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

Appeal Case No. A5041/2020
A quo case No: 2018/27249

1. Reportable: No

2. Of interest to other judges: No

3. Revised: Yes

(Signature)

In the matter between:

BARBAGLIA N.O., MICHAEL	**First appellant**
ANDERSEN N.O., CHARL	**Second appellant**

(The first and second applicants are cited in their respective representative capacities as the Trustees for the time being of The Lion Trust)

BARBAGLIA, MICHAEL	**Third appellant**

and

NOBLE LAND (PTY) LTD	**First respondent**
BARBAGLIA, GREGORY MASSIMO	**Second Respondent**
BARBAGLIA N.O., GREGORY MASSIMO	**Third Respondent**
PEDRIGAL N.O., CARLOS	**Fourth Respondent**

MIZZA N.O., DOMINICO **Fifth Respondent**

(In their capacities as trustees of for the time being of The Omegna Trust)

BARBAGLIA, SILVANA **Sixth Respondent**

(Intervening Party)

Appeal against refusal of winding-up of a company on just and equitable grounds. Appeal upheld.

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] The facts of this commercial matter are unique, and set out a family tragedy. The two main personalities involved are two brothers who are at war with each other. Their dispute in the matter on appeal before us, is about a property-owning company, the first respondent: Noble Land (Pty) Ltd ("*Noble Land*"). Their real dispute is about the division of a family's business(es). The court *a quo* referred to the situation as a family feud.

The material context

[2] The two brothers, Michael Barbaglia ("*Michael*") and Gregory Barbaglia ("*Gregory*") are the two directors of Noble Land. They each have an interest in a family trust: Michael has an interest in The Lion Trust (it is described in the founding papers as "his" family trust) and Gregory has an interest in the Omegna Trust (it is described in the founding papers as "his" family trust). The Lion Trust holds half of the issued shares in Noble Land and the Omegna Trust holds the other half. Thus, on the one side of the dispute one has Michael and The Lion Trust, and on the other, Gregory and The Omegna Trust.

[3] Michael and The Lion Trust unsuccessfully sought the winding-up of Noble Land in the court *a quo*. Michael is the third appellant (in his capacity as a

director of Noble Land) and also the first appellant in his capacity as a trustee of The Lion Trust.

[4] The mother of the two brothers, Silvana Barbaglia ("*Mrs Barbaglia*"), joined the proceedings as the sixth respondent. She did not participate in the appeal. The appellants and respondents other than Michael, Gregory and Mrs Barbaglia, are trustees of the two shareholders (the Lion Trust and the Omegna Trust). When I refer to "*respondents*" in the rest of this judgment, I refer to the respondents before this court, namely the second to fifth respondents.

[5] The remaining family member, but not a party to the proceedings before us, was the husband of Mrs Barbaglia and the father of Michael and Gregory. I refer herein to him as "*Mr Barbaglia*". Mr and Mrs Barbaglia have sought to extract themselves from the family business(es). This led to the family feud between the two brothers. Mr Barbaglia, who was elderly, recently passed away. Mr Barbaglia formed Pabar (Pty) Ltd ("*Pabar*") in 1965. It has been and still is reported to be a successful business and it has funded many ventures that the Barbaglia family has embarked upon. The legal basis for this arrangement is in issue.

[6] The above summary is not a finding that all the parties are properly before the court, as the validity of the appointment of the second appellant, Charl Andersen NO, as a trustee of The Lion Trust, is in issue. The contention is that Mr Barbaglia did not have the capacity to resign as a trustee of The Lion Trust thereby paving the way for the appointment of Mr Andersen as trustee on 8 April 2019. We need not resolve this dispute in this matter, as it has no bearing on the outcome of this appeal.

[7] Noble Land owns substantial immovable assets, but does not create sufficient income to cover its monthly running expenses. Its running expenses are met and have been met by Pabar.

