REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 45084/2010

DATE: 04/05/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between

ERICH BRACK 1st Applicant

ROBERT STEPHEN LANGER 2nd Applicant

and

FRONT RUNNER RACKS 2000 (PTY) LTD
(Registration No: 1999/023159/07) 1st Respondent

BUSH AIR SAFARI (PTY) LTD
(Registration No: 1998/005802/07) 2nd Respondent

ROOF RACK CITY (PTY) LTD
(Registration No: 1998/014127/07) 3rd Respondent

STANLEY HARRY ILLMAN
(Identity No: 461029 5028 080) 4th Respondent

J U D G M E N T

BORUCHOWITZ, J:

[1] This is an application for the winding-up of the first and second respondents ("Front Runner" and "Bush Air") on the ground that it is just and equitable as envisaged in s 344(h) of the Companies Act, No 61 of 1973.

[2] The application is brought by the applicants in their capacities as members and directors of Front Runner and members of Bush Air. They each hold 20% of the issued share capital of these companies. The third respondent ("Roof Rack"), a private company, holds 60% of the issued share capital of Front Runner and Bush Air. Stanley Harry Illman, the fourth respondent, is the sole director of Bush Air and the sole shareholder and director of Roof Rack.

[3] The applicants allege that in terms of a shareholder's agreement or understanding they, as the sole directors of Front Runner, had the exclusive right to manage its affairs without interference by Illman. In breach of that agreement, Illman attempted to convene a general meeting with a view to appointing three additional directors to Front Runner's board so as to stack the board and thereby gain control of its management. This conduct has created substantial animosity and has led to a deadlock in Front Runner's affairs and a breakdown in the confidence and trust between the directors and members. Consequently, circumstances exist which render it just and equitable that Front Runner be wound-up. So far as Bush Air is concerned, the applicants contend that due to the fact that the same parties have interests in Bush Air the above equally applies and that it too falls to be wound-up on the just and equitable basis.

[4] The existence of the alleged agreement or understanding that the applicants would exclusively manage the Front Runner business is disputed by the respondents. They also dispute that there exists any deadlock or circumstances that would justify the winding-up of Front Runner and Bush Air.

[5] Counsel for the respondents took the point, by way of a preliminary objection, that it was not competent for the applicants to seek the liquidation of two separate companies in one application. Reliance is placed upon decisions in this and other divisions, namely *Breetveldt & Others v Van Zyl and Others* 1972 (1) SA 304 (T); *Ferela (Pty) Ltd v Craigie* 1980 (3) SA 167 (W); *Main Industries (Pty) Ltd v Serfontein & Another* 1991 (2) SA 604 (N); *Caltex Oil (SA) (Pty) Limited v Govender's Fuel Distributors (Pty) Ltd* 1996 (2) SA 552 (N) and *Business Partners Limited v Vecto Trade 87 (Pty) Ltd and Others* 2004 (5) SA 296 (SE).

[6] The most significant of the cases quoted is that of *Breetveldt*, which has been quoted with approval in the *Ferela*, *Main Industries* and *Caltex Oil* cases, and with qualified approval in *Business Partners* (*supra*). In *Breetveldt* Margo J held (at 314F) that the joinder of more than one company as respondents in an application for their liquidation cannot be allowed except possibly by the consent of all interested persons, or, in a case where there is a complete identity of interests. There the applicant sought relief which included, among other things, an order for the liquidation of four separate

companies, namely a holding company and subsidiaries which were incorporated for the specific purpose of developing and exploiting certain patent rights. Despite the fact that the companies were closely related and their affairs interlinked. Margo J expressed disapproval of the joinder, remarking as follows, at 314F-H:

> "… … In my view such a proceeding cannot be allowed, except possibly by the consent of all interested persons, or in a case where there is a complete identity of interests.
>
> In the present case, each company has its own separate share capital, separate shareholders and separate creditors and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such company. In the compulsory winding-up of a company, the petition is an important document. Its purpose, *inter alia*, is to place before the Court, for the information of the company, the creditors and shareholders, a statement of the material facts upon which a winding-up order is claimed, and it also serves to provide information to the Master, the Sheriff, the liquidator and other interested parties. If, for example, creditors in one or other of the companies in this case, should wish to intervene on the return day, or to suggest a compromise under sec. 103 of the Companies Act, there is no valid reason why they should have to become involved in the affairs of three other companies."

