IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

16/11/16

Date of hearing: 2 November 2016

Case number: 81348/2014

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

15/11/2016
DATE

SIGNATURE

In the matter between:

SHAILENDRA RAMESH MAHARAJ **Applicant**

and

NEW AFRICAN ALLIANCE INVESTMENTS (PTY) LTD **Respondent**

JUDGMENT

BRENNER AJ

1. This application involves a claim for the winding up of the respondent, New African Alliance Investments (Pty) Ltd ("the company") at the behest of Shailendra Ramesh Maharaj ("Maharaj"). Maharaj has applied for a provisional winding up, alternatively, a final winding up order. For the sake of convenience, this application is referred to as "the liquidation application".

2. Maharaj's locus standi to bring the application is based on his being a shareholder and creditor. Additionally, he contends that he was a director and that his subsequent removal as such was unlawful. Of which, more later.

3. His case for the liquidation of the company is based first and foremost on its being just and equitable to liquidate the company under section 344(h) of the old Companies Act, 26 of 1973 ("the 1973 Companies Act"), alternatively, on section 344(f), based on an inference that it is commercially insolvent and unable to pay its debts timeously.

4. The law relating to the liquidation of companies is prescribed in part G of chapter 2 of the Companies Act, 71 of 2008 ("the 2008 Companies Act"), read with chapter XIV of the 1973 Companies Act. Under the 2008 Companies Act, the laws relating to insolvency continue to apply in terms of the 1973 Act.

5. The winding up of a solvent company is dealt with under section 81(1)(d)(iii) of the 2008 Companies Act, where it is just and equitable to do so. If one assumes that it is not proven that the company is insolvent, whether commercially or factually, then section 81(1)(d)(iii) of the 2008 Companies Act applies. In my respectful view, a case has not been made out for the insolvency of the company.

6. The provenance of the disputes which culminated in the liquidation application is summarised below. I have endeavoured to create a timeline for the purpose of coherence, as gleaned from the plethora of affidavits pertaining to the applications launched by Maharaj in 2013 and 2014. I will refer to the 2013 application as "the preservation application" and the 2014 application, being this application, as "the liquidation application."

7. In the liquidation application, mention is made to affidavits and documents in the preservation application, which are incorporated by reference into the liquidation application. In my view, it was not inappropriate to do so, since the events which culminated in the preservation application are, in the main, directly relevant to the grounds for the liquidation application.

8. The facts are scattered all over the place like so much flotsam and jetsam. This proved a difficult exercise as no chronology of events was produced by Maharaj. It would have been appropriate for his legal representatives to have done so, given these constraints.

9. For the purpose of coherence, I have conjunctively analysed the averments made in both the preservation and liquidation applications.

10. According to his version, Maharaj is a 51 year old businessman who works and resides in Verulam, Kwa Zulu Natal. He had been involved in various business dealings with an influential businessman, one Gladstone Reuben ("Reuben") since 2001, and had allegedly invested about R50 million in business opportunities introduced to him by Reuben. In some of these dealings, Maharaj and Reuben involved another businessman, one Surendra Masilalal Narsi ("Narsi"). According to Maharaj, Reuben never had funds to invest in the business, the source of funding coming from Maharaj and others.

11. Circa 2005, Reuben approached Maharaj with the business opportunity of investing in chrome mining resources. The company in casu was incorporated to acquire a stake in Ehlobo Group (Pty) Ltd ("Ehlobo Group"). Ehlobo Resources (Pty) Ltd ("Ehlobo Resources"), was a wholly owned subsidiary of Ehlobo Group, and Ehlobo Resources owned shares in certain mining companies. I interpose to mention that "Ehlobo" is mentioned throughout as simply "Ehlobo" without reference to whether it means "Ehlobo Group" or "Ehlobo Resources". This is not material to the disputes in casu.

12. The company's registered office is in Sandton, Gauteng. The company commenced business on 15 July 2005 with its industry being described as

"financial intermediation, except insurance and pension funding." Its issued share capital amounted to R600,00, according to the Cipro search referred to below.

13. Maharaj contends that he and Narsi each lent the amount of R7 570 000,00 as start-up capital to the company, thereby creating credit loan accounts against it. In his view, it was agreed that the loan accounts would be repaid first, then he, Narsi and Reuben would receive a one third share of profits of the company.

