IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delete whichever is not applicable

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

Date: 7 June 2014

Signature.....

CASE NO: 21203/2014

17/6/2014

In the matter between:

ANISSIA BOTHA First Applicant

PETRUS JOHANNES VAN DYK Second Applicant

and

ADROIT COMMUNICATIONS (PTY) LTD Respondent

" A house divided by itself

cannot stand"

Abraham Lincoln

JUDGMENT

Ismail J:

[1] The applicants in this matter seek an order whereby the respondent is liquidated. The applicants aver that the respondent is factually insolvent. They are also seeking the winding up of the respondent on another ground, namely that it would be just and equitable to do so, as the directors of the respondent are at loggerheads and that a situation has prevailed where the directors are in deadlock.

[2] The respondent has in total 6 directors and it appears that there are two camps consisting of three directors in each camp.

[3] The applicants are two directors as well as shareholders and they hold in total 24 % of the companies shares and on the other side two directors, Mr Hall and Mr Munnnik, together with another director

hold a 48% stake in the company.

[4] At the commencement of the proceedings Mr Smit, acting for the applicants, informed me that the applicants will not pursue the argument that the respondent is factually insolvent. In fact they will accept that the respondent is solvent.

[5] Notwithstanding the admission that the respondent is solvent the applicants will still seek an order that the respondent be wound up on the ground that it would be just and equitable to do so.

Background

[6] The respondent is a company wherein various entities hold certain shares. The companies and entities who are shareholders of the respondent have been specified in paragraph 22 of the founding affidavit. For the purposes of this judgment I do not propose to repeat the entities who hold the relevant percentage of shares in the respondent.

[7] It might be mentioned that there were several matters which found its way to this court against the respondent. There was an application brought

by an employee who sought an order that the company be placed under business rescue which was opposed by the company through the efforts of Mr Munnik and Mr Hall without the approval of the other directors. There was also an application brought by messrs Munnik and Hall whereby they sought the winding up of the respondent wherein they averred that there was a deadlock within the existing board of directors.

[8] The applicants are of the view that the company is being run by the executive directors of the respondent namely Mr Munnik and Mr Hall to the exclusion of the non-executive directors. They have taken certain decisions such as laying of employees of the company unilaterally without holding a board meeting to discuss such an issue or at the least informing the other directors.

[9] Mr Munnik and Mr Hall admit that there is a deadlock in the board and they have decided that they would run and manage the company on a day to day basis without involving the other directors. This conduct on their part the applicants submit on its own reflects and signifies mismanage – ment.

Legal principles

[10] The applicants case is based on section 81(1) (d) of the new Companies Act. Weiner J in *Muller v Lilly Valley (Pty) Ltd* [2012] 1All SA 187 (GSJ) stated that the legal basis for the winding up under section 81(1) (d) (iii) is the same as that that under s 344(h) of the old Companies Act.

[11] Mr Smit, submitted that there was authority that a company albeit be solvent could be wound up on the just and equitable ground, where the parties lost faith in the management of the company. In *Budge and Others NNO v Midnight Storm Investment 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) at para [5] of the judgment Meyer J deals with the aspect of winding up of a company on this basis referring to what Coetzee J, in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985(2) SA 345 (W), at 349G-350H, stated, where he, referred to the long history of the just and equitable ground for winding up and to the five categories of cases that may be brought under it.

" The first.....

The third is that of deadlock which results in the management of the companies' affairs, because the voting power at board and general meeting level is so divided between dissenting groups, that there is no way of resolving the deadlock other than by making a winding up order. The kind of case which falls most frequently to be dealt with under this heading is one where there are only two directors or only two shareholders, usually in a

private company, who hold equal voting shares or rights and have irreconcilably have fallen out.

Fourthly, grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held wholly or mainly by the directors and it is in substance a partnership in corporate form, the Court will order its winding up in the same kind of situation that it would order the dissolution of a partnership on the ground that it is just and equitable to do that ...."

[12] Mr Smit submitted that Mr Hall and Mr Munnik were running the company unilaterally and without the other members of the board being consulted or resolutions, on important aspects, being taken at board level. Munnik and Hall dismissed 28 employees in January 2014 without board approval. Furthermore, they changed the core business activities of the respondent without consulting the other directors or informing them thereof. In their response both Munnik and Hall conceded that there is a deadlock at board level as well as within the general body of shareholders. They seem to labour under the belief that because the company is making a profit it is permissible for the executive directors to run the affairs of the respondent to the exclusion of the non-executive directors. It is quite apparent that all " is not well within Adriot "

[13] Mr Smit relied upon King III in volume 2 of Henockberg , on the role and function of the board. He also referred to various aspects from King III in chapter 2. Some of the points raised were:

"2 the board should collectively provide effective corporate governance that involves monitoring the relationship between the board and management of the company, and between the company and stakeholders;

19. Directors should exercise objective judgment on the affairs of the company independently from management, but with sufficient management information to enable a proper and objective assessment to be made.