[7] *Breetveldt* has withstood the test of time. It has been referred to with approval by courts in this province and in Natal (*Cf Ferela*; *Main Industries*

and *Caltex Oil*). It has received qualified approval in the Eastern Cape Division in *Business Partners supra*. There the court expressed the view that it was not a *sine qua non* that there has to be a complete identity of interest for a valid joinder of more than one debtor in an application for liquidation or sequestration. Kroon J said the following at paragraph [34]:

> "… I align myself with the approach followed in *Breetveldt*, *Ferela* and *Caltex Oil*. I have, however, some difficulty with the stance that a complete identity of interests is a *sine qua non* for the valid joinder of more than one debtor in liquidation and/or sequestration proceedings. One cannot readily conceive of a situation where there would in fact be a complete identity of interest between debtors. Perhaps a preferable test would be that mooted by counsel for the applicants, viz a sufficiently substantial coincidence of interests such as would practically or at least substantially place the case outside the objections to joinder that were adverted to in the three cases referred to above and properly bring the case within the ambit of Rule 10."

[8] On the basis of the *stare decisis* principle this Court may only depart from the approach adopted in *Breetveldt* if convinced that it is clearly or palpably erroneous (see *Bloemfontein Town Council v Richter* 1938 AD 195 at 232. The above-quoted dictum in *Business Partners* is persuasive but insufficient to persuade me that *Breetveldt*, which has been consistently followed over many years is erroneous. I am thus duty-bound to follow *Breetveldt*.

[9] The applicants have sought to invoke Rule 10, which is also applicable to applications, to justify the joinder. Rule 10(3) entitles an applicant to join any number of respondents in one application whenever the question arising between them or any of them and the applicant/s depends upon the determination of substantially the same question of law or fact. It was argued that given the commonality in shareholders and interests between them (Bush Air is a property-owning company and its only asset is the property from which Front Runner trades) there is a sufficient identity of interests to warrant their winding-up in the same application.

[10] It was emphasised in the *Ferela* and *Main Industries* cases that the provisions of Rule 10(3) of the Uniform Rules of Court are not readily applicable to liquidation or sequestration proceedings. In holding that it was inadvisable that two separate estates be dealt with in one application, Coetzee J stated the following in *Ferela* (at 17F):

> "… … This is not simply a case where either money or property is claimed from a respondent and where the provisions of Rule 10 would very easily be applicable *mutatis mutandis*. This is a procedure which really achieves a *concursus creditorum*. That is the purpose of sequestration proceedings. It is to my mind inadvisable that two separate estates should be dealt with in this way, each leading to its own and utterly separate *concursus creditorum*."

In *Main Industries* (*supra*), Booysen J said the following (at p 607C-D):

> "It is in principle undesirable that two or more persons should be joined in an application for their sequestration as respondents in one application, even in a case in which they are jointly and severally indebted to the applicant. This is so for a number of reasons. The question whether each respondent has committed an act of insolvency or is in fact insolvent and the question whether it would be to the advantage of creditors has by the nature of things to be separately determined in respect of each respondent. It follows that the provisions of Rule 10(3) of the Uniform Rules of Court are not readily applicable to sequestration proceedings …"

And, at 607F, Booysen J continues:

> "It is furthermore confusing and prejudicial to creditors interested in only one respondent's estate to consider their attitude to matters such as intervention or proof of claims in the light of application papers which deal extensively also with the estate of another person. If such a person were to seek to intervene in the proceedings there is no reason why it should become involved in the affairs of and an application dealing with the estate of another. *Cf Breetveldt & Others v Van Zyl & Others* 1972 (1) SA 304 (T) at 314."

[11] In the present matter there does not exist a complete identity of interests that would permit the joinder of Front Runner and Bush Air in a single application for their liquidation. The application is based on the just and equitable ground contemplated in s 344(h) of the Companies Act. The section confers upon the Court a wide discretionary power which has to be exercised

judicially with due regard to the justice and equity of the competing interests of all concerned (*Moosa, NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H. The approach to be followed is aptly described by Friedman AJP in *Pienaar v Thusano Foundation* 1992 (2) SA 552 (BGD) 580 at 580F-G:

> "The Court is guided by 'broad conclusions of law, justice and equity', and in doing so it must take into account competing interests and determine them on the basis of a judicial discretion of which 'justice and equity' are an integral part. The Court has to 'balance the respective interests and tensions and counterbalance the competing forces and resolve and determine them in a fair, proper and reasonable manner.'"

