IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

APPEAL CASE NO.: A5040/2011
CASE NO.: 10/20152

In the matter of:

RAVINSKY, SHARLENE	First Appellant
JANKELOWITZ, LEON SELWYN	Second Appellant

and

GOSSEL, ROBERT DAVID	First Respondent
GOSSEL'S RECORD CLUB (PTY) LTD	
t/a GRC PROPERTIES	Second Respondent

JUDGMENT

SATCHWELL J:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4/5/12
DATE
SIGNATURE

INTRODUCTION

1. This is an appeal against an order of Masipa J dismissing appellants' application for a final winding up order of second respondent ('the company'). We are required to determine whether or not it is *"just and equitable"* that the company should be wound up in terms of Section 344(h) of the Companies Act, 61 of 1973.

2. The company was incorporated in 1968. In 1973 the company purchased a stand and a shopping centre was built. This was done with the purpose of providing accommodation for the Gossel furnishing business. The company continues to carry

on business as a property owning company collecting rentals from tenants in those buildings on that property. This is the sole source of income for the company.

3. The first respondent ('Gossel') was, with his father, one of three founding shareholders and directors. By 1998, both Gossel's father and mother were deceased and he owned 50% (fifty per centum) of the issued shares of the company. From 1998 onwards Gossel was the sole director of the company. In 2002 the third shareholder passed away and the appellants ('Ravinsky' and 'Jankelowitz') each inherited a 25% (twenty five per centum) shareholding. Ravinsky controls her and her brother's combined 50% (fifty per centum) shareholding. Gossel continued as the sole director of the company until Ravinsky was appointed a director in 2004.

4. Notwithstanding, that the company remains fully functional and profitable, Ravinsky seeks to have the company wound up. In summary she complains that the lawful management of the company is so compromised that only the appointment of a liquidator would ensure resolution of her unresolvable complaints. She submits that it would be *"just and equitable"* to wind up the company for a number of reasons: the management of the company is not conducted in accordance with the Articles of Association; Gossel acts ultra vires his powers and excludes Ravinsky from making any contribution towards the management of the company; Ravinsky has no confidence in Gossel's management of the company and there is deadlock between them on many issues. Understandably, some of these complaints overlap with others or are intertwined with each other. I shall attempt to distinguish and deal with them in a coherent manner.

NON COMPLIANCE WITH THE ARTICLES OF ASSOCIATION

5. The Articles of Association provide that there *"shall be not less than three"* directors of the company.[1] From 1968 to 1998 there were three directors. For the period 1998 until 2004, there was only one director - viz Gossel. In 2004, Ravinsky was also appointed a director.

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[1] Clause 65.

6. It is Ravinsky's view that the failure to ensure the full complement of directors has enabled a situation to develop where Gossel has arrogated unto himself all powers with regard to the management of the company and where Ravinsky is unable to make any meaningful interventions since there is an impasse in the 50% voting powers of the two directors[2].

7. There may be issues on which the two directors have been unable to reach agreement – ranging from their respective statuss to the nitty gritty of the management and finances of the company. In part these difficulties may emanate from the history of the incorporation and management of the company, in part from their different perceptions of the role of a company director, in part from mistrust from both sides of either their competency or trustworthiness. It is certainly possible that these differences of opinion would never have even arisen if there had been the full quorum of directors as provided for by the Articles of Association.

8. What is immediately apparent is that none of the shareholders and neither of the directors have ever sought to secure the appointment of a third director in compliance with the relevant clause of the Articles. No one has attempted to ensure that the provisions of clause 65 pertaining to the quorum of directors are implemented. We are referred to no correspondence, minutes of meeting or discussions on this issue. It appears to have been entirely unconsidered and unexplored by anyone.

9. Ravinsky appears content to have made the complaint that there has not been and continues not to be compliance with the Articles but has, herself, taken no steps to resolve the situation.

10. When this complaint was made by Ravinsky in her founding affidavit, Gossel responded that he had not *"been mindful of the requirement in the articles"* but that this "*has never hampered the company's operations*" and there had *"never been a deadlock at board level in the history of the company"*.

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[2] In terms of the Memorandum and Articles each director and member of the company exercises one vote for each share.