14. The company came to own an indirect 2,1% interest in "Samancor", and an indirect interest in Karibo Coal (Pty) Ltd. The returns on these investments were expected to be in the region of R52 million.

15. According to Maharaj, he and Narsi were the only directors of the company in 2005, and on 20 June 2007, Reuben was appointed a director. According to Maharaj, he and Narsi were the original shareholders of 50% each of the shares in the company.

16. In September 2007, the company indirectly acquired a 15% stake in "Ehlobo". The return was *"left in the control of"* Reuben because he had *"intimate knowledge of the transaction."* In July 2008, US$20 million was offered for the shares in Samancor by Sivi Gounden, with a potential return of R300 million. It was aborted allegedly owing to Reuben's delays, Reuben being a director of the Ehlobo Group. In the interim, the price of chrome dropped and Gounden cancelled his offer. Eventually, the company derived R6 851 061.00 from the sale by Ehlobo Resources of its shares in Samancor.

17. In 2008, Reuben told Maharaj that R2 million was required to pay management fees to "Ehlobo." Narsi and Maharaj agreed to reduce their shares in the company by 10% each on the premise that 20% of the shares would be sold to Pricilen Govender ("Govender") for R3 million, to cover the management fee, and to keep a further R1 million in reserve. Maharaj avers that he never met Govender.

18. In February 2013, Maharaj was given sight of the CM42 share transfer form which had been signed by him in blank to implement the sale of shares to Govender. He noticed the price for the 20% shareholding at a nominal figure of R120,00, when the actual price was R3 million. In Maharaj's view, this was a *"fraud on the fiscus."*

19. Maharaj disputes that the company ever received the benefit of the money payable by Govender or Govender's company and, accordingly, the transfer was invalid.

20. On observing the completed version of another CM42, Maharaj picked up that the transfer of his shares was to New Africa Alliance Holdings, for a price of R180,00. Maharaj also observed that he had signed two directors' resolutions concerning the transfer of shares which were invalid for various reasons.

21. In 2008, Reuben had suggested another disposal of shares by Maharaj and Narsi by another 10% each, to enable Tumelo Motsisi and Fezikile Mahlati to acquire 20% in the company. Maharaj said that he would only agree to this after the company started to make a profit and the loan accounts were repaid. He states:

"Accordingly I did not sign a CM42 document in respect of this transfer and have never done so. Rather curiously, I have now discovered that the fourth respondent (Narsi), transferred 20% of his shares to Keona Group (Pty) Ltd."

22. In October 2008, attorneys Cliffe Dekker Hofmeyr ("CDH") became involved in the sale of the indirect shareholding in Samancor. Of which, more later. Maharaj maintains that he started to become circumspect about the affairs of the company and was obstructed in his attempts to obtain the company's records.

23. On inspecting the records eventually provided to Maharaj, he observed "several inexplicable inconsistencies." They are summarised below:

    17.1 one Ramnarayan was appointed as director in lieu of Narsi in March 2008, without his knowledge;

17.2 the auditors were changed in March 2008 without his knowledge;

17.3 the purchase price for the sale of shares to Govender was not paid to the company; it turned out that the price of R3m was paid to Ihubo Investments (Pty) Ltd, which has no connection with Ehlobo or the company;

24. Until 2009, Maharaj regarded himself as a 40% shareholder. It was never agreed that the Keona Group (Pty) Ltd would hold shares in the company. He now discovered that he held a 20% shareholding in the company.

25. A letter dated 2 February 2009 from attorneys CDH to Maharaj's attorneys recorded the shareholding in the respondent as:

(i) Keona Group (Pty) Ltd : 20%
(ii) New Africa Alliance Holdings (Pty) Ltd : 40%
(iii) Umzingeli Investments (Pty) Ltd : 20%
(iv) Shailendra Ramesh Maharaj : 20%

26. The above was disputed by Maharaj. CDH replied that there was a shareholders' resolution which approved the share transfer. It was only signed by Reuben and Narsi. Maharaj was not at the meeting and doubts he was invited to it.

27. A resolution attached to the papers dated 9 May 2009, held at a meeting attended by Messrs Maharaj, Narsi, Reuben and one Tumelo Motsisi, says the following concerning shareholders' loans (I have corrected cosmetic spelling mistakes for the sake of convenience):

"SHAREHOLDERS LOAN

"There was general agreement amongst the founding shareholders, being Messrs Reuben, Narsi and Maharaj, that when the company was set up, they would all have equal shareholding, and that Messrs Marsi and Maharaj would contribute equity financially and Mr Reuben would contribute through bringing commercial opportunities and sweat equity. Mr Reuben Brought the Ehlobo opportunity and was responsible for running with the transactions, while Messrs Narsi and Maharaj contributed equity of R7 million each.