[8] An imprecise reference to family business(es) is required, as the respondents' version is that the relationship is a single one of a universal partnership (i.e., one family business), with one third of the shares owned by each of Michael, Gregory and their parents (jointly). This is in dispute. This judgment (and the

judgment in the court *a quo*) approached the matter on the basis that the parties involved on the papers before this court intended Noble Land and Pabar to have separate corporate personalities and clearly entered into an arrangement as to their shareholdings. As already referred to, the Lion Trust and the Omegna Trust each holds 50% of the shares in Noble Land. Pabar's shareholding is in dispute, but it is also not held in three, one-third allocations either. On the respondents' version, it is owned 100% by Mr and Mrs Barbaglia. Michael avers that he holds 15%, and his parents the remaining 85%.

[9] The court *a quo* dismissed the application for the winding up of Noble Land on 2 July 2020. The appeal is before this court with leave of the court *a quo*.

Legal grounds for the relief sought

[10] The appellants sought a final winding-up order in their founding papers in terms of:

[10.1] Section 344(f),[1] read with section 345,[2] of the *Companies Act* 61 of 1973 (being on the basis that Noble Land is unable to pay its debts);

[10.2] Section 344(h)[3] of the 1973 Companies Act (being on the basis that it appears that it is just and equitable that the company should be wound-up).

[11] Alternatively to a winding-up under the 1973 Companies Act, the appellants seek the appointment of a liquidator on the basis that "*the company appears to be insolvent*" under section 163(2)(b), as read with section 163(1)[4] of the

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[1] "*A company may be wound up by the Court if … the company is unable to pay its debts as described in section 345*";

[2] In this case, section 345(1)(c) and 345(2):
"*(1) A company or body corporate shall be deemed to be unable to pay its debts if-*
(a) …
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company";

[3] "*A company may be wound up by the Court if … it appears to the Court that it is just and equitable that the company should be wound up*";

[4] "*(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;

2008 Companies Act (relief applicable in the case of oppressive or prejudicial conduct).

[12] In a winding-up of a company, the usual first question is if the 1973 Companies Act still applies. The 2008 Companies Act repealed the 1973 Companies Act in section 224, but retained certain sections as an interim arrangement in cases of insolvent companies. Accordingly, which Act applies, is a question determined with reference to solvency. The interim retention of parts of the 1973 Companies Act is set out in Schedule 5 to the 2008 Companies Act. It retains Chapter 14 of the 1973 Companies Act under which the sections mentioned above, fall. The schedule then expressly states that "*sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2*" of the 2008 Companies Act.

[13] However, if only winding-up for just and equitable reasons are in issue, the solvency issue becomes of lesser importance. The reasons are that both Acts contain such a section, and as will appear below, the impact of a decision by the Supreme Court of Appeal, *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA).

[14] The two just and equitable sections are section 344(h) of the 1973 Companies Act and section 81(1)(d)(iii) of the 2008 Companies Act. Section 344(h) has been quoted above in footnote 3. Section 81(1)(d) of the 2008 Companies Act reads:

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

(a) …

(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-
(a) …
(b) an order appointing a liquidator, if the company appears to be insolvent";

(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;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up".

[15] There is a great deal of overlap between the two just and equitable sections. Section 81(1)(d) and the effect of the *Thunder Cats* judgment are addressed later herein.

Material facts

[16] In short, Noble Land's relevant history and financial position are as follows:

[16.1] Noble Land was formed in 1998 and since inception, Prabar funded its operations on some basis;

[16.2] Over time, so funded by Prabar and some mortgage finance, Noble Land acquired three properties, a property situated in Sandhurst, a property situated in Morningside, and a property situated in Umhlanga;

[16.3] The first two properties are investment properties and the third property is a holiday apartment. They are of considerable value;

[16.4] A mortgage bond is registered against the Sandhurst property in favour of a bank in the amount of about R3.9 million. The monthly instalments are about R64 000.00. The value of the property,

according to the appellants, is about R50 million. The value is in dispute, but not that it is considerable. It is convenient to make two points now: (a) If the secured creditor, the mortgagee is not paid, it will foreclose on the property, and (b) there is significant equity in the property to prevent a sale in execution by selling the property to a willing buyer. An upmarket dwelling has been erected on this property;