11. He then went on to tender that

> *"In any event I have no difficulty if the company takes steps to appoint a neutral, independent "professional" third director to the board of the company. If we cannot reach mutual agreement on who to appoint, this appointment could be made by an independent body such as the South African Institute of Chartered Accountants or the Law Society; it is appropriate that the director appointed has business experience. This will resolve any concerns which Sharlene has in regard to Board decisions..."*

12. The response of Ravinsky has been to state that "*the appointment of a further director would not, at this stage, resolve matters because the conduct of the first respondent has been such that if what I believe to be the position is established, action would have to be instituted against the first respondent to remove him as a director.*"

13. In the first place, this court is not in a position to deal with the allegations made by Ravinsky against Gossel. We cannot, therefore, pre-empt the situation once a board is properly constituted. In the second place, the appointment of a further director would enable any investigations or discussions which it may be appropriate to conduct. Thirdly, if any decisions adverse to Gossel were required, then the two other directors would be in a position to make them and prevail on a majority basis.

14. Further Ravinsky has responded that it is hard to imagine any person who would willingly take on the harrowing task of being an umpire between Gossel and herself in managing the Company. There would be expensive and time-consuming arguments at every turn. Indeed, at the hearing of the appeal, it was argued for Ravinsky that the appointment of the required third director would result in expenditure of time, money and energy on resolution of "*constant day to day squabbling about the running of the company*".

15. This approach seems to me to be extremely short sighted. With three directors in place, there should be no need for any squabbling about the minutiae of the company's affairs. Firstly, the nature of the business of this company hardly requires the day to day involvement of each director – it rents out property to established tenants and maintains such property. Secondly, it is difficult to

comprehend why it is anticipated that there will always be squabbling - after all the company was run for the benefit of shareholders for many years without any squabbling and those issues to which Ravinsky has made reference can either be resolved by majority vote and by delegation of daily tasks to an appropriate person. Finally, there will be three directors which will ensure that three minds will approach such issues as would reasonably require the attention of the board and such issues will be determined by majority vote.

16. It is further complained that Gossel has, contrary to the provisions of the Articles, arrogated to himself the title of Managing Director and Chairman of the company as well as the powers which are associated with or flow from such position. Ravinsky maintains that Gossel has not been validly appointed a managing director and, in any event, that this position cannot continue on a permanent basis. Gossel maintains that he has *"been Managing Director since 1974"* i.e. from the time that the property was purchased and the shopping centre built.

17. The Articles of Association permit the appointment of *"one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary or commission or participation in profits or partly in one way and partly in another) as they may think fit".* [3] Further, the directors may *"entrust to or confer upon a managing director or manager for the time being such of the powers and authorities vested in them as they may think fit and .... For such time and to be exercised for such objects and purposes...as they may think expedient."*[4]

18. There is nothing to gainsay that Gossel was appointed the first and only managing director of the company. Indeed, with the death of the other initial shareholders and directors and his sole directorship, it could hardly have been otherwise.

19. Not only the Articles of Association but also common business sense dictates that any appointment as *"manager"* or *"managing director"* is an appointment which may be revisited from time to time – either upon expiry of the term initially determined or as and when the situation is believed to require it. There can certainly be nothing

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[3] Clause 72
[4] Clause 73

irrevocable about Gossel's appointment.

20. We have not been referred to any attempt to convene a meeting of directors to change the situation nor to any attempt to convene a general meeting of shareholders to terminate his occupation this office. One can appreciate that Ravinsky's response would have been that such an exercise would have been purposeless since Gossel's vote would have cancelled out her vote. This is a potential impasse which has not happened and which will not arise as and when a third director is appointed in compliance with the Articles.

21. Again it is notable that this is yet another issue which has not been properly raised at any meeting – either of directors or shareholders. Ravinsky has made many complaints concerning both Gossel's attitude towards her and his proprietorial attitude towards the management of the company. Yet Ravinsky has not proposed herself as managing director, she has not indicated that she could or should occupy this position, she has not responded favourably to the appointment of a further director who might well be a suitable person for appointment to this office.

