IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

11/9/2019
DATE

SIGNATURE

CASE NUMBER: 2018/42821

In the matter of

RAJAY, VINAY	**FIRST APPLICANT**
NIKAD CAPITAL (PTY) LTD	**SECOND APPLICANT**
And	
ZWENE INSURANCE BROKERS (PTY) LTD	**RESPONDENT**

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an application brought by the applicants for the winding up of the respondent.

[2] The application is brought in terms of section 81 (1) (d) (i) and (iii) and (e) of the Companies Act 71 of 2008 ("the Act"). The applicants allege that the company is

deadlocked internally in its operation and that a director has committed fraud and that accordingly it would be just and equitable to wind it up.

[3] The application is opposed.

[4] The issue in dispute is whether the first applicant was a shareholder from its inception.

[5] At the commencement of the application, the applicant's counsel brought an application in terms of Uniform Rule 28 (10) to amend the notice of motion to insert an additional prayer in terms of section 163 (2) (e) & (k) of the Act to direct the respondent to rectify the Securities Register to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

[6] I will deal with this application by considering four matters, namely;

1. Whether the applicants have *locus standi* to bring an application for the winding up of the respondent in terms of section 81 (1) (d) (i) and (iii) of the Act.
2. Whether the first applicant has the right to seek an amendment of the notice of motion to insert an additional prayer in terms of section 163 (2) (e) & (k) of the Act.
3. Whether there are grounds to order a winding-up of the respondent in terms of section 81 (1) (d) (i) and (iii) of the Act.
4. Whether there are grounds to grant an order in terms of section 163 (2) (e) & (k) of the Act.

BACKGROUND

[7] The respondent was incorporated on the 15th of October 2013. The total issued shares amounted to 1000 shares. It is common cause that the Respondent, is an insurance broker, and is a solvent company.

[8] Vinay Rajah ("the first applicant") is the sole director and shareholder of Nikad Capital (Pty) Ltd ("the second applicant"). The respondent is Zwene brokers and it has two directors, namely Vinesh Reddy ("Reddy") and Neelan Chetty ("Chetty").

APPLICANT'S SUBMISSIONS

[9] The applicants contend that the first applicant and Reddy, (the deponent to the answering affidavit), each injected R140 000-00 into the respondent. The other

director, Chetty, injected R90 000-00. The first applicant contends that the initial terms of the shareholding agreement were oral and that the first applicant would be owner of 40% (forty percent) of the shares, at all material times. Reddy would be owner of 40% (forty percent) of the shares and Chetty 20% (twenty percent) of the shares. The first applicant in terms of an agreement referred his share to his sister who is called Indrani Pillay ("Pillay").

[10] The applicant's counsel stated that it is common cause that the first applicant's shareholding is not registered in his name, hence an amendment was sought to rectify the Securities Register to include the name of the first applicant as a 40% (forty percent) shareholder in the respondent.

[11] The applicant's counsel argued this application has arisen because the respondent refuses to register the first applicant's 40% (forty percent) shares in his name or in the name of the second applicant.

[12] The applicants allege they have *locus standi* in that they fall within the definition of "Beneficial Interest" read with the definition of "Securities" in section 1 of the Act. The definition of beneficial interest states;

"**beneficial interest**, when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to-

(a) Receive or participate in any distribution in respect of the company's securities;
(b) Exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
(c) Dispose or direct the disposition of the company's securities, or any part of a distribution in respect of securities, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act 2002 (Act 45 of 2002)"

[13] The definition of "securities" states;

"'**securities**' means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company"

[14] The applicant's counsel made reference to three agreements, one dated the 17th of February 2016 (entered into between Pillay and the first applicant), one dated the 17th of January 2018 (entered into between Pillay and the second applicant) and a third agreement dated the 12th of June 2018 entered into between Pillay and the Reddy.

The first agreement dated the 17th of February 2016

[15] The first agreement was entered between the first applicant and Pillay.

[16] Of importance in this agreement is clause 4 which relates to the transfer of shares. It states the following;

> "4.1 Indrani Pillay will not be entitle to sell the shares or any portion of the shares to a third party, nor will she be entitled to transfer the shares as security or use the shares as security in any way.
> 4.2 The shares will only be held by Indrani Pillay for a period of one (1) year from the effective date.
> 4.3 Indrani Pillay undertakes to transfer the shares to Nikad Capital (Pty) Ltd or Vinay Rajah on date of termination and will sign all required documents to transfer the shares to Nikad Capital (Pty) Ltd or Vinay Rajah within 2 (two) days after the termination date or as per the written consent between the parties.
> 4.4. Vinay Rajah will then regain his shares either in his personal capacity or in the Company by the shares being transferred to Nikad Capital (Pty) Ltd."