[16.5] No mortgage bond is registered against the Morningside property. The value of the property, according to the appellants, is at least about R55 million. The value is in dispute, but not that it is considerable;

[16.6] A mortgage bond is registered against the Umhlanga property in favour of a bank in the amount of about R1.5 million. The monthly instalments are about R50 000.00. The value of the property, according to the appellants, is about R12 million. The value is in dispute, but not that it is considerable. The same points made with regard to the Sandhurst property about the consequences of non-payment of the mortgage loan and the equity in the property, apply to the Umhlanga property;

[16.7] Noble Land's monthly expenses in mortgage repayments, rates and taxes, and maintenance amount to about R170 000.00. It earns a rental income of about R22 000.00 per month from one of the properties. The shortfall is paid by Prabar and has always been paid by Prabar;

[16.8] Prabar also paid for the acquisition (and development) of the three properties in as far as this has not been financed by the two mortgage loans; and

[16.9] No formal loan agreement has been concluded between Prabar and Noble Land. The appellants aver that in 2013 Noble Land was indebted to Prabar in the sum of R8 Million (which amount has increased) and to another related company it is indebted in the sum

of about R2.1 Million. These amounts are disputed, but it is not in dispute that the assets of Noble Land exceed its liabilities.

Is Noble Land factually or commercially insolvent?

[17] Noble Land is solvent. It is factually solvent as its assets exceed its liabilities by a large amount. It is commercially solvent on the unique facts of this case as its monthly expenses of about R170 000.00 are paid in full through rental income and payments by Prabar. No current debt of Noble Land remains unpaid. There is no proof that Prabar will stop making payment (and put Noble Land at risk), and if it does, the sale of one immovable property will restore commercial solvency at least for a long time and/or there is large equity in the immovable properties against which money could be borrowed. I pause to add that the payment of expenses by a third party does not in itself justify the winding-up of a company. See *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WC) para 81-82.

[18] As such, in considering the winding-up of Noble Land, the matter has to be approached in terms of the 2008 Companies Act. See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 SCA para 17-24.

Just and equitable ground for winding-up

[19] The respondents argued that a finding that the 2008 Companies Act applies, would end the matter, as no winding-up was sought under the 2008 Companies Act in the papers and in the heads of argument.

[20] It is correct that no winding-up was so sought under the 2008 Companies Act. The appellant did not plead compliance with sections 81(1)(d)(i) or 81(1)(d)(ii) of the 2008 Companies Act.

[21] I respectfully disagree that the failure by the appellants to plead compliance with section 81 of the 2008 Companies Act is fatal to the relief sought. It is unnecessary to determine each of the requirements set out in sections

81(1)(d)(i) and 81(1)(d)(ii), as this court has an overall discretion to wind-up Noble Land in terms of section 81(1)(d)(iii). This appears from *Thunder Cats*.

[22] *Thunder Cats* dealt with the just and equitable winding-up under the 2008 Companies Act and approved of a winding-up order under section 81(1)(d)(iii) in a case where there was a general breakdown of the relationship between the shareholders and, the company was of the kind envisaged in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA), being one that is in substance a partnership in the guise of a company. The SCA in paragraph 14 held that section 81(1)(d)(iii) extends the cases for a just and equitable winding-up and indeed could overlap with a deadlock described in sections 81(1)(d)(i) and 81(1)(d)(ii). This would mean that it could be just and equitable to wind up a company even where there has say been non-compliance with section 81(1)(d)(ii), the two consecutive annual general meeting stipulation. Hence the SCA held in paragraph 14 that section 81(1)(d)(iii) has an extended meaning:

> "… *This case is also concerned with the 'deadlock principle' or, preferably, the failure of the relationship between the parties. The examples of 'deadlock' given in s 81(1)(d) (i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, and, it seems to me, are not exhaustive and do not limit s 81(1)(d)(iii). The use of the word 'otherwise' in the subsection does not limit what is meant by 'just and equitable'. On the contrary, it extends the grounds of winding-up to include other cases of deadlock. It is conceivable that it may be just and equitable to liquidate even if the shareholders have been unable to elect successors to directors for less than the stipulated period that includes two consecutive annual general meeting dates, as s 81(1)(d)(ii) requires*."