22. Again, one returns to the purpose of the Articles of Association. The aggrieved shareholders and the aggrieved director are perfectly entitled to ensure that both they and Gossel ensure that the Articles are implemented. Such implementation includes the appointment of a further director so that the board of directors will be quorate and there will not be a stalemate in voting at board meetings. This is a responsibility of all shareholders and directors – not only Gossel. Once this is done, then meetings can be convened and resolutions properly tabled and discussed and voted upon. To date this has not happened.

EXCLUSION OF THE SECOND DIRECTOR

23. A further complaint is that Gossel, in abrogating to himself all decision-making powers concerning the company and assuming the title and role of managing director, has excluded Ravinsky from any management role in the affairs of the company. .

24. It is trite that the every director stands in a fiduciary relationship towards the company and that he or she must exercise their powers in good faith and do what

they can to serve the best interests of the company and not their own. Quite obviously, Ravinsky must be in possession of all information pertaining to the affairs of the company so that she can apply her mind to the affairs of the company. She has direct online access to the company's banking account. There is nothing in the papers before us to suggest that Gossel has ignored Ravinsky's position as director, denied her access to information, concealed decisions from her. Indeed, the many emails emanating from Ravinsky demanding or requesting information all seem to have been answered in some detail – some would say too much detail. The minutes of meetings indicate Ravinsky has been present and voted thereat. The financial statements (and the emails between the parties) indicate Ravinsky has been furnished with all financial information and has approved of same by her signature.

25. However, the crux of Ravinsky's dissatisfaction is that Gossel's *"high- handed approach"* and *"unilateral"* behaviour has resulted in an unlawful denial of her right to participate in the management of the company. Ravinsky asserts that she is entitled equally with Gossel to run the company. She relies upon the Articles of Association which provide that *"the business of the company shall be managed by the directors"*.[5]

26. However, that Ravinsky is a director of the company does not necessarily involve her involvement in the nitty gritty of the day -to -day running of company. That the *"business of the company is to be managed by the directors"* is a fundamental statement of obligations of all directors but this is not a statement that each director of each company shall fill out receipts, type letters, post the letters, negotiate the terms of each contract, draft and sign same and generally be involved in the daily affairs of the company – which are primarily administration functions. It is a statement as to the overall policy and fiduciary oversight required of each director in relation to the affairs of the company.

27. In the present case, as already discussed the Articles of Association permit the appointment of a " *managing director or manager*"[6] [7]. Furthermore, the Articles permit the directors to entrust certain powers and authorities vested in them upon

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[5] Clause 71
[6] Clause 72
[7] The distinction between the two is known to our law .

such managing director or manager [8]. Our law well knows the distinction between executive or managing director and non-executive director. The nomenclature is not important: delegation to an executive or managing director is " *merely for the more convenient discharge of the business of the company*"[9].

28. This was discussed in Fisheries Development Corporation of SA Ltd v Jorgensen and Another 1980 (4) SA 156 (W):

> *"The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal."*[10] *"it is necessary to have regard to relevant aspects of a director's duty of care and skill. In England certain principles have emerged from the decided cases on that duty....The extent of a director's duty of care and skill depends to a considerable degree to the nature of the company's business and on any particular obligations assumed by or assigned to him. See In re City Equitable Fire Insurance Co 1925 407 at 427. Compare Wolpert v Uitzigt Properties (Pty) Ltd and others 1961 (2) SA 257 (W) at 267D-F. In that regard there is a difference between the so-called full-time or executive directors, who participates in the day to day management of the company's affairs of a portion thereof, and the non executive director who has not undertaken any special obligations. The latter is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at any other meetings which may require his attention. He is not, however, bound to attend all meetings, though he ought to whenever he is reasonable able to do so. In re City Equitable Fire case supra at 429. Of course if he has reasonable grounds for believing such to be necessary, he ought to call for further meetings. Nowhere are his duties and qualifications listed as being equal to those of an auditor or accountant. Nor is he required to have special acumen or expertise, or singular ability or intelligence, or even experience in the business of the company. In re Brazilian Rubber Plantations and Estates Ltd (1911) 1 Ch 425 at 437. He is nevertheless expected to exercise the care which can reasonably be expected of a person with his knowledge and*

