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

CASE NO: 36874/19

(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 8/9/2020

A. Maier-Frawley

In the matter between:

B, T Applicant

and

B, L Respondent

In Re: (Main application)

B, L Applicant

and

AURUM PROPERTIES CC First Respondent

B, T Second Respondent

J U D G M E N T

(Handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 September 2020.)

MAIER-FRAWLEY J:

Introduction

1. An application for the winding up of Aurum Properties CC (Aurum) was brought by L B (as applicant) against Aurum (as first respondent) and T B (as second respondent) in terms of sections 66 to 81 of the Close Corporations Act, 69 of 1984, read together with sections 81(1)(d)(i) and 81(1)(d)(iii) of the Companies Act, 71 of 2008 ('the main application').

2. Thereafter, the second respondent (as applicant) launched an interlocutory application for the postponement of the main application, pending the finalisation of divorce proceedings pending between the applicant and second respondent, and therein further seeking, *inter alia,* (i) condonation for 'the late of this counter-application' and (ii) 'that the founding affidavit to this application shall constitute the founding affidavit to the counter-application.'

3. For convenience, the parties in the interlocutory application will be referred to as cited in the main application. Aurum Properties CC will interchangeably be referred to as 'Aurum' or 'the corporation' in the judgment, as the context requires.

4. By some slip of performance, only the main application was set-down for hearing on 11 August 2020. It was subsequently allocated for hearing by me on 12 August 2020. Counsel for the applicant and second respondent filed

practice notes and heads of argument in respect of the main application, in which they referred only to the relief sought in the main application with reference to the estimated duration of its hearing. No mention was made therein of the interlocutory application, nor was the court alerted to the fact that the interlocutory application was to be pursued at the hearing of the main application.

5. The court was only alerted to the need to determine the interlocutory application during the course of the presentation of applicant's argument in the main application. This resulted in the following quandary: Firstly, court time had by then been expended in the presentation of the applicant's argument on the merits of the main application; secondly, the interlocutory application would, if granted, necessarily result in the postponement of the main application.

6. Given that the right to a 'fair trial' is a constitutional imperative,[1] I decided to hear the interlocutory application, since the parties (applicant and second respondent) were already before court, a complete set of papers had been

---

[1] In terms of Section 34 of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate another impartial tribunal or forum. The right in Section 34 contains three central components:(i) The right for disputes to be decided before a court; (ii) The right to a ***fair*** public hearing; and (iii) that where appropriate, the court may be replaced by an independent impartial tribunal or forum. This fundamentally allows, as a substantive right, every person access to courts, individual equality and non-discrimination. Section 9 of the Constitution provides for the right to be equal before the law and to equal protection and benefit of the law. The right (of access to justice) demands practical effective access or the right loses meaning. Fairness of a hearing with its undoubted inclusion of the right to be heard *(audi alteram partem)* bears on the fact that for the right to be practical and effective it is intended that this be accessible and possible to achieve in the court of litigation chosen. See in this regard: *Nedbank Limited v Gqirana N.O and Another; First Rand Bank Limited v Cornellisson and Another; Standard Bank of South Africa Limited v Msutu and Another; Nedbank Limited v Gcina; Firstrand Bank Limited t/a Wesbank v Twynham; FFS Finance SA (Pty) Limited t/a Ford Credit v Jabanga; FFS Finance SA (Pty) Limited t/a Ford Credit v Rolomane* [2019] ZAECGHC 71; 2019 (6) SA 139 (ECG), a decision of the full Court.

filed and uploaded to the Caselines electronic platform, and despite the failure to file heads of argument, the matter was otherwise ripe for hearing. Furthermore, the outcome of the interlocutory application would, for obvious reasons, have a direct bearing on whether or not the main application could proceed, whether with or without the counter-application. In any event, a postponement of the interlocutory application for hearing on another day in another forum (the interlocutory court), would serve no purpose other than to increase both parties' legal costs.

7. The issue of determination at the hearing thus converted into whether or not condonation should be granted to allow the second respondent's counter-application to be ventilated together with the main application; and whether or not the main application should be postponed until the divorce proceedings between the applicant and the second respondent ('the parties') were finalised, or some earlier date.