[23] This would mean that this court, as had been the case in *Thunder Cats*, could draw upon (and expand on) the well-established body of law with regard to the just and equitable winding-up ground that existed under the 1973 Companies Act, and which that judgment fully discussed in paragraphs 15-17.

[24] In essence this court has a wide discretion in the exercise of which a broad conclusion of law, justice and equity must be applied to the facts.

[25] The respondents argued (I quote from the heads of argument):

> "*Vincenzo,*[5] *Michael and Gregory agreed as long ago as 1990 that the businesses operated by them would be conducted for the benefit of all three of them in equal shares. Gregory identifies this agreement as a "universal partnership". Silvana*[6] *refers to this agreement as the "Barbaglia Estate*" …."

[26] It seems to me that it would be an untenable argument to deny that the relationship between the two registered shareholders is that which exists in a so-called a domestic company, founded on the analogy of partnership. It is further untenable to argue that the relationship between Michael and Gregory is irretrievably broken down and deadlocked. The objective facts led the court *a quo* to find that "*it is common cause that the relationship between the brothers is toxic and dysfunctional, both on a professional and a personal level*".

[27] Due to the impact of *Thunder Cats*, there is a great deal of overlap between the two Companies Acts on a just and equitable winding-up. With respect, it matters not that the wrong legislation was relied upon, provided that the basic contentions were made (the case was pleaded for a winding-up on a just and equitable basis), and the facts have been established. It woud be placing form over substance to hold otherwise.

Factual disputes and dirty hands

[28] The respondents correctly argued that there are unresolved factual disputes in the matter. In my view they could remain unresolved, save for any that would stand in the way of the relief I intend to recommend. The principal argument is that the application is an abuse, that the respondents are not to blame for the current situation, but that the appellants are. This is a factual dispute that could not be resolved finally on the papers. I disagree that it stands in the way of a winding-up order.

[29] *Thunder Cats* in paragraph 17 referred to the principles set out in *Apco Africa (Pty) Ltd and Another* v *Apco Worldwide Inc* 2008 (5) SA 615 (SCA) para 19 which states (underlining added):

[5] Mr Barbaglia
[6] Mrs Barbaglia

> "… *The second, usually called the deadlock principle, is derived from the Yenidje Tobacco Company case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more 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. (See also Moosa NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T) at 137; Emphy and Another v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D) at 366H - 367B.)*"

[30] The SCA in *Apco* considered if the party seeking the winding-up, caused the paralysis, and stated in paragraph 21 the test to be (underlining added):

> "*Actual deadlock is not an essential to the dissolution of a partnership. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other which each has a right to expect and that such impossibility has not been caused by the person seeking to take advantage of it.* …"

[31] The SCA in *Apco* thereafter considered the evidence and found that it was not established that the applicant for the winding-up approached the court with so-called dirty hands; having sabotaged the company and causing the paralysis. The SCA determined the factual disputes in this regard on the record and found that the evidence does not support such a contention.

[32] These extracts would seem to support the respondents' contentions. However it is not the end of the matter. Put differently, does *Apco* mean that a court must make a finding in every case that the person seeking the winding-up of a company on just and equitable grounds has so-called clean hands? The answer is "no".