[17] The minutes of a special directors meeting held on the 1st of March 2016, illustrates that the directors present at this meeting were Reddy ("VRed"), Pillay ("IP") and the first applicant (VRaj). The minutes state that;

> "3) VRed notified the board the board of his intention to sell 400 shares (40%) to IP with effect from 1 March 2016 and will deliver the share certificate to IP on conclusion of the sales of shares agreement.
> 4) VRed motioned to appoint Indrani Pillay (ID No:7411290086083) as a Director of the company to ensure continuity and sustainability.
> 5) It was noted that IP has nominated VRaj to attend meetings and carry her proxy vote in her non-attendance.
> 6) It was resolved that Indrani Pillay (ID No: 7411290086083) as is appointed as a Director with effect from 1 March 2016..."

[18] The applicants contend the respondents do not deny that the agreement of the sale of shares dated the 23rd of March 2016 was concluded between Reddy and Pillay to give effect to the first agreement.

[19] Accordingly the applicants contend that because Reddy was at this meeting dated the 23rd of March 2016, the respondent had full knowledge of the first agreement entered into between Pillay and the first applicant and was also aware of the cession of the shares from the first applicant to Pillay and that Pillay would be acting as a nominee.

[20] The applicant's counsel argued that this first agreement is a cession of the first applicant's 40% (forty percent) of the shares for a limited period to Pillay. The first applicant was therefore a beneficial owner of the shares and Pillay was a nominee who would hold these shares on his behalf for a period of 1 (one) year. The nominal payment made of R400 on the 26th of April 2016 to Reddy, which was refunded to Pillay by the first applicant, shows that the first applicant was the one pocketing all the costs of these transactions and that Pillay was merely a figurehead.

[21] The applicants contend dividends were paid to the first applicant by the respondent in respect of the shareholding. This was effected by the respondent paying the dividends to Pillay who would then pay it over to the first applicant. Counsel argued that Pillay paid these amounts to the first applicant as she was a nominee.

The second agreement dated the 17th of January 2018

[22] The applicants contend that the second agreement, between Pillay and the second applicant, was concluded in order to give effect to clause 4.2, 4.3 and 4.4 of the first agreement. The applicant's counsel argued that this is actually a cession and not a sale, as Pillay was merely carrying out her obligations in terms of the first agreement, which stated that after a year she was to transfer these shares back to either the first applicant or the second applicant.

[23] The first applicant contends that he, alternatively the second applicant are entitled to registration of the shareholding in their names by virtue of the first agreement (clause 4.2 and 4.3). The applicants contend that the respondent's contention that the second agreement is null and void has no foundation in law.

The agreement entered into between Pillay and Reddy dated the 12th of June 2018

[24] The applicants allege that Reddy in an attempt to circumvent the provisions of the first and second agreement, fraudulently induced Pillay to conclude an agreement on the 12th of June 2018. The effect of this agreement is that Pillay sold the first applicant's shareholding in its entirety to Reddy. The applicant's counsel argued this was an attempt by Reddy to steal the shareholding of the first applicant. The first applicant alleges he only became aware of this around the 19th of June 2018.

[25] The first applicant contends that Pillay was persuaded by Reddy to conclude this agreement as Reddy informed Pillay that the second agreement she had entered into with the second applicant was invalid. The applicants contend that had Pillay known that the second agreement was in fact valid and enforceable, she would not have signed the fraudulent agreement.

[26] The applicants contend that an agreement induced by fraud is void *ab initio*. Reference was made to the case of *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

[27] The applicants content that irrespective of whether Pillay entered into a sale agreement of shares with Reddy, she was in any event obliged to deliver the shares to the first or second applicant in terms of the first and second agreement.

SUBMISSIONS MADE BY THE RESPONDENTS

[28] The respondent alleges that in order for the first or second applicant to bring an application in terms of section 81 of the Act, he must either be a director or a shareholder. According to the register of member shares, the only shareholders were Reddy, Chetty and Pillay, and at the time that the answering affidavit was filed Pillay had resigned.