The dispute was as to whether or not the cash contributions amounted to a shareholders' loan, and if there are such loans, whether or not the cash contributions amounted to a shareholders' loan, and if there are such loans, whether they should be paid first before any dividends to shareholders. The contention was that there were no shareholder loans discussions before, but that the 3 of them would be equal shareholders.

RESOLUTION

It was resolved that all three founding shareholders represented by Messrs Reuben, Narsi and Maharaj would participate equally. The shareholders agreed that all three will have equal loan accounts to the company of R7million each. These shareholder loans will have to be paid before any type of distribution."

(my emphasis)

28. On 30 June 2009, Ehlobo disposed of its indirect interest in Samancor Chrome, resulting in sale proceeds of R6 923 138,84 being paid to attorneys CDH.

29. A resolution of the shareholders dated 30 June 2009 (signed by Maharaj), resolves that the sum of R6 000 000.00 should be distributed as follows:

    a. To Maharaj, the sum of R2 000 000,00;
    b. To Narsi, on behalf of New Africa Alliance Holdings (Pty) Ltd ("NAAH"), the sum of R2 000 000,00;
    c. To Reuben, on behalf of NAAH, the sum of R2 000 000,00.
    d. The balance, to Cliffe Dekker Hofmeyr, for legal services, and for any expenses incurred subject to prior shareholder approval.

30. It appears that the above distributions were duly paid.

31. A further distribution occurred via shareholders' resolution dated 8 December 2009, concerning a balance which remained after payment of the above amounts. The sum of R600 000,00 was to be distributed as follows:

    a. To Maharaj, the sum of R200 000,00;
    b. To Narsi, on behalf of NAAH, the sum of R200 000,00;

c. To Reuben, on behalf of NAAH, the sum of R200 000,00;
d. The balance, to Cliffe Dekker Hofmeyr, for legal services, and for any expenses incurred subject to prior shareholder approval.

32. It appears that the above distributions were duly paid.

33. In December 2011, Maharaj discovered that a further distribution of about R6 million was about to become available immediately. It appears that this was as a result of Ehlobo selling its indirect interest in Umcebo Mining for the price of about R6 295 853.00. Attorneys Edelstein-Bosman Inc ("EB") dealt with the transaction.

34. By this stage, however, relations amongst Maharaj, Reuben and Narsi had started to deteriorate. Numerous meetings of shareholders and directors were called, without prior notice, urgently, purporting to intend to pass resolutions without Maharaj knowing their nature in advance of the meetings. Suspicion set in. Narsi continued to attend directors' meetings even though he was no longer a director. On 19 July 2012, Ramnarayan apparently resigned and Reuben was appointed a director. Maharaj was not given notice of this meeting or resolution.

35. Maharaj thereupon refused to sign any more resolutions unless outstanding matters were resolved. Reuben, however, appeared bent on gaining access to the above distribution.

36. On 17 May 2012, Ehlobo disposed of its indirect interest in Umcebo Mining, resulting in sale proceeds of R6 295 853.00 becoming available.

37. A resolution of the shareholders dated 17 May 2012 resolves that the sum of R6 000 000,00 should be distributed as follows:

a. To Maharaj, the sum of R2 000 000,00;
b. To Narsi, on behalf of New Africa Alliance Holdings (Pty) Ltd ("NAAH"), the sum of R2 000 000,00;
c. To Reuben, on behalf of NAAH, the sum of R2 000 000,00.

d. The balance, to the trust account of Auditors Arvind Magan and Associates pending further resolution.

38. Maharaj refused to sign the May 2012 resolution.

39. A meeting on 18 July 2012 turned into a screaming match. Only one matter was agreed, namely, that the company would open a bank account. Maharaj, however, insisted that he, Reuben and Narsi would all jointly have to authorise bank transactions. Reuben disagreed.

40. A meeting was convened on the next day, being 19 July 2012. Maharaj was not invited. It appears that Ramnarayan resigned as director and Narsi was re-appointed. The resolutions were sent to Standard Bank to facilitate the opening of the bank account. According to Maharaj, Reuben and Narsi continued to convene meetings without Maharaj.