Relevant background

8. The applicant and the second respondent are husband and wife. For purposes of the interlocutory application, they are the relevant parties. They were married to each other on 27 January 2006, out of community of property, with the inclusion of the accrual system. In due course, they together formed Aurum as a property owning enterprise.

9. The erstwhile matrimonial home is situated on immovable property that is owned by Aurum. There are various buildings on the property, including a residence and office premises. The parties are members of Aurum on a 50/50 basis. The parties acquired the property through the medium of Aurum for investment purposes and established their family home at the residence located on the property. The property is the only asset of Aurum

and the only source of income it receives, is in the form of rental obtained by it from tenants on the property, including Laser X CC. There is a bond registered over the property in favour of Standard Bank. The monthly bond liability is discharged from rentals paid by tenants on the property

10. The parties separated in July 2017 whereupon the applicant vacated the erstwhile matrimonial home. The second respondent instituted divorce proceedings against the applicant during July 2018.

11. The second respondent still resides in the erstwhile matrimonial home together with his girlfriend and the four minor children born of the marriage between the parties.

12. The parties have joint interests in other entities, including Laser X CC ('Laser X'). The parties agreed to form the B Business Trust ('BB Trust'), which owns the member's interest in Laser X. Laser X's business business is run by the second respondent, from which he draws a monthly income. The parties are both trustees and beneficiaries of the BB Trust. Laser X in turn is one of the tenants on the property owned by Aurum and has, until November 2019, historically paid rent to Aurum in respect of its occupation of business premises situate on the property.

13. The parties' personal and working relationship became strained after they separated, which intensified as time went on, not only because of the distrust that was building between them on a personal level but because of certain other contentious and acrimonious litigation they are engaged in, including their divorce proceedings. Their various disagreements between the parties are highlighted in the papers filed in the main application as well as in the interlocutory application.

14. It is common cause that Aurum is solvent. Although the parties disagree about the precise value of the property, its value, on either party's version, far exceeds the value of the outstanding bond liability. In the main application, the applicant seeks to have Aurum liquidated on grounds of deadlock between the members in the management or functioning of the corporation, alternatively, because it is just and equitable for it to be wound up, not least of all because the feuding between the members has resulted in a situation where the second respondent is said to be benefitting from the corporation at the expense of the applicant. The main liquidation application is thus aimed at a sale of the property, with its nett proceeds distributed between the parties equally. That would of course place the second respondent and the parties' children at risk of having to vacate what has been and still remains their primary residence.

15. In the intended counter-application, the second respondent seeks an order in terms of section 36 of the Close corporations Act for the cessation of the applicant's membership of the corporation, *inter alia,* on grounds that it would be just and equitable to do so, with the aim of purchasing her member's interest in the corporation, thereby avoiding a forced sale of the property through liquidation. Alternatively, relief is sought in terms of section 49 of the Close Corporations Act, based on *inter alia,* allegations that particular acts on the part of the applicant are unfairly prejudicial, unjust or inequitable to the second respondent, such as would justify the grant of an order for the purchase of the applicant's interest in the corporation by the second respondent.

16. In her answering affidavit in the interlocutory application, and based on the second respondent's valuation of the property, the applicant made a *with*

prejudice offer to purchase the second respondent's membership interest in Aurum for R2 million. Her offer was framed as follows:

"If the 2nd Respondent is serious about this contention I will with pleasure purchase his 50% for an amount of R 2 000 000 00. I say this with prejudice and will purchase it on the same conditions as the second Respondent wishes to purchase my 50%. If the second Respondent is honest and bone fide he will accept this offer and make a large profit for himself. …If he … accepts my offer he will make a handsome profit of R 700 000 00 and I will obviously on-sell the property and make a profit of several million.

17. In a letter dated 25 June 2020 addressed by the second respondent's attorneys to the applicant's attorneys, the applicant's offer was accepted, as follows:

" 1 *In paragraph 12.10* [of the answering affidavit] *your client makes a with prejudice offer to purchase our client's membership in Aurum Properties CC for the amount of R2 000 000.00 (two million rand). Our client accepts your client's offer.*

2. *Your client is required to pay the purchase price of R2 000 000.00 into our trust account (the details of which are set out below) within 7 (seven) days from the date hereof, and upon receipt of the payment our client will deliver the signed CK documents to yourselves reflecting the transfer of membership from our client to your client."*

18. For reasons not immediately discernible, a sale on the basis of the applicant's aforesaid tender fell through. In the replying affidavit, the second respondent avers that the applicant reneged on the tender and now insists on the liquidation of Aurum proceeding.