[29] The respondent contends that the first applicant has no *locus standi* to bring this application as Pillay was the registered holder of shares and the first applicant has never been a registered owner of shares. At best, the first applicant is a beneficial owner of shares, and not a shareholder as per the definitions in section 1 of the Act.

[30] The respondent's counsel argued that the case law is clear that the respondent only needed to concern itself with the registered shareholders.

[31] The respondent contends that the second agreement entered into between Pillay and the second applicant, is not in compliance with the terms of the memorandum of incorporation, read with section 39 of the Act, in that there was no acceptance or ratification of this sale of shares.

[32] As regards the agreement entered into between Reddy and Pillay dated the 12th of June 2016, for the sale of Pillay's shares to Reddy, the respondent's counsel argued that this is a binding and valid agreement which is further supported by the resolution signed by Pillay, Reddy and Chetty on the 12th of June 2018. Therefore, it cannot be set aside on the basis that there is a confirmatory affidavit by Pillay confirming the first applicant's contention that she was induced to enter it. Counsel added that I cannot make a finding on fraud and that it should be referred to trial. Counsel argued that even though there is an e-mail dated the 5th of March 2018, whereby Pillay states that she was not the "rightful owner of the shares", this is a decision that I cannot make on the papers and that this should be referred to trial.

[33] The respondent's counsel argued that even if the first applicant was a beneficial owner, after this sale of shares, his shares were transferred to Reddy, and this deprives the first and second applicant of *locus standi*..

[34] Counsel argued that even if I should find that the first and second applicant have *locus standi* on the merits, there are no grounds for a winding up, as the winding up of a solvent company is a drastic and draconian remedy and should not easily be granted. Reference was made to the case of *Re Levine Developments (Israel) Ltd* 1978 5 BLR, 172. Counsel referred me to the decision of *Palmieri v AC Paving Co Ltd* 1999 48 BLR (2d) 130 (BCSC) where the learned Levine J stated that, in deciding on whether it would be just and equitable to wind up a company because of a deadlock, one should consider whether there are no other effective and appropriate remedies.

[35] The respondent contends that the applicant has failed to explain why the respondent is deadlocked, and has failed to show that there will be irreparable injury to the company, or that the company's business cannot be conducted to the advantage of the shareholders, or that the conduct of the directors are harming or may cause harm to the company.

[36] As regards the registering of the first applicant as a shareholder, the respondent's counsel argued that in terms of section 163 only a shareholder or director may apply for this.

[37] Accordingly, counsel requested that this application be dismissed, even if the amendment to the notice of motion is allowed.

EVALUATION

[38] An application to wind up a solvent company is governed by section 79 and 81 of the Act.

[39] Section 79 of the Act states;

"(1) A solvent company may be dissolved by-

(a) Voluntary winding-up initiated by the company as contemplated in section 80,and conducted either-

(i) by the company; or

(ii) by the company's creditors, as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81."

[40] Section 81(1) (d) (i) and (iii) and (e) of the Act states;

"81 (1) A court may order a solvent company to be wound up if-...

(d) the company, one or more directors 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 shareholders generally, as a result of the deadlock;...

(iii) It is otherwise just and equitable for the company to be wound up;

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that-

(i) The directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) The company's assets are being misapplied or wasted; or"

Whether the applicants have *locus standi* to bring an application for the winding up of the respondent in terms of section 81 (1) (d) (i) and (iii) of the Act.

[41] The first question to be considered is whether the applicants have *locus standi* to bring an application in terms of section 81 (1) (d) (i) and (iii) and (e) of the Act.

[42] The respondent contends that even if there was a sale of shares agreement between Pillay and the second applicant, the second applicant still does not have *locus standi* as there was no acceptance or ratification of the sale of shares agreement, which is a requirement in terms of the respondent's memorandum of incorporation, read with section 39 of the Act. Clause 2.1 (3) of the Memorandum of Incorporation states as follows;

> "the pre-emptive right to be offered and to subscribe for **additional shares**, as set out in Section 39, is not limited, negated or restricted in any manner contemplated in Section 39(3), or subject to any conditions contemplated in that section."

[43] It is clear that no additional shares were created, therefore I do not see that this sale of shares between Pillay and the second applicant needed to be accepted, ratified or offered to the other two shareholders, namely Reddy and Chetty, as both of them knew that Pillay was doing everything on behalf of, and on the instructions of the first applicant. The respondent's counsel argued that I should not be constrained by the words "additional shares", and that I must look at the wording of clause 2.1.2 (e) which precedes clause 2.1.3.