41. On 17 September 2012, Maharaj was invited to an urgent directors' meeting on 18 September 2012. He was unavailable, and told Reuben so. Nevertheless, at this meeting, Reuben and Narsi agreed to pay the Umcebo distribution to the company's auditors, Arvind Magan and Associates ("AMA"). EB informed Maharaj's attorneys of this intention and invited Maharaj to launch an application, if he so required, to prevent the payment. EB eventually agreed to pay the monies into the company's bank account.

42. At a board meeting on 30 September 2012, Reuben attempted to pass a resolution regarding the distribution. Maharaj objected, as none of the proposed resolutions was provided in advance. The impasse regarding the bank account arose from the insistence of Reuben and Narsi that only two directors should have joint authority to transact. Maharaj was also becoming concerned that Narsi was being influenced by Reuben.

43. On 2 February 2013, Maharaj met Reuben at a soccer game at Moses Mabhida Stadium in Durban. Reuben apparently threatened to remove Maharaj as director of the company if he persisted in refusing to the release of the money.

44. On 4 February 2013, another shareholders' and directors' meeting was convened, with notice of the resolution intended to be passed, to remove Maharaj as a director of the company. Maharaj's attorneys sent a letter informing Reuben and Narsi that the notice and resolution were procedurally defective. On 4 February 2013, CDH withdrew the notice for the proposed meeting on 19 February 2013.

45. On 14 February 2013, a new notice of a shareholders' and directors' meeting was served. Yet again, Maharaj's attorneys objected to the validity of the notices and resolutions. But this time, the objection was ignored. On 22 February 2013, Maharaj served a notice in terms of section 165 of the companies Act, 2008, on the company, dealing with his allegations of *"financial maladministration of the company's funds,"* to the benefit of Reuben and Narsi. There was no response.

46. On 8 March 2013, Reuben voted on behalf of Umzingeli as 20% shareholder to remove Maharaj as director. Narsi voted on behalf of New Africa Alliance Holdings "purportedly" holding 40% of the shares. Maharaj voted against, with his vote counted as 20%. No other shareholder voted. In Maharaj's view, the resolution was invalid owing inter alia, to the invalid transfer of shares to Umzingeli, and the invalid transfer of 30% of his shares to New Africa Alliance Holdings. In his view, neither of the latter two parties was a shareholder of the company. Maharaj persists in his view that he remains the owner of 50% of the shares in the company.

47. A Cipro search conducted on 30 October 2014 reveals the following.

48. Surendra Manilal Narsi ("Narsi") was appointed as director of the company on 24 July 2012 and resigned on 8 March 2013. It appears, however, that this is a mistake and that Narsi did not resign. (Narsi is a 54 year old businessman who resides in Congella, Kwa Zulu Natal.)

49. Reuben, a 52 year old businessman, was appointed on 20 June 2007, and remains a director.

50. Maharaj was appointed on 15 July 2005 but was later removed as such. He disputes the validity of his removal as director.

51. Jayshree Ramnarayan Inarman ("Inarman") was appointed on 3 March 2008 but resigned on the same date. This may be an error of some sort.

52. In the result, the two current and remaining active directors of the company appear to be Narsi and Reuben.

53. Arising from the meeting on 8 March 2013, on 22 March 2013, Maharaj resolved to bring legal proceedings, to which end he signed an affidavit in support of an urgent application in this Court, under case number 17811/2013, citing the company, Reuben, Inarman, Narsi and six other respondents. The notice of motion is not part of the papers. This is "the preservation application".

54. In the preservation application, Maharaj applied to suspend the operation of the decision taken to remove him as a director of the company, pending the outcome of an application to prevent attorneys EB from paying to the company the sum of R6 295 853,00, arising from Ehlobo's disposal of its indirect interest in Umcebo Mining. The application was struck from the roll on 19 March 2013 for lack of urgency, but was prosecuted thereafter in the ordinary course, and affidavits were exchanged.

55. Ultimately, on 27 August 2013, Ms Justice Potterill granted an order to interdict attorneys EB from paying out or encumbering monies held in a Section 78(2A) investment account, in the amount of about R6 295 853,00, held on behalf of the company. The remainder of the relief sought in Maharaj's application was postponed to 28 October 2013. It would appear that part of this relief was an order to set aside Maharaj's removal as a director of the company.