[8] Clause 73
[9] Robinson v Imroth 1917 WLD 178
[10] 163 D-F.

experience. City Equitable Fire case supra at 428-9; and Brazilian Rubber case supra at 427."[11]

29. In present instance, Gossel has certainly been the *de facto* managing director for a number of years when he was the only appointed director[12]. There is nothing to gainsay his contention that he was appointed to this position as long ago as 1974. Ravinsky was initially, upon inheritance of her shareholding, content to leave the day to day running and management of the company in the hands of Gossel. When she was appointed a director in 2004, Ravinsky continued to allow de facto control to remain vested in Gossel. In 2006 Ravinsky signed an authorisation for Gossel to "*single handedly*" conduct " *any other financial activities that might be required for the operation*" of the company. Once the board of directors is quorate, then his appointment could be reconsidered.

30. Where there has been no delegation by the board of directors then the powers of management are "*exercised by means of resolutions adopted at meetings of directors or by a written decision signed by all directors*"[13] or by each director involving him or herself in the daily administration of the company. Ravinsky may certainly have the time to devote to the business and may wish to do so - she would not be excluded from so doing - "*in the absence of clear language to this effect*"[14] – and "clear language" is where a "*managing director or manager*" can be and has been appointed.

31. In argument Ravinsky relied upon authorities which, with respect, correctly state that a director has a right to complain if "*if he is prevented from carrying out his duties and exercising his rights as a director*"[15] but reading of those judgments discloses very different facts from the present case: unilateral sacking of a managing director by another director and not the board; the board resolving that a director vacate

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[11] 165-166F-B.

[12] Gossel states that, while he was the sole director of the company, "*there was no objection to my sole directorship by the other shareholders. They were quite content to leave the day to day management of the company to me*". He continued as sole director even after Ravinsky and Jankelowitz became shareholders.

[13] Van Tonder supra

[14] Robinson supra

[15] Robinson supra

his office on grounds of conflict of interests; exclusion of a director from meetings of the board and removal of his name from the company's letterhead; obstacles placed in the way of a director when he wished to obtain information as to the affairs of the company. Where reliance is placed upon other English and South African authorities to argue that Ravinsky cannot be prevented from participation in the management of the company, it should be noted that those authorities were concerned with exclusion of directors in very different and not analogous circumstances[16].

32. One exchange of communication between Ravinsky and Gossel suffices to contextualise her complaint. During April 2010 Ravinsky emailed Gossel several times demanding:

a) an explanation for a list of expenses appearing on the company bank account – to which Ravinsky has internet access; an explanation for expenses in the Profit and Loss statement prepared from files then in the possession of the company auditor; copies of Telkom and Vodacom statements "*to verify every call made*"; copy of a slip from Shoprite Checkers in the amount of R 92.16 incurred to purchase four lever arch files; details of charges for R 168.00 on a credit card; explanations for two payments made to Gossel – one for R 8,955.29 and one for R 34,54; explanations for a list of payments appearing on the bank account;

b) These demands for information were accompanied by statements such as "*As we are 50% shareholders of this company and I am a Director you have a fiduciary obligation to let us know what you are spending the money on – as half the money is ours*".

c) Each and every one of these queries received a response with details. It was pointed out that some of the information was with the auditors and that other of the information would be dealt with by the auditors in the forthcoming audit.

d) There is no complaint that any request or demand has gone unanswered

[16] For example, implementation of the sale of the major assets of the company pursuant to the policy of the board nevertheless requires reference to the board for implementation of that policy – see Novick and Another v Comair Holdings Ltd and Others 1979(2) SA 116

or that there has been any lack of probity on the part of Gossel in incurring any one of the expenses in respect of which detail was demanded.

33. It is then hardly surprising that in one email, Gossel remonstrates with Ravinsky that her demands of reports on specific amounts with proof thereof *"while not waiting for the normal process of auditing to take place, it means that you consider that there is a clear case of suspected misconduct by me as Managing Director, as well as a lack of confidence in the company auditor."* He goes on to say that

> *"I will not waste my time carrying out a forensic analysis on your behalf to satisfy your totally unfounded mistrust. I will only respond to queries that are within reason and provide reports on information I believe is salient. As the Managing Director I have the right to discharge my duties without interference from co-directors, thus by you demanding details about each and every small payment made, you are clearly trying to make a nuisance of yourself, which is adversely affecting the running of the company."*

Gossel again invited Ravinsky to page through all the documentation at the auditor's office and even to have a forensic audit carried out by a qualified forensic auditor at her own expense.