48. The collective responsibility of management vest with the CEO and as such the CEO bears the ultimate responsibility for all management functions. The board delegates to management via the CEO, who will in turn delegate to those reporting to him.

Principle 2.18: The board should comprise a balance of power, with a majority of non-executive directors. The majority of non-executive directors should be independent.

63. The board should ensure that there is an appropriate balance of power and authority on the board. No one individual or block of individuals should be able to dominate the board's decision-making.

What appears, above ,are some guidelines from King III. The list is not exhaustive.

Despite the deadlock at the respondent the two directors are of the view that they are entitled to run the day to day activities of the company.

[14] Section 81 of the new Companies Act stipulate:

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

(a) the company has-

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding- up by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) ...

(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;

(e) ....

(f) ..."

[15] Another grievance which the applicants raised is that when business rescue proceedings were brought against the respondent, Munnik and Hall opposed the application on behalf of the respondent without obtaining a resolution of the board to do so.

In the matter of *Gainsford and Others NNO v Haib AB* 2000 (3) SA 635 (W) at 638I-640B the question of the applicants authority to act on behalf of the respondent was questioned. The court stated:

" the applicant raised the point *in limine* regarding the authority of Brian Kakn Inc to act on behalf of the respondent herein and in terms of Rule 7 (1) called upon them to file a power of attorney indicating their authority so to act.

Rule 7 provides that:

' (1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of the party that such person is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the Court that he is authorized so to act, and to enable him to do so the Court may postpone the hearing of the action or application.

Mr Erasmus on the other hand relied upon the matter of *Wolhuter Steel v Jatu Construction* 1983 (3) SA 815 (O) at 823 C where the court stated:

" It would be quite ludicrous to hold that a director, or a company acting through its directors, is not an interested party when it comes to deciding whether it and/or they have the right to be heard on the return day of the rule nisi"

[16] Ironically, Hall and Munnik themselves instituted proceedings by way of motion for the winding up of the respondent. This application has not been enrolled. This begs the question what has changed since their institution for the winding up proceedings.

[17] Munnik and Hall have applied to intervene in these proceedings. It was submitted on behalf of the applicants that they have not shown or provided any information nor demonstrated any interest for intervening apart from stating that they are directors of the respondent.

In *Erasmus Superior Court Practice at B1-103, the authors state:*

'It is not sufficient for the applicant merely to state that (a) he or she has an interest in the action: he or she must make such allegations as would show, (b) that he or she has a *prima facie* case, (c) that his or her application is seriously made and (d) is not

frivolous. (see footnote 7 and the cases referred to there).

[18] Mr Erasmus, acting for the intervening parties, submitted that the court would be loathed to wind up a solvent company which has people working for it, who derive their livelihood from the company. That is a consideration which any court in its discretion would take into the equation when determining the question of winding up or not. On the other hand the court is bound to look at all the surrounding factors, more particularly the manner in which this company is functioning. It is common cause that there is a deadlock at both board and shareholders level.

Counsel suggested that the applicants who are not satisfied with the manner in which the company is operated should resign as directors and they should sell their shares.
In my view this would be nothing other than a hostile takeover by some directors at the expense of others. In political terms a *coup d etat.*

[19] In the matter of *In re Yeninde Tabacco Comapany, Limited* 1916 CD 426 the court 'held, affirming the decision of Astbury J., that if this was a case of partnership there would clearly be a ground for dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The p0osition amounted to a complete deadlock, and it was " just and

equitable" that the company be wound up'.

See also *Moosa N.O v Mavjee Bhavan (Pty) Ltd & Another* 1967 (3) Sa 131 at 137E-H.

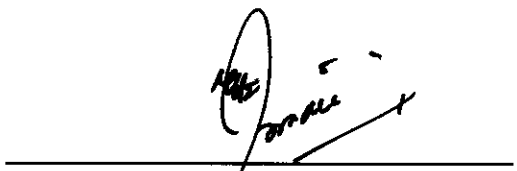
[20] Mr Erasmus submitted that the court should dismiss the application alternatively it should wind up the respondent provisionally, in order to hold a general meeting of shareholders, where new directors could be appointed. This suggestion could have been a plausible solution, however, I am told that it is common cause that the shareholders of the company is also deadlocked.

[21] Accordingly I am of the view that in the exercise of my discretion it would make no difference to order a provisional winding up order in the light of the prevailing situation.

[22] In the circumstances I make the following order:

(1) the application for intervention is dismissed with costs;

(2) The respondent company is wound up with cost.



Ismail J

APPEARANCES :

For the Applicants : Adv J G Smit instructed by Natalie Lubbe Attorneys, Johannesburg

For the fourth respondent: Adv F J Erasmus instructed by Cillie and Reyneke Attorneys, Pretoria.

Date of hearing: 5 June 2014.

Judgment delivered : 13 June 2014