56. In an answering affidavit from Reuben in the preservation application (dated 3 October 2013), he makes the following significant statements, (the first respondent being the company):

"9. In fact, very little about what the Applicant (Maharaj) said is accurate or truthful."

19. Self-evidently, there is a deadlock as between what the Applicant contends for (on the basis of his so-called 50% shareholding in the First Respondent) and the balance of the shareholders in the First Respondent. To order that the Applicant be reinstated as a director of the First Respondent would simply result in the First Respondent not being able to conduct any business at all. This cannot be to anyone's advantage. In this regard, I submit that it would be far better that this Honourable Court decline to order the Applicant's reinstatement as a director. The First Respondent can then continue to operate in the ordinary course of its business."

(my emphasis)

57. On 20 October 2014, Mr Justice Tuchten set aside the order of Ms Justice Potterill dated 27 August 2013, and dismissed Maharaj's preservation application, with costs. Maharaj contends that there was no proper prior service on him of the application which preceded the order of Mr Justice Tuchten, whether by notice of set down or at all. It is not necessary to address the issue of whether or not there was proper service of the notice of set down, for the purpose of this application. On 24 October 2014, attorneys EB proceeded to transfer the monies to the company's bank account.

58. On 4 November 2014, Maharaj issued Summons out of the Gauteng Division of this Court in Johannesburg, under case number 40257/2014, for repayment of his loan of R7 570 000,00, alternatively, payment of 50% of the funds standing to the credit of the company and available for distribution to its shareholders. The action was defended.

59. Two days later, on 6 November 2014, Maharaj launched the liquidation application before this Court, on an urgent basis, under case number 81348/2014, (the same case number as this application), for the provisional liquidation of the company, and enrolled same for 11 November 2014. It was struck from the roll for want of urgency but was thereafter prosecuted in the ordinary course, and answering and replying affidavits were duly served.

60. In Maharaj's founding affidavit in this liquidation application, dated 5 November 2014, when it was first brought on urgent grounds, in annexing the above affidavit of Reuben in the 2013 application, Maharaj states:

"8. This being an urgent application and facing time constraints, I do not wish to burden the Honourable Court unnecessarily with lengthy papers, but the dispute between me, the Respondent Company and the other directors of the Respondent company is fully canvassed under case number 17811/2013 and that matter I do not want to redraft what is already said under oath in those affidavits and I annex only the affidavits hereto as Annexures SRM 6, 7, 8 and 9."

61. The response of Reuben on behalf of the company (dated 13 November 2014), to the above paragraph, is telling:

"21. I am advised that it is impermissible for the applicant to attach affidavits and ask this Honourable Court to have regard thereto, without indicating at the very least what portions are referred to and relied upon by the applicant. The annexures and the allegations contain therein, in this regard, fail to be struck out, alternatively, disregarded by this Honourable Court."

62. The company did not bring an application to strike out the attachments in question. Nor do I consider it inappropriate for this Court to have regard to annexures which are pertinent to the material issues in this application. I consider the company's answer in this regard to be cavalier. Nevertheless, the company addressed a large portion of the disputes in its preliminary introduction to its answering affidavit in the liquidation application.

63. In his founding affidavit, Maharaj avers that the company is neither trading nor is it an income-generating enterprise, nor does it have employees. In the answering affidavit of Reuben, on behalf of the company, Reuben had admitted that in March 2013:

"currently however (the company) is not trading and its only asset is an amount of cash held in trust by (Edelstein-Bosman Inc)."

64. In the answering affidavit served on 13 November 2014, Reuben goes on to mention, however, that the company's interest in Ehlobo Resources (Pty) Ltd ("Ehlobo") had been realised and the company stood to benefit from a return of between R3 million and R4 million. Therefore, the amount paid to EB was not the company's only asset. Maharaj in his replying affidavit (served on 19 November 2014), replies that Reuben is vague about this transaction and provides no detail of it or any indication of when the monies will be paid.

65. Reuben concedes that

> *"Whilst it is indeed so that the company is not trading, in sense suggested, (sic) to suggest that it is not a "generating enterprise" is an oversimplification of the facts, and..... the company's business is to hold investments and realise them as and when appropriate."*

66. Maharaj avers in his affidavit that he still believes that he is a 50% shareholder in the company, but goes on to state that he is at least a 20% shareholder. He states that he, Reuben and Narsi all had credit loan accounts against the company for R7 million each.