[44] Clause 2.1.2 (e) states that the Company must not make an offer to the public of any of its securities and an issued share must not be transferred to any person other than "(e) another person approved by the company before the transfer is effected". This may be so, however, clause 2.1.2 (b) states an issued shares may be transferred to "(b) a shareholder of the company, or a person related to the shareholder of the company". Therefore I find no problem in Pillay having transferred or sold the shares she was holding, on behalf of the first applicant, to the first applicant himself, as Pillay is the sister of first applicant and is related to him. Accordingly I do not find that this second agreement is null and void.

[45] In the case of *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*

1976 (1) SA 441 (A), the learned Holmes JA at page 453 stated the following;

"A nominee is an agent with limited authority: he holds shares in name only. He does this on behalf of his nominator or principal, from whom he takes his instructions; see *Sammel and Others v President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (AD) at p. 666. The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'...Ownership of shares does not depend upon registration..."

[46] In the case of *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A), the learned Trollip JA at page 289 stated that;

"In some instances, ..the registered shareholder may hold the shares as the nominee, ie agent, of another, generally, described as the "owner" or "beneficial owner" of the shares. This fact does not appear on the company's register, ...The term "beneficial owner" is, juristically speaking, not wholly accurate, but it is a convenient and well-used label to denote the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests."

[47] According to the definition in the Act of "beneficial interest" (*supra*) I am convinced that the first applicant had a right or entitlement, through ownership, agreement, and relationship with the respondent, through his nominee Pillay, to receive and participate in the distribution of the respondent's securities. According to the definition of "securities" in the Act, it includes shares, debentures or other instruments. The first applicant was the "beneficial owner" of the shares held by Pillay on his behalf, and Reddy and Chetty knew all along that Pillay was merely a nominee. The first applicant was a shareholder in the first instance.

[48] Clause 5.1.2 of the first agreement states very clearly that Pillay will "only sign Suretyship Agreements as a shareholder with the written consent of Vinay Rajah", furthermore, clause 5.1.3. states Pillay will "provide Vinay Rajah with all claims, bills and statements in respect of the company within two (2) days after, receipt of same, or after she has become aware of same;" Clause 5.1.4 states that Pillay will "inform Vinay Rajah of any decisions to be taken either strategic, contractual or financial", Clause 5.1.5 states that Pillay "will sign any documents required in order to give the required mandates to Vinay Rajah to make decisions regarding the Company".

[49] The respondent alleges it did not have knowledge of the first agreement entered into

between the first applicant and Pillay, however I find this not probable on the papers, as there are numerous e-mails written by Reddy to Pillay, which will be referred to hereunder, showing that Reddy must have known that Pillay was merely a nominee.

[50] There is an e-mail written by Reddy to the first applicant dated the 20th of May 2016 which refers to ways of best dealing with tax implications. Reference is made in this e-mail to the role of "Ziggy" who is Pillay. The contents of the e-mail are as follows;

> "1) I spoke to Tamryn and she said it has to be against Ziggy and will impact her tax declaration and has to be paid directly to her for the audit trail. I realise this may be posing problems for you so I propose the following alternatives
> 2) Pay the dividend 80% to me (R80k), a resolution has to be signed off all VR, NC and Ziggy (must be her signature) then once the tax is calculated I split 50-50 between us and provide appropriate paperwork for the calculation…
> 3) Alternatively, if you can confirm that this 40k will not represent more than 80% of your income coming into Nikad Capital for FY2017 i.e. not a PSP then; we could pay R40k to Nijad and taxation becomes your responsibility…
>
> Please review my proposals and correct me if you understand things better or call me to discuss in more detail or share another idea you may have…"

This e-mail was written after the first agreement between Pillay and the first applicant was concluded. It is very clear from the contents of this letter that Reddy is dealing with the first applicant as if he is the shareholder. Otherwise, I see no logical reasoning why Reddy would be addressing these concerns and percentages to the first applicant.

[51] There is a further e-mail dated the 25th of May 2016 from Reddy to the first applicant, where there is a proposal by Reddy to the first applicant that certain monies be paid to a certain Tamryn for a SARS audit trail, but that if the first applicant wanted the money paid to another account then a signed mandate authorising payment into another bank account will be required. It is clear Reddy was dealing with the first applicant as if he was a shareholder, or at most that the first applicant had a beneficial interest in the business of the respondent.