Submissions of Counsel

Second Respondent:

19. The second respondent submits that this case involves a domestic partnership between the parties, albeit run through the mechanism of the corporation. The genesis of such partnership is the marriage between the parties, which is subject to the accrual system. The joint efforts of the parties

in amassing their respective estates are to be accounted for in the divorce, when the patrimonial consequences of the marriage will be dealt with. The patrimonial consequences include: (i) the extent to which one party's accrual exceeds that of the other, which must be accounted for; and (ii) what is to happen to the parties' overall joint interests in various entities[2] including Aurum, upon divorce – if necessary, a liquidator or receiver will be appointed to distribute the assets. The divorce court is the right forum for the dissolution of the partnership to be addressed.

20. The breakdown in the marital relationship has been ongoing since 2017. The second respondent therefore questions why now, three years later, the applicant insists on the liquidation of Aurum, more so when the very property in question is the primary residence of the children. The Close Corporations Act allows for relief to enable a corporation to continue in existence, with the one member buying the other out at a fair price. On the second respondent's calculations, the accrual in the applicant's estate exceeds the accrual in his estate.

21. There are disputes in the papers concerning the value of the property owned by Aurum. These disputes should not be resolved on paper but should be determined in the course of the divorce proceedings. The second respondent's argument can be summarised as follows: he seeks to purchase the applicant's membership in Aurum from her for a market related price. He contends that this aspect cannot be seen in isolation - the value of the applicant's membership must be taken into consideration together with all accrual and thereafter to determine the amount of money which is to be paid to him in respect of his entitlement to share in the accrual. On his calculations of the accrual, the amount the applicant will be required to pay

[2] The papers indicate that the parties have joint interests in *inter alia,*: Aurum Properties CC; B Business Trust; and Laser X.

him exceeds the value of her membership interest in Aurum. In the premises set off will extinguish his liability to the to the applicant in respect of her share in Aurum, should the court order the cessation of applicant's membership in the corporation.

22. According to the second respondent, even if Laser X does not pay rental, the applicant would not be prejudiced thereby in that she is effectually a co-owner of the business and any profits derived from the business, ultimately inure to her benefit. The second respondent alleges that Laser X is experiencing financial distress and that it will to the ultimate benefit of both parties for it to be given an opportunity to recover financially and to carry on trading, as its profitability would preserve its financial value to the parties.

Applicant:

23. The applicant submits that the corporation's business (that of property ownership with income generating capability through rentals paid by tenants on the property - for purposes of liquidating the bond liability) is not being conducted to the advantage of both members generally but rather for the benefit of the second respondent, who: (i) pays no rent to Aurum for his occupation of the residence on the property owned by Aurum or his use of the municipal utilities; (ii) has stopped paying rent on behalf of Laser X to Aurum since November 2019; (iii) pays for his personal expenses such as legal fees from Aurum's banking account. The applicant submits that this is a cosy situation for the second respondent, but not one from which the applicant derives any benefit, rather, her membership value is being eroded by the non-payment of rental[3] and the concomitant delay in the full

[3] By virtue of the fact that the corporation is losing rental income monthly, which loss is increasing with every month that goes by.

discharge of the bond liability whereby interest continues to accumulate on the unpaid debt.

24. The applicant submits that she will be prejudiced by a delay in the hearing of the main application, not only as a result of the aforegoing, but because the divorce action will likely not be heard within the next year – pre-trial procedures have not been completed and no trial date has yet been obtained. Furthermore, the applicant foresees the need to apply for the joinder of the B Business Trust in the divorce action,[4] which will cause a further delay in trial readiness.