67. In support of his case for urgency, mention is made of the order of 20 October 2014 which had the effect of permitting EB to release the monies to the company, and his apprehension that same would be dissipated to his detriment qua shareholder and creditor, and for the personal benefit of Messrs Reuben and Narsi. He had established that the monies were paid on 24 October 2014 by attorneys EB into the bank account of the company, and opined that these monies were the only asset of the company.

68. He also avers that another creditor at the time, attorneys CDH, had issued summons against the company, New Africa Alliance Holdings (Pty) Ltd, Reuben and Narsi, in the Johannesburg High Court on 16 July 2014, for payment of the aggregate amount of R339 973,23 for legal fees.

69. On 13 November 2014, presumably by way of interlocutory relief in this application, Maharaj successfully secured urgent interdictory relief to prevent the dissipation of the monies paid by EB into the company's bank account. An

order of Court was made by Mr Justice Tuchten in which the company undertook not to dissipate or pay funds in its bank account to either its shareholders or directors, pending finalisation of this application. If it had to pay any bona fide debts, it would inform Maharaj's attorney before such debts were paid. Maharaj's replying affidavit was due for service by 14 November 2014, and the parties could re-enrol the application once the papers had been attended to and heads of argument filed. The issue of urgency and the costs of senior counsel were reserved.

70. In response to Maharaj's assertion that the company is commercially insolvent, Reuben, on behalf of the company, avers that this is "*absurd*", and that the payment to the company of the sum of R6 896 358,61 was not its only asset.

71. In reply, Maharaj admits that R6 896 358,61 was paid to the company on 24 October 2014. He attaches what purports to be a "detailed calculation of the company's assets and liabilities showing that it is allegedly *"factually and commercially insolvent."* This calculation is by no means detailed. It simply lists funds held as assets, of R1 714 379,54, less shareholders' loans of R6 767 119,00 owed to him and R3 120 000,00 owed to Narsi.

72. Maharaj refers to the schedule of disbursements attached to Reuben's answering affidavit. Maharaj points out that, in October 2014, Reuben and Narsi had been paid an aggregate of R1 880 000,00 from the monies paid to the company. Maharaj had received no payment at all from these proceeds.

73. The schedule reveals that, apart from payments to lawyers and auditors, and a loan made by "Sparepro", the following payments were made:

    a. R380 000,00 in consulting fees to Narsi on 31 October 2014;
    b. R380 000,00 in consulting fees to Reuben on 31 October 2014;
    c. R1 500 000,00 by way of shareholders loan to Narsi on 8 November 2014;
    d. R1 500 000,00 by way of shareholders loan to Reuben on 8 November 2014.

74. It is apparent from this schedule that, between 30 October 2014 and 12 November 2014, (coincidentally, one day before the interdict), payments totalling R5 181 978,46 in the aggregate had been disbursed from the company's bank account.

75. Maharaj complains that Messrs Reuben and Narsi had embarked on a mission to deplete the funds remitted to the company's bank account and that they were not entitled to enrich themselves at the expense, and to the prejudice of, the company's creditors. It was of paramount importance that a liquidator should be appointed to investigate the conduct of Messrs Reuben and Narsi, to set aside impeachable transactions, and to investigate the financial and commercial affairs of the company. He comments that Messrs Reuben and Narsi are *"unable to distinguish between the funds to which they are entitled and the funds which belong to the respondent*" and accuses them of using the company's bank account as their "piggy bank."

76. In his answer, Reuben confirms payment to attorneys CDH of the sum of R430 230,93 and payment to attorneys Naidoo Maharaj ("NM") of R600 000,00 for legal fees. He mentions that the company had been granted at least two costs orders against Maharaj in proceedings under case numbers 15377/2013 and 17811/2013. The company intended to tax the costs. Reuben tenders to pay to Maharaj the sum of R1.5 million less the attorney and own client legal costs of CDH and NM, with the resultant balance being R469 769,07. On taxation, any difference between what was taxed and the attorney and own client costs would be refunded to Maharaj. In reply, Maharaj denies any liability for untaxed costs, rejects the offer, and persist in his claim to payment of R6 767 119,00.

77. Reuben asserts that, regarding any winding up of the respondent:

> *"A winding up will have catastrophic consequences for the company, and cost it unnecessarily by having to pay liquidators their allowance on whatever is recovered, to the disservice