to take the contingent and prospective liabilities of the corporation into account in determining whether a corporation is unable to pay its debts. It appears that the respondent will be able to meet all of its debts in the ordinary course of business and that all trade creditors of the

respondent have been paid. It is, however, common cause that the respondent will be unable to repay substantial portions of the members' loan accounts representing their initial capital contributions if they ever become due. They will only become due when a resolution is passed by the members determining that they are to be repaid. Such resolution has not been taken and it is clear from the answering affidavit that the reason for this is to subordinate the members' claims to the claims of all other creditors.

[13] Section 68(d) of the Act provides for the winding up of a corporation if it appears to the court that it is just and equitable that the corporation be wound up. The applicant appears to found his claim for relief on this ground firstly on the basis that the relationship between the members is akin to that between partners or quasi-partners and friendly co-operation is no longer possible, and, secondly, on minority oppression.

[14] Clause 5.2 of the association agreement, however, expressly provides that '[t]he relationship between the Members as such shall not be construed as that of partners or quasi-partners.' A party is, as a rule, bound by his agreement, so that if the contract states that there is no relationship of partnership, he cannot claim that there is one in fact [see: Hart v Pickles 1909 TH 244 at p 247; Le Voy v Birch's Executors 1913 AD 102; Dickinson & Brown v Fisher's Executors 1916 AD 374 at p 383]. Obviously different considerations prevail when the question is raised by third parties who are not parties to the agreement.

[15] Bennet's undisputed statement in paragraph 37 of the answering affidavit is this:

> 'The situation is accordingly therefore that the applicant has been treated in a more advantageous manner than have Wales and I. In terms of the association agreement, it was agreed that additional capital contributions would be repaid prior to initial capital contributions. This agreement has been strictly adhered to.'

[16] Mr Cohen, who appears for the applicant, submitted that it would be just and equitable to wind up the respondent since its substratum has disappeared. This ground, however, has not been pertinently raised in the founding papers or even in the replying papers. I am not satisfied that all relevant aspects pertaining to a disappearance of the respondent's substratum have been canvassed on the papers.

[17] In all the circumstances I am not satisfied that the applicant has established a case for the granting of a final winding up order on a balance of probabilities [see: SMM Holdings (Pvt) Ltd v Southern Asbestos Sales (Pty) Ltd [2005] 4 All SA 584 (W) at p 593, para [27]].

[18] In the result the following order is made:

1. The provisional winding up order is discharged.
2. The application is dismissed with costs.