25. The applicant further submits that a postponement until the divorce is finalised will serve no purpose as:

25.1. The liquidation of the corporation is not a dispute on the pleadings and whether the divorce is finalised or not, it will remain a dispute;

25.2. The parties' respective accruals are also not a dispute in the divorce proceedings as both the Applicant and the second respondent seek an order that their assets be divided in terms of their ante-nuptial contract. In the event that the parties cannot agree on the division of their estates in terms of the ante-nuptial contract, then the court will have to be approached again and/or a liquidator appointed; and

25.3. The divorce action will not resolve the impasse that has arisen between the parties whereby Aurum's bank account is being utilised by the second respondent as a 'piggy bank' for subsidising the

[4] This is because the applicant points out that the second respondent denies that the value of Laser X CC should be taken into consideration for purposes of the computation of the accrual, due to the fact that B Business Trust is the sole member of the Close Corporation, whilst she contends that the second respondent utilises the bank account of *inter alia,* Laser X CC as his personal 'piggy bank'.

second respondent's living and personal expenses to the prejudice of the applicant

Evaluation

26. In the interlocutory application, the second respondent seeks the following relief:

"(a) That the application for the liquidation of the Second Respondent be postponed up to and until the divorce action between the First Respondent and the Applicant has been finalized.

(b) That the above Honourable Court condone the late filing of this counter-application.

(c) That the founding affidavit to this application shall constitute the founding affidavit to the counter-application.

(d) The First Respondent is granted 20 days within which to file her answering affidavit to the counter-application, the rules of court will apply to the filing of any further processes, affidavits in these proceedings.

(e) Costs of the application if opposed."

27. The legal principles governing the grant and refusal of postponements are well-established. In *Carephone (Pty) Ltd* v *Marcus NO and Others,*[5] Froneman DJP held:

'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice.'

28. The Constitutional Court held in *Lekolwane & another* v *Minister of Justice and Constitutional Development*:[6]

[5] *Carephone (Pty) Ltd* v *Marcus NO & others* 1999 (3) SA 304 (LAC) para 54.
[6] *Lekolwane & another* v *Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17. See also *National Police Service Union* v *Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112C-F.

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this court is satisfied that it is in the interests of justice to do so. In this respect the application must ordinarily show that there is good cause for the postponement, whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest.'

29. It is against this background that I proceed to consider the relief sought in the in the interlocutory application.

30. The second respondent states that the counter claim was not included at the time that the answering affidavit was filed as he was not advised that he had the right to do so. This was as a result of an oversight on the party of the Second Respondent's legal team. The legal team consulted with counsel late in March 2020, after receipt of the Applicant's heads of argument, and was advised to bring the current counter - application and application for a postponement. The papers were prepared expeditiously thereafter. He submits that there can be no prejudice to the Applicant if leave is granted to introduce the counter-claim at this stage.

31. The second respondent submits that Aurum forms part of the accrual and that it should not be liquidated before the accrual is finally determined in the divorce,[7] by reason of the following: On the second respondent's

[7] The nett asset value of each party's estate and the extent of the accrual in their estates remains a point of contention between the parties on the papers, not least of all because the value of their membership interests in Aurum is in dispute. The applicant previously indicated her willingness to accept the second respondent's calculations for purposes of her purchasing his 50% membership interest in Aurum (at a windfall, according to her), so that she could on-sell the property and make a 'huge profit'. The second respondent seeks to purchase the applicant's membership in Aurum from

calculations, his estate shows no accrual whilst that of the Applicant shows an accrual of R 3 357 996,93. On his calculations, the Applicant will be liable to pay him an amount of R2 308 846,33, which amount exceeds the value of the Applicant's membership interest in the corporation. In the premises, set off will extinguish his liability to the First Respondent in respect of her share in Aurum, should the court order the cessation of applicant's membership in the First Respondent.

32. The applicant has disputed the correctness of the second respondent's calculations as too, the second respondent's valuation of the accrual. A determination of the accrual in the respective estates of the parties and the calculation of what will be payable to the party whose estate shows the lesser or no accrual, is to be determined in the pending divorce, either by agreement between the parties or by a receiver or liquidator appointed for such purpose. On the applicant's version,[8] the value of the parties' interests in Laser X CC ('Laser X') will also form part of the accrual calculation on divorce.[9]

33. The applicant contends that the liquidation of Aurum need not and should not await the finalisation of the parties' divorce. On her version, the bond liability ought to have been discharged by now but has not been discharged

---

her for a market related price. He contends that this aspect cannot be seen in isolation - the value of the applicant's membership must be taken into consideration together with all accrual and thereafter to determine the amount of money which is to be paid to him in respect of his entitlement to share in the accrual. On his calculations of the accrual, the amount the applicant will be required to pay him exceeds the value of her membership interest in Aurum. In the premises set off will extinguish his liability to the to the applicant in respect of her share in Aurum, should the court order the cessation of applicant's membership in the corporation.