[52] In an e-mail dated the 30th of June 2016, Reddy referred to the first applicant as "Dude". The contents of this e-mail states that Reddy still wanted to include the first applicant in management meetings, and was even prepared to meet with him after

hours or on weekends. This clearly illustrates, that even after a meeting had been held on the 1st of March 2016 with all the directors present, (which includes the first applicant), and even with the knowledge that Reddy knew that 400 shares had been sold to Pillay, there was still a desire on the part of Reddy to include the first applicant in all management meetings. This by implication suggests that Reddy still viewed the first applicant as a shareholder or director, even if technically the shares were in Pillay's name, which supports the applicant's case that Pillay was holding the shares as a nominee only, as per the contents of the first agreement.

[53] There is an e-mail dated the 28th of November 2017 written by Reddy to the first applicant, which refers to disbursement, it states;

"3. Disbursements into your account – This has been discussed previously in relation to the 2016 payment. Unfortunately we will pay into I Pillay account and any transfers should be arranged with her."

The contents of this e-mail clearly suggests that Reddy was aware that Pillay was a nominee and that if there were any transfers, it had to be arranged between the first applicant and Pillay.

[54] This is further supported by an e-mail sent by Pillay to the first applicant dated the 5th of March 2018 where she states;

"...Please note that I did state that I am not the rightful owner of these shares, however, it was pointed out, that I am the registered holder of the shares as well as a listed creditor and therefore am bound by the laws that govern a person in this type of position..."

[55] Most important of all is an email sent by Pillay to both Reddy and Chetty dated the 24th of April 2018 whereby Pillay states;

"Firstly, I need to inform you that I cannot sign the NDA as originally discussed. After having gone through the document and also given it a lot of thought, the NDA prevents me from sharing information with Vinay, which I believe that he is entitled to. I did mention it at the meeting, that although I am legally listed as the shareholder, these shares do not belong to me and therefore, I cannot make decisions on this shareholding without Vinay being privy to the information..."

From this e-mail it is clear that Reddy knew what the status of Pillay was, namely that Pillay was a nominee and did not own the shares.

[56] From the above it is clear that Pillay was a nominee and that she paid the dividends received by her to the first applicant. The amounts paid by Pillay to the first applicant were R34 000-00 (on the 6th of July 2016), R128 000-00 on the 15th of December 2017, and R128 000-00 (on the 18th of December 2017).

[57] Although the second agreement is a sale, the intention of this agreement is clearly to give effect to the first agreement, that after a year, Pillay would transfer the shares back to either the first or second applicant. Even though the second agreement is termed a sale, it is clear this was a cession and not a sale. If one looks at clause 4.2 in the first agreement it is clear that "The shares will only be held by Indrani Pillay for a period of one (1) year from the effective date." In other words, after a year the shares automatically reverted back to the first applicant.

[58] The argument proffered by the respondent's counsel that section 81 of the Act has not been complied with as neither the first or second applicant were shareholders, is without merit. On this basis the point *in limine* raised by the respondent is dismissed.

[59] I also find that this decision can be reached on the papers and that I need not refer this aspect to trial. I am satisfied that the version presented by the applicants that the first applicant was the actual beneficial owner of the shares and not Pillay does not need further clarity. From the various e-mail referred to *supra*, I am convinced that the denial of the respondent that the first applicant was a shareholder does not raise a real, genuine or *bona fide* dispute of fact. In fact from the various e-mail discussions held between Reddy and the first applicant, I am convinced that the version of the respondent is so far-fetched and untenable that I am justified in rejecting it on the papers.

Whether the first applicant has the right to seek an amendment of the notice of motion to insert an additional prayer in terms of section 163 (2) (e) & (k) of the Act to direct the respondent to rectify the Securities Register to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

[60] The second question is whether, the first applicant has the right in terms of section 163 (2) (e) & (k) of the Act to direct the respondent to rectify the Securities Register

to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

[61] In the matter of *Barnard v Carl Greaves Brokers (Pty) Ltd and Others and two Other cases* 2008 (3) SA 663 (C), there was an application to wind up a company under the old Companies Act, on the basis that it would be just and equitable. Barnard was not yet registered, however the learned Binns-Ward AJ at paragraph [41] stated;

> "...I do not consider the fact that Barnard is not yet registered as a member is an obstacle to his resort to s 252. I have already found that Barnard is a shareholder entitled as against the company to obtain the insertion of his name on the members' register...In my view it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of cooperation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order as a member for relief in terms of s 252."