[33] If one has regard to the remainder of *Apco*, the SCA in paragraph 29 and especially paragraph 30 in effect put the dirty hands argument subordinate to the real issue of justice and equity (underlining added):

> "*[30] But it is perhaps not necessary to go that far. It suffices, on the analogy of partnership law, to state that the company is now in a state which could not have been contemplated by the parties when it was formed and that it ought to be terminated as soon as possible. It is, after all, contrary to the good faith and essence of the agreement between the parties that the state of things*

> *encountered here should be allowed to continue. As it was put in In re Yenidje Tobacco Co Ltd (at 430):*
>
> > *In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think that it is quite clear under the law of partnership, as has been asserted in this court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership and for the reasons which are stated by Lord Lindley in his book on Partnership . . . and which, I think, is quite justified by the authorities to which he refers:*
> >
> > > *'Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner or the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.'*
>
> *In my opinion the proved facts bring the present case well within this passage.*
> …"

[34] In *Thunder Cats* the SCA also made it clear in paragraph 27-29 that even if it were to be found that the party seeking the winding-up was at fault, it was not an absolute bar to success, but only an important factor. I accordingly respectfully decline to follow *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 368H where it was held that an applicant who relies upon the just and equitable provision, must not have been wrongfully responsible for the situation which has arisen. It is but a factor.

[35] It seems to me that the approach of the SCA is pragmatic and one of common sense. Often when there has been a breakdown in a relationship, one would find with difficulty a party who is solely responsible. Often both parties would be at fault to some degree, even if most of the fault could be apportioned to one party. In this regard I agree with the assessment of the court *a quo* that both brothers have to some extent contributed to the current state of affairs.

[36] Ultimately in this matter, this court cannot resolve all the factual disputes about which camp is the more obstructionist. It seems to me that the conclusion in *Apco* paragraph 28-30 applies here too. It is common cause that here is a

complete breakdown in the relationship which makes Noble Land unable to function. No one would describe their relationship as one of friendly co-operation in running the affairs of Noble Land. There is no reasonable hope of tiding over the period of conflict and of Noble Land emerging as a functioning company. The parties are hopelessly at loggerheads. Both settlement talks and mediation failed. Noble Land is now in a state which could not have been contemplated by the parties when it was formed, and the way forward appears to be more and more litigation with no end in sight. These material facts can be determined on the papers, despite the numerous factual disputes, including about the conduct of the appellants.

[37] On the facts of this matter, those disputes have reached a level where it would be just and equitable to wind Noble Land up.

Conclusion

[38] The form of the order and costs remain in issue.

[39] I agree with the respondents that on the facts of the matter, a provisional order would not be appropriate. I agree that (and I borrow from the heads of argument) that the usual reasons motivating a provisional order are not present. There are no unpaid creditors or interested third parties to be afforded an opportunity to oppose the relief. There are really no third parties outside the family who are affected, as the mortgage creditors are secured creditors. There is no cogent reason to appoint a liquidator to manage Noble Land's affairs in the interim pending any further hearing.

[40] It was never in contention that the costs of two counsel should be awarded. It seems to me to be fair and just to order that the costs be paid from the insolvent estate. Ultimately the appellants succeed on a basis not expressly pleaded, and not dealt with in the court *a quo* on the basis that it was not relied upon. The current situation seems at least in part to have been caused by Michael, and the only way to determine the degrees of blame would have been a long oral hearing. The matter is in essence a dispute within a family. Under these circumstances the usual rule that the appellants should be awarded the costs of the appeal, in my view, should not be followed.

[41] Accordingly, I propose that the following order be made:

1. The appeal is upheld;

2. Paragraph 1 of the order of the court *a quo* dated 2 July 2020 is set aside and replaced with the following order-

   "*1.1 The first respondent is placed under final winding-up;*

   1.2 The costs of the application are to be costs in the winding-up, inclusive of the costs of two counsel where so employed;"

3. The costs of the appeal are to be costs in the winding-up, inclusive of the costs of two counsel where so employed.

DP de Villiers
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I agree

MP Tsoka
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I agree

PA Meyer
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Heard on: 21 April 2021

Delivered on: 24 June 2021 by uploading on CaseLines

On behalf of the Appellants:	Adv A Subel SC
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