[8] In para 13.4 of the answering affidavit filed in the interlocutory application.

[9] The monthly rent payable by Laser X to Aurum was historically used to discharge the monthly bond liability over the property, that is, until November 2019, when rent payments ceased to be made at the behest of the second respondent who, as is common cause, is in sole control of the business and solely manages same to the ultimate benefit of the parties in their capacity as joint beneficiaries of the B Business Trust, being the sole member of Laser X.

due to the conduct of the second respondent in failing to pay rental due to Aurum (whether personally or on behalf of Laser X) and in utilising funds from the corporation's account for his personal expenses and business interests in which the applicant is not involved. This, so she contends, essentially means that the income stream to which Aurum is entitled, is being drained as a result of the second respondent's conduct. He lives rent-free in the residence; and has now, as is common cause, caused Laser X to stop paying rent. This has effectually impaired the attainment of the corporation's economic ends (full discharge of the bond liability) and has resulted in a situation where: (i) the second respondent is benefitting from the present state of affairs at the expense of the applicant and (ii) the corporation's business is not being conducted to the advantage of the shareholders generally.

34. The monthly rent payable by Laser X to Aurum was historically used to discharge the monthly bond liability over the property, that is, until November 2019, when rent payments ceased to be made at the behest of the second respondent, who is in sole control of the business but manages same to the ultimate benefit of the parties in their capacity as joint beneficiaries of the B Business Trust, it being the sole member of Laser X. The bond account has not been shown to be in arrears by virtue of the non-payment of rent by Laser X. Although the question of whether or not the applicant is being prejudiced by the current situation or to what extent remains in dispute on the papers,[10] what is not in dispute is that Laser X paid

[10] Applicant contends that Aurum is losing rental income monthly due to non-payment of rent by Laser X; the second respondent is living rent-free, with all house maintenance, insurance, and municipal utilities being paid for by Laser X; which is solely to his advantage and concomitantly to her disadvantage, as she derives no benefit therefrom. Ultimately she contends that corporation's business is not being pursued to the advantage of both shareholders. On the second respondent's version, Laser X is in a precarious financial position, which he attributes to the withdrawal of funds (R1 million) by the applicant from the account of Laser X in 2017 (to pay for the purchase of her present home); the negative impact of Covid 19 on the business; and the downturn of the economy. A

reduced rental for a period of time and no rental to Aurum since November 2019. It is thus losing its rental income stream of R72,000.00 per month.

35. Although the second respondent's case for condonation is scant on detail, the ultimate test is whether it is in the interests of justice to grant condonation.[11] According to established jurisprudence, [12] the question of prejudice to the opposite party, should condonation be granted, is to be considered.

36. In determining whether the interests of justice require that condonation be given, I cannot lose sight of the nature of the relief sought by each of the parties (in the main application and intended counter-application) as well as the importance to the parties of the consequences thereof.

37. Accusations of misconduct have been levelled by each party against the other in the papers in justification of the relief sought by them. Ultimately, a determination of the merits of the accusations will have a bearing on what relief, if any, the court will ultimately grant. A court hearing the liquidation application is, pursuant to the exercise of its discretion, restricted to the

---

'rent holiday' was implemented to enable Laser X to recover to profitability for the benefit of both parties and Aurum. The respondent submits that the mere fact of a 'rent holiday' does not necessarily in and of itself translate to prejudice to Aurum or the other member.

[11] See: In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus Curiae* 2008 (2) SA 472 at 477A-B ('Van Wyk'), the Constitutional Court put it thus:
"…the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised … and the prospects of success." (own emphasis).
See too: *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), para 51.