[62] The facts of the case of *Du Plooy NO and others v De Hollandsche Molen Share Block Ltd and Another* 2017 (3) SA 274 (WCC) are similar to the facts *in casu*, in that the respondents in that matter did not want to acknowledge that the trust was a shareholder and refused to enter the trust in the share register. The Trust accordingly sought a declaration that it was the owner of the shares. The court found the trust was the owner of shares and ordered that the share register be amended to reflect the trust as a shareholder.

[63] The facts of the case of *Barnard v Carl* (*supra)* are similar to the matter *in casu*, as the first applicant is also bringing an application in terms of section 163 of the Act when in fact he is not registered as a shareholder. The case of *Barnard v Carl* supports that this is possible, accordingly I find that the first applicant may seek this amendment. Uniform rule 28 (10) allows such an amendment.

[64] Uniform rule 28 (10) states;

> "The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit"

[65] I accordingly grant the applicants their request to amend their notice of motion to insert

an additional prayer in terms of section 163 (2) (e) & (k) of the Act to direct the respondent to rectify the Securities Register to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

Whether there are grounds to order a winding-up of the respondent in terms of section 81 (1) (d) (i) and (iii) of the Act.

[66] In considering whether there are grounds to wind up the respondent, which is a solvent company, the following cases below are of importance.

[67] The learned Willis JA in the case of *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) stated at paragraph [22] that;

"...in order for a solvent company to be wound up in terms of either s 890 or 81 if the new Act, it must be commercially solvent..."

Further at paragraph [23];

"The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not..."

[68] It is clear that there were problems in this company already at a meeting on the 15th of October 2016, whereby all three directors, namely, Reddy, Chetty and the first applicant agreed that the only amicable solution was to sell the company.

The minutes at paragraph 1.4.1.2 state;

"VRed commented that as there exists a disagreement between the shareholders on the way forward for the company and this is making it difficult for the company to continue operations and pursue growth opportunities. The only amicable proposal was to sell the company or book. All present agreed."

[69] The learned O'Donovan J in the case of *Sweet v Finbain* 1984 (3) SA 441 (W) stated at page 445;

"There is nothing in the Companies Act, or in the reported cases, to indicate that it is only a registered member who is entitled to apply to Court for a winding-up on just and equitable grounds....There is no rule excluding, for example, a creditor, such as the applicant in this

case, who claims to be entitled to be registered as a member. Such a person is in my view, entitled to apply to Court for a winding-up on the ground that it is just and equitable. An applicant cannot be in a worse position where the management of a company unlawfully deletes his name from the register of members, or causes his shares to be transferred to another – a matter to which the Court cannot be required to shut its eyes. Provided he can show that there is some ground for winding-up, such as exclusion from the management, or justifiable lack of confidence in the conduct and management of the company, grounded on the conduct of the directors, a creditor is entitled to apply to Court for a winding-up order on just and equitable grounds."

[70] In the matter of *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350 C-H the court considered the just-and-equitable ground to be falling into five broad categories, to wit: (1) disappearance of the company's substratum, (2) illegality of the objects of the company and fraud committed in connection therewith, (3) deadlock in the management of the company's affairs; (4) grounds analogous to those for the dissolution of partnerships, and (5) oppression.

[71] In the matter of *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) the court held that the deadlock principle is founded on the analogy of a partnership. It held with reference to confidence and trust relationships in a company, it is similar to those existing between partners in a partnership business. If the conduct of one 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.

[72] In the matter of *Cilliers NO and Others v Duin & See (Pty) Ltd* 2012 (4) SA 203 (WCC) the learned Binns-Ward J at paragraph [5] stated;

"...what might be termed 'complete deadlock' – applies in the case where, because the directors or shareholders are equally divided, there is an inability to make decisions that are necessary for the company to function."

[73] In the matter *in casu*, I have considered the five categories which comprise a deadlock as referred to in the case of *Rand Air v Ray Investments* (*supra*). I do not find that the 1st , 4th or 5th categories are applicable to the facts *in casu*. As regards the 2nd category which relates to the alleged fraudulent agreement entered into between Reddy and the first applicant, the case of *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA419 (SCA) is of importance. In this matter the learned Cloete J at paragraph [2] stated;

"The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a representation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the contract is void *ab initio*"

[74] The submission made by the respondent's counsel that the sale of shares from Pillay to Reddy cannot be set aside because it is binding and valid, and also because it was supported by the signed resolution on the 12th of June 2018 by Pillay, Reddy and Chetty, has no merit in light of the decision of *Brink v Humphries* (*supra*). Furthermore the respondent is ignoring the fact that the first applicant injected R140 000-00 into the company and that Pillay paid the dividends to the first applicant. The fact remains that Pillay was a nominee who took all her instructions from the first applicant.