[12] The competing interests involved are of the widest character and would include the legal, financial, pecuniary and non-pecuniary interests of those concerned, whether directly or indirectly, in the affairs of the company sought to be winding-up. Where, as in the present case, two companies are involved, the Court has to separately determine in respect of each company whether it is just and equitable that it be wound up. The field of fact to be covered is extensive as the competing interests involved are not the same, and the same questions of law and fact do not arise. The following are some obvious differences.

[13] Front Runner is managed and administered by its two directors, the applicants. Illman, the fourth respondent, is not a director and on the case put

forward by the applicants has no right to participate in its management at all. Bush Air is run by its sole director, Illman. The applicants do not participate therein.

[14] On the applicant's version, there is a shareholders' agreement in Front Runner which excludes Illman from involvement in its day-to-day affairs. There is no suggestion of any such agreement in Bush Air.

[15] The issue giving rise to the alleged deadlock is on the version of the applicants, the attempt by Roof Rack and Illman to convene a general meeting in Front Runner to stack its board. There is no suggestion of any such issue in Bush Air.

[16] Front Runner is a trading operation which both manufactures and distributes accessories for off-road vehicles. It obviously has a workforce. It trades in several countries internationally. Bush Air is a property-owning company. There is no suggestion that its activities extend beyond Gauteng. Nor does it have a workforce.

[17] Front Runner and Bush Air presumably have their own separate creditors. There is no allegation on the papers to suggest that one or other company has no creditors or that the two companies have the same creditors. There is evidence of a loan by Investec Bank Ltd to Bush Air. It is reasonable to assume that a company engaged in manufacturing and distributing motor vehicle accessories has different creditors and debtors from a company that

simply holds fixed property. It is also reasonable to assume that both companies have separate relationships with the Receiver of Revenue and presumably have separate banking relationships. Creditors of either of the companies may wish to intervene in the proceedings in order to oppose the liquidation. It would be confusing and prejudicial to creditors interested only in one of either Front Runner or Bush Air that they would have to become involved in the affairs of an application dealing with the estate of another.

[18] The origin of the application appears to lie in the desire expressed by the applicants to retire. There is no suggestion of any retirement of any part of the management or directorate of Bush Air.

[19] The interests of the applicants and Illman are clearly divergent. The applicants are merely minority shareholders in Front Runner and Bush Air. It appears from the papers that Illman purchased the business of Front Runner in its entirety and has always been its sole funder. He, through Roof Rack, holds 60% of its issued share capital, having donated 20% to each of the applicants. His interests as the majority shareholder are clearly different to those of the applicants.

[20] For these reasons I am satisfied that there has been a misjoinder.

[21] It was submitted on behalf of the applicants that the point *in limine* taken by the respondents would not be dispositive of the application even if

upheld. Relying on the approach adopted by Kroon J in the *Business Partners* case it was submitted that the Court should allow the applicants to withdraw the application against Bush Air subject to an appropriate order as to costs and permit the applicants to proceed with the application for the liquidation of Front Runner. Having regard to the consistent approach followed in this division over many years, such a course would not be justified. The misjoinder is in my view fatal to the application, which falls to be dismissed.

[22] The respondents contend that the costs of the abortive application should be paid by the applicants on the scale as between attorney and client. The basis for such punitive order is that the applicants faced with notice of the misjoinder point in the answering affidavit simply proceeded regardless, and that had they heeded the warning, substantial costs could have been avoided. Costs on a punitive scale are not, in my view, warranted in the present case. There is no principle of law that it is impermissible to apply to wind up two companies in one application. The question whether there was a sufficient identity of interests was reasonably arguable and the prospect of the Court upholding the misjoinder point was not a foregone conclusion. In my view the respondents are entitled to costs on the party and party scale including the costs consequent upon the employment of two counsel as this was clearly a matter which warranted the attention of two counsel.

[23] I accordingly make the following order:

The application is dismissed with costs, including the costs consequent upon the employment of two counsel, such costs to be paid by the first and second applicants jointly and severally, the one paying, the other to be absolved.

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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