[12] To name but a few, see: *Foster v Carlis and Houthakker* 1924 TPD 247 at 252; *Marais v Aldridge* 1976 (1) SA 746 (T) at 752C; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018(3) SA 451 (GJ) at 454F-G.

remedy of granting a winding-up order, if the requisites for the grant thereof are found to have been established,[13] whereas the court enjoys a wide discretion under section 49 of the Close Corporations Act as to the order it will make to settle the dispute between the members of a corporation, if it is just and equitable to do so.[14]

38. The papers indicate that the applicant wishes to liquidate her investment - whether this occurs by means of winding-up of the corporation or through a disposal of her member's interest, will be for a court to determine in due course under the just and equitable provisions envisaged in the statutory enactments relied on by the parties. On the papers as they presently stand, the second respondent seeks to retain the property and to purchase the interest of the applicant at a fair price, as determined by court.

39. I am not persuaded that it will be in the interests of justice for the second respondent to be deprived of the opportunity to have his counter-application determined by court, precisely because principles of fair play and justice demand it.[15] Any prejudice to be suffered by the applicant as a result of a delay in the adjudication of the main and counter-application will be alleviated to a great extent by the order which I propose to grant, which aims at eliminating unnecessary delays in the set-down of the hearing of both the main application and the counter-application in due course. It remains open

[13] The all-encompassing provisions of section 81(1)(d)(iii) of the new Companies Act does not provide for the disposal of shares from one shareholder to another, or stated differently, the just and equitable provisions of the Act do not countenance any deviation from the statutory prescriptions once the factual grounds for just and equitable winding-up have been established.

[14] See: *Gatenby v Gatenby & others* 1996 (3) SA 118 (E) at 122 D-F where it was said, *inter alia*, that '*These are far-reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants to or not*.'

[15] See fn 1 above.

to the applicant to seek an expedited hearing upon a duly motivated request directed to the office of the ADJP.

40. The applicant strongly contends that the postponement application is a delaying tactic to enable the second respondent or Laser X to continue, with impunity, not to pay any rental to Aurum, which she contends will cause 'irreparable harm' to her. The papers do not, however, demonstrate that the monthly bond instalment is not being serviced monthly, despite the non-payment of rental by Laser X to Aurum. There is in any event a dispute on the papers as to when the attainment of Aurum's economic goal was to be achieved.[16] The applicant also retains a joint financial interest in the profitability of Laser X, in her capacity as joint beneficiary of the B Business Trust. In that regard, any prejudice resulting from the delayed hearing of the liquidation application is in my view, ameliorated.

41. It is clear that the disagreements between the parties surrounding the functioning of the corporation and their inability to work together can seemingly only be resolved in one of three ways: by way of (i) settlement or (ii) liquidation of the corporation; or (iii) by means of a buy-out by one member of the other member's interest.

42. Since the right to share in the accrual is exercisable only upon dissolution of the marriage, it is only then (once such value is determined) that it will be known whether or not payment in respect of the value of the applicant's member's interest (assuming the counter-application succeeds) can be applied by way of set-off.

[16] I.e., whether this was to occur 'as soon as possible, as the applicant contends, as opposed to monthly over time, as the second respondent contends.

43. The second respondent pegs his hopes upon his counter-application succeeding and him ultimately obtaining an order terminating the applicant's membership of the corporation and the sale of her member's interest to the second respondent against the payment by him of a fair value for her member's interest. He does not want even the counter-claim to be determined until the divorce is finalised, because he believes that he will be entitled to pay for the acquisition of the interest of the other member, by way of set-off.[17] The difficulty, however, is that the second respondent's version necessarily presupposes that an order in those terms will be granted by the court hearing the counter-application. It further presupposes that the accrual determination by the court hearing the divorce will be consistent with the second respondent's calculations, which are presently in dispute on the papers.

44. I am inclined to agree with the applicant's counsel that the divorce hearing will not resolve the disagreements between the members as to the management or functioning of the corporation or whether the business is being conducted to the advantage of the members generally. Whilst the value of the accrual remains an issue in the divorce proceedings, the determination of which will resolve what payment is to be made to the party whose estate has shown the lesser accrual, unless the parties reach agreement as to the distribution of their joint owned assets, liquidation would have to be resorted to.