[75] The contents of the first agreement, namely clause 0.11 is clear. It states that;

"The parties acknowledge that Vinay Rajah is legally entitled to the shares in the company and is the rightful shareholder of the shares;".

The provisions of clause 6.1.2 of the first agreement states;

"Vinay Rajah will:-

6.1.1 make all decisions either strategic, contractual or financial in respect of the Company;

6.1.2 receive all benefits and rights and accept full responsibility of all risks and liabilities in and to the company"

[76] I find that Pillay was negligent in not communicating to the first applicant that she was selling the shares to Reddy. Pillay knew what the contents of both the first and second agreement were. Clause 4.1 of the first agreement expresely prevented Pillay from selling the shares or any portion thereof. If Reddy made certain misrepresentations to her, whether innocently or not, the fact remains Pillay should have spoken to the first applicant before she entered the agreement with Reddy. I find that on the papers there is a fundamental mistake made by Pillay which results in the agreement between Reddy and Pillay being void *ab initio*. I do not however find on the papers that there is

sufficient evidence to support that there was a fraudulent misrepresentation made to her by Reddy. Accordingly the 2nd category has no application.

[77] As regards the 3rd category I find that this category is applicable to the facts *in casu*. There were many e-mails directed by Reddy to the first respondent originating in 2016, however in 2018 this all changed. In an e-mail written by Reddy to the first applicant dated the 5th of February 2018, it is clear that Reddy is becoming obstructive and is finding ways not to deal with the first applicant. The e-mail states;

"This sale of shares in Zwene Insurance Brokers is null and void. I hereby refer to you back to I Pillay for any further enquiries regarding this matter. Only further correspondence with I Pillay will be entered into by us the existing shareholders."

This e-mail is confusing, as Reddy had been communicating with the first applicant since 2016, at times referring to the first applicant as "dude" and referring to Pillay by her nickname "Ziggy". The actions of Reddy are strange and it is clear from the e-mail dated the 5th of February 2018 that he is now backtracking on all the previous communications he had personally with the first applicant.

[78] From the manner in which the first applicant has been treated, it is clear that Reddy does not want to deal with him.

[79] It is important to further note that from the minutes of meetings held as far back as the 1st of March 2016 and the 15th of October 2016, the three directors who were named as being present were Reddy, Chetty and the first applicant. The first applicant would never have been referred to as a director unless he had a vested interest and shares in the respondent. Paragraph 1.4 of the minutes held on the 15th of October 2016 dealt specifically with the "Shareholder Discussion of the Business". The first applicant was part of all these discussions. Therefore there is no reason for Reddy to later have excluded the first applicant as not a shareholder.

[80] In considering an application to wind up a solvent company, the discretion I have must be applied in a judicious and principled manner, as a court should not lightly interfere in the internal affairs of a company. From the above it is clear that Reddy made all means to deprive the first applicant of his rightful ownership of the 40% (forty percent shares). Irrespective of the respondent's counsel stating that there is no deadlock between the

remaining two shareholders, namely Reddy and Chetty, I find there is a deadlock caused by the breakdown of trust between members of the company with no hope of reconciliation between Reddy and the first applicant. The first applicant intended at all times to be a shareholder, after Pillay completed the one year period, and when the first applicant tried to reclaim his rightful position in the company, he was barred from doing so by Reddy.

[81] It is clear that even though the first applicant is no longer recognised as a director, which is contrary to the minutes dated the 1st of March 2016, where he was cited as a director, he still has *locus standi* to bring this application.Although his name is not reflected as a shareholder, it was always his intention to reclaim the shares held by Pillay after one year. From the contents of the e-mails between Reddy and the first applicant, Reddy knew what the role of Pillay was. The fact that Reddy got Pillay to go against the contents of the first agreement where she could not sell the shares, illustrates that Reddy was trying to exclude the first applicant from the management of the company which has caused this deadlock and has prevented the company from conducting its business to the advantage of the shareholders, of which the first applicant is one of them.

[82] Due to the fact that Reddy refuses to give effect to the initial intention of the first Applicant, and fails to recognise his involvement in the company, and fails to enter his name in the register, shows that it would be just and equitable to wind up the respondent.