34. Ravinsky claims that Gossel has improperly *"enriched himself"* or his daughter and that there are *"suspicious transactions falling outside the scope of operations of the company"*.

35. The first issue concerns Gossels remuneration which comprises both fees and commissions. It is complained that Gossel has appropriated monies without prior consultation with Ravinsky and without any resolution authorising same. The complaint continues that *"the only skill required"* in running this business is the ability to organise tenants and that the quantum of remuneration received in unjustified.

36. The Articles provide that *"the remuneration of directors shall from time to time be determined by the company in general meeting"* and that directors' remuneration,

tenure of office and otherwise must be *"as may be arranged by the directors"*.[17] One can only note, yet again, that this issue has not been raised in a general meeting, that this issue has not been tabled at a meeting of the board of directors, that no steps have been taken to ensure that there are not less than three directors and that a majority vote can prevail. It is also noteworthy that Ravinsky has accepted the audited financial statements of the company and signified her acceptance by signing of same.

37. The second issue concerns Gossel's employment of his daughter Liesa to negotiate with the City Council of Johannesburg for reduction of claims levied by the Council against the company. Again it is complained that Gossel was never authorised to enter into any arrangement with Liesa. It is submitted that her engagement and payment is not authorised by the Articles but this is incorrect – employment is authorised. Ravinsky goes further to assert that the more appropriate means to resolve the alleged indebtedness of the company to the Council would have been to retain attorneys and litigate.

38. This court cannot comment on the advisability of litigation as opposed to negotiation. Further this court cannot comment on the success or otherwise of the services rendered by Liesa. One is constrained to remark yet again on the absence of meetings at which there is any deadlock, the signature and therefore acceptance by Ravinsky of the audited financial statements of the company, the failure to initiate any steps to appoint one or even three additional directors to the board (as permitted in the Articles).

39. The third issue is Gossel's use of the nomenclature of 'managing director' and 'chairman'. I have already discussed his de facto occupation of the position of managing director which position is authorised in the Articles and to which he claims he was appointed. The title 'chairman' is of no relevance to this litigation since we have not been referred to any instance where any chairperson has ever cast an additional vote to resolve any impasse.

39.1 It is noted that none of Ravinsky's attorneys or accountants to whom statements, reports, accounts, records were provided ever raised any allegations of impropriety on

[17] Clause 87.

the part of Gossel.

40. Again, the exercise of management functions by Gossel clearly have their origins in the history and development of the company and its operations. Such status and such functions and such exercise can be revisited at the appropriate meeting of the board of directors – when properly constituted.

41. Where reliance is placed by Ravinsky upon a series of English and some South African authorities dealing with "domestic" companies [18], I shall later deal with such companies - suffice to say that this company does not fall within that genus.

DEADLOCK

42. Ravinsky maintains that there is now a "*deadlock*" within the company. This deadlock appears be based on two premises: the first is the impossibility of either agreement or majority rule; the second is the complete lack of confidence and trust between herself and Gossel.

43. The first contention is expressed thus: On the one hand majority rule is impossible because the shareholdings are equally split between herself and Gossel, and there are only two directors whose votes would cancel each other out. On the other hand unanimous agreement between Gossel and Ravinsky is impossible because of their mutual distrust and animosity. The result, claims Ravinsky, is that the company as a whole can in reality never make a legally valid decision or pass a valid resolution.

44. The difficulty with these submissions is the absence of any evidence or any instance where the company has been unable to function by reason of inability to reach agreement – at either shareholder or board level. Annual financial statements have been approved by both directors, dividends have been declared and paid, the business is running profitably.

45. The second contention sees Ravinsky take the argument further: Gossel's *modus operandi* is always to take decisions first and then subsequently inform Ravinsky

[18] For example a partnership of four practising doctors as in Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 W

thereof. This high handed attitude has done much to engender the lack of confidence experienced by Ravinsky in Gossel. She believes that some of his business decisions have been questionable but even if they were not, his mode of operation inspires a loss of confidence in his running of the company.