45. To delay a determination of the issues arising in the main and counter-applications until after the divorce is finalised would not be in the interests of justice. The applicant submits that the second respondent is deriving an

[17] The applicant alleges in his founding papers that '*It is clear that the Applicant will be liable to pay me an amount of R2 308 846,33* [in respect of the accrual upon divorce] *This amount exceeds the value of the Applicant's membership interest in the First Respondent* [Aurum]*. In the premises set off will extinguish my liability to the First Respondent in respect of her share in the First Respondent, should the court order the cessation of the applicant's membership in the First Respondent.*'

unfair advantage from using the bank account of Aurum as a source of funds, *inter alia,* to pay for his personal and legal expenses, which is to her disadvantage. For the second respondent to merely say that all these transactions are 'accounted for' and that the applicant has access to the bank accounts of the corporation, fails to address the point: the point being, that it is the very conduct complained of by the applicant in seeking the liquidation of the solvent corporation. The second respondent also failed to disclose to the court that Laser X had stopped paying any rent to Aurum since November 2019, with full knowledge that this is an important issue upon which the parties fundamentally disagree.

46. In seeking to introduce claims under the provisions of section 36 and 49 of the Close corporations Act at an advanced stage of the liquidation proceedings, only to postpone the adjudication thereof until the divorce is finalised, premised on the view that the calculation of the accrual should more appropriately be dealt with at trial, given the nature and extent of the disputes in regard thereto in the papers, is akin to wanting 'the best of both worlds'.[18] Having launched the applications on motion, the sword must fall where it lands. [19]

47. Whilst I have already concluded that it will be in the interests of justice for the counter-claims to be introduced, it is clear the second respondent failed to prosecute such proceedings in accordance with the practice directives of this court. The second respondent failed to file a practice note or heads of argument or to enrol the matter for hearing, whether timeously or at all.

---

[18] This expression is not unlike the English idiomatic proverb or figure of speech, namely, 'You can't have your cake and eat it (too)'. The proverb literally means 'you cannot simultaneously retain your cake and eat it '

[19] My adaptation of the idiom: 'to fall on one's sword', which literally means, to take full responsibility for a negative situation.

48. Heads of argument are important for the proper administration of justice, as Marcus AJ pointed out in *S v Ntuli*[20] when he said:

> 'Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.'

49. The second respondent's aforesaid failure has thus inevitably resulted in the postponement of the main application. Heads of argument will have to be filed by both parties in the counter-application, whereafter the merits of the applications can be determined in one joint sitting. The consequences of the second respondent's failure cannot be laid at the door of or visited upon the applicant. The applicant gave notice in paragraph 18 of her answering affidavit in the interlocutory application that she will seek costs on the attorney and client scale. Having regard to the peculiar circumstances of the matter, I consider that such an order would be fair and just.

50. For all the reasons given, the following order is made:

ORDER:

1. .The late filing of the second respondent's counter-application to the main application is condoned.
2. The founding affidavit, dated 13 April 2020, deposed to by Troilyn John B in the interlocutory application, shall constitute the founding affidavit in the counter-application. The answering and replying affidavits filed

[20] *S v Ntuli* 2003 (4) SA 258 (W) para 16; approved in *Feni v Gxothiwe and Another* (2369/2013) [2013] ZAECGHC 109; 2014 (1) SA 594 (ECG) (7 November 2013), para [6]..

pursuant thereto, shall constitute the answering and replying affidavits in the counter-application.

3. The second respondent is directed to file and deliver his heads of argument in the counter-application within 15 days of grant of this order. Thereafter, the applicant is directed to file and deliver her heads of argument in the counter-application within 15 days of the delivery of the second respondent's heads of argument.

4. The main application for the liquidation of Aurum Properties CC and the counter-application thereto, are postponed *sine dies*;

5. The second respondent is to pay the wasted costs occasioned by the postponement of the main application and the counter-application on the attorney and client scale.

_____
Maier Frawley J

Date of hearing: 12 August 2020
Judgment delivered 8 September 2020

APPEARANCES:

Counsel for Applicant: Adv E.S. Heynecke
Instructed by: Van Der Berg attorneys

Counsel for Respondent : Adv. M. Smit
Instructed by: Martin Pike Incorporated Attorneys