An order in terms of section 163 (2) (e) & (k) of the Act that the respondent rectify the Securities Register to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

[83] Section 163 (2) (e) & (k) of the Act states;

> "**163 Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**
>
> (1) A shareholder or a director of a company may apply to a court for relief if-...
>
> (a) Any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
>
> (b) The business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that

unfairly disregards the interests of, the applicant; or

(c) The powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit including-

(e) an order directing an issue or exchange of shares;

(k) an order directing rectification of the registers or other records of a company; or"

[84] In the matter of *Knipe and others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 the learned Daffue J indicated a few aspects pertaining to the operation of section 163, these were stated as follows; at paragraph [31];

"Section 163 of the Act provides protection against oppressive or prejudicial conduct"

Further at [33];

"the powers of the court to grant relief in accordance with s 163 are very wide and could touch on many aspects of the company's business...the court may make any order 'it considers fit' "

[85] The first applicant injected R140 000-00 and this is not in dispute. There is no basis why a person would inject that kind of money into a business with no purpose. It is clear to this court that he injected that kind of money because he wanted to be an original shareholder. The applicant's founding affidavit at paragraph 17 states that "The capital injected by the three shareholders into the business was R140 000-00 each by myself and Reddy for 40% shareholding and R90 000-00 by Chetty for his 20% shareholding". In the answering affidavit, the respondent replies to this by saying "The content of this paragraph is noted". It is not denied. There is no logical explanation why then the first applicant is not registered in the Registrar of Shareholders.

[86] The confirmatory affidavit of Pillay supports the version of the first applicant that he was technically the true third shareholder and that she kept the shares as a nominee. Taking into consideration all the e-mails written by Reddy to the first applicant referred to at paragraphs [50] to [53] *supra* as well as the e-mails written by Pillay to Reddy at paragraphs [54] and [55] *supra* it is clear that the first applicant was a shareholder of

40% (forty percent) of the shares of the respondent.

[87] As stated at paragraph [79] *supra* the minutes of the meetings held on the 1st of March 2016 and the 15th of October 2016, reflect Reddy, Chetty and the first applicant as the directors of the respondent. There is therefore no reason why Reddy later tried to deprive the first applicant of his rightful 40% (forty percent) of the shares by entering into an agreement with Pillay to buy the 40% (forty percent) of shares from her which he knew actually belonged to the first applicant.

[88] Reddy admits four times in the answering affidavit that the first applicant was a beneficial owner of the shares, see the following;

Paragraph 11.5 "At best for the first applicant he is a beneficial owner of shares..."
Paragraph 30 "At best for the first applicant he was the beneficial owner of shares..."
Paragraph 37 "The first applicant would at all times only be a beneficial owner of shares in the respondent..."
Paragraph 42 "Save to reiterate that the first applicant, at best, can be a beneficial owner of shares,..."

[89] From the above I am convinced the first applicant is the beneficial owner of shares and should have been recognised by Reddy and Chetty as being the rightful owner of the 40 % (forty percent) of shares. The conduct of Reddy in denying the first applicant his rightful 40% (forty percent) of shares is unfairly prejudicial to the first applicant.

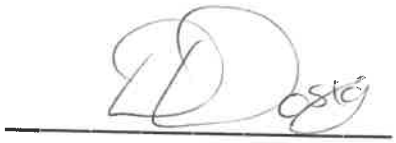
[90] In terms of section 163 (2) (e) & (k) of Act 71 of 2008 I order the respondent to rectify the Securities Register to reflect the first applicant as a 40% (forty percent) shareholder in the respondent.

ORDER

[91] In the premises the following order is made;

1. Directing the respondent, alternatively the liquidator, to rectify the Securities Register in terms of Section 163 (2) (e) & (k) of Act 71 of 2008 to reflect the first applicant as a 40% (forty percent) shareholder of the respondent.
2. Placing the respondent under winding-up in the hands of the master of the above Honourable Court.

3. The costs of this application be costs in the administration of the winding-up of the respondent.
4. Further and alternative relief.



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ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Applicants **Instructed by** **SPELLAS LENGERT KUEBLER BRAUN (SLKB) INC. Attorneys**	**Adv A.D. Wilson**
On behalf of the Respondent **Instructed by KISSONDUTH Attorneys**	**Adv A.J Reyneke**

Heard on the 31st of May 2019
Judgment handed down on the 11th of September 2019