46. These submissions rely upon an appreciation that the company is what is known as a *"domestic company"* which would entitle this court to go behind the legal entity of the company itself to examine the expectations, rights and obligations of the members *inter se* arising from the basic agreement or understanding between them.[19]. In the present case I am in agreement with the learned judge in the court *a quo* - this is not a domestic company. There is no continuing *"personal relationship"* underlying this company. The members *inter se* have no *"shared purposes, co-operation and mutual confidence"* which removes this company from the ranks of all other commercial investments. We are not here dealing with an association or partnership of doctors or pharmacists or other collegial businesspeople who *"shall participate in the conduct of the business"* in the sense that they offer expertise or skills which comprise the very nature of the business itself. Save for the right of pre-emption there is no *"restriction on the members rights to transfer their shares"*.[20]

47. The particular considerations relevant to a 'domestic company' in deadlock are therefore not applicable in the present case.

DEADLOCK ON SALE

48. Ravinsky complains that neither she nor her brother have *"received market related or real benefits"* from their respective or combined shareholdings. Clearly, this indicates that they wish, as Gossel maintains, to unlock the value in that shareholding(s) by disposal of the assets of the company – either to Gossel or to a third party on the open market.

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[19] Blackman, Jooste, Everingham, *Commentary on the Companies Act*, Vol 3, 14-111/14-116

[20] See Emphy v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D); see *Erasmus* v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W), 184

49. It is common cause on the papers that there have been a series of offers to sell Ravinsky and Jankelowitz shareholdings to Gossel - apparently commencing in May 2006 until April 2010.[21] Ravinsky and her brother have also proposed that attempts should be made to obtain a third party purchaser - no details of any such exercise have been given save that Gossel says that he furnished Ravinsky with certain information as to tenants and rentals specifically for such purpose. Ravinsky and her brother have also demanded that the property should be disposed of at public auction which proposal Gossel felt would be financially unwise.

50. Gossel agreed that he would be amenable to sell his shareholding along with Ravinsky and Jankelowitz so that the entire company or the entire property would be placed on the open market – subject to the conditions that he did not agree to the property/ his shareholding being marketed at a fixed amount and Ravinsky could not represent a value for his shares as part of any deal without his written approval. *"In other words, I was prepared to consider selling my shares, with theirs, at a market related price in the normal course"*.

51. The refusal of Gossel to purchase Ravinsky and Jankelowitz shareholdings at their proposed prices, the refusal of Gossel to acquiesce in sale of the property on public auction and possibly the failure by Ravinsky and Jankelowitz to secure a third party purchaser for their shareholding appears to have triggered a series of responses-queries on the minutiae of Gossel's management of the business, attempts to curtail Gossel's banking powers in respect of the company financial affairs, demands for dividend distributions as also *"rental distributions"* and *"matching payments"*, intimations and then clear warnings of the intention to have the company wound up.

52. Clearly the shareholders and directors are not ad idem on the value to them of their investment – Ravinsky and Jankelowitz and her brother wish to disinvest while Gossel wishes to continue the investment. It is in the light of this background, that Ravinsky's approach towards both Gossel and the running of the company can be understood.

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[21] The sums proposed range from R 775 000 in May 2006, R 4 000 000 in September 2009, R 2 900 000 in October 2009, R 2 700 000 in December 2009.

53. I am in agreement with Gossel that Ravinsky has attempted to *"contrive a deadlock"*. There is not one single instance to which Ravinsky has pointed in her papers that indicate that Gossel has been disregarding of her fiduciary duties and obligations as a director; she has not referred us to any refusal or failure by Gossel to furnish her with information; she claims to disagree with his remuneration yet she has signed the financial statements once she has perused the original documentation prior to and after the audit; similarly she claims to disapprove of the employment of Liesa yet she has signed the financials.

54. The many and detailed queries and complaints and implicit allegations in the emails of Ravinsky to Gossel certainly suggest that Ravinsky has attempted to engineer an unpleasant state of affairs[22] – to which Gossel seems to have been carefully invulnerable. No decision is made on this point and nothing need be referred to oral evidence.

55. Insofar as Ravinsky holds the view that Gossel has made business and other decisions which are not in the best interests of the company – for example that the company should pursue litigation against the City Council - this court can make no finding on that situation – save to comment that negotiation does not necessarily appear to be an unwise or unprofitable business decision when compared with litigation.

OTHER REMEDY

56. It is only if Ravinsky has satisfied the court that she is entitled to some relief and that it is *"just and equitable"* that the company should be wound up that this court would look to Gossel to prove on a balance of probabilities that Ravinsky has some other remedy and that she is acting unreasonably in not preferring it."[23] It is my view that Ravinsky has failed to discharge the onus resting upon her that she is entitled to relief.

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[22] See Emphy v Pacer Properties (supra), 368-9

[23] Moosa, No v Mavjee Bhawan (Pty) Ltd And Another 1967 (3) SA 131 (T)

57. However, even if Ravinsky had shown that the court should come to her aid, I am not satisfied that there are not other remedies available to her and Jankelowitz.

58. Ravinsky states that various avenues of action were attempted so as to resolve the situation of deadlock prior to institution of litigation. She names only the offer by Ravinsky and Jankelowitz of their combined shareholding for sale to Gossel. This came to nothing because Gossel was not prepared to purchased their shares – Gossel says he did not want to incur indebtedness so to do while Ravinsky says he was looking only to obtain the shares at a knock-down price.

59. Thereafter Ravinsky states that consideration was given to other possible options – ranging from seeking relief in terms of section 252 of the Companies Act to selling her and her brother's shareholding on the open market. She believed that the first option would not resolve the conflict between Ravinsky and Gossel and within the company whilst the second option would not result in fair market value.

60. A third option has been dealt with in some detail by Gossel – that the total shareholding or the company itself be made available for sale on the open market at fair value. The conditions he attaches to this proposal appear eminently reasonable - he is certainly entitled to have some say in the value to be sought and obtained. Such conditions do not render this option impossible to implement and it remains a real one. This solution has apparently not commended itself to Ravinsky. She would prefer to have the company wound up resulting in liquidation costs, a potentially forced sale and uncertainty for tenants.

61. A further remedy, to which Gossel has committed himself is the appointment of a further director which has been discussed throughout this judgment.

CONCLUSION

62. It is my view that the circumstances are not such that render it "*just and equitable*" that the company be wound up. This application is, at best, premature. The directors ought first to ensure that the board of directors is quorate – that may ameliorate all problems. Thereafter, the management of the daily business of the company ought to be delegated to an executive director or allocated between all

directors or a manager be employed. The roles of the directors can easily be clarified and must then be accepted.

63. The company remains well managed, profitable and fully functional. The property assets are assessed to be in good condition; the tenants are of long standing; the returns have been consistent throughout the vagaries of the economy. The company has substantial cash reserves - in the bank and invested in interest bearing accounts. Shareholders receive regular dividends. Liquidation of such a company is undesirable.

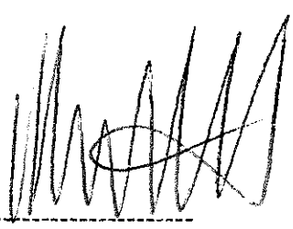
64. This is not a '*domestic company*' where quarrelling and mistrust should be allowed to terminate the corporate entity. No "*contest of virtue*"[24] needs be adjudicated in the present case.

65. There is nothing before this court to show that Ravinsky has been deprived of her opportunity to exercise her duties as a director (where she is not an executive director). Her attempts to direct or mange or oversee the administration of the company have been misdirected but do not constitute sufficient reason to consider the winding up of this company.

66. In the result :

a) The appeal is dismissed.
b) The appellants are to pay the respondent's costs including the costs attendant upon the employment of senior counsel.

DATED AT JOHANNESBURG THIS 13TH APRIL 2012



Satchwell J

[24] Bayly and Others v Knowles 2010 (4) SA 548 SCA

I agree

Tsoka J

Date of hearing: 10th April 2012

Date of Judgement : 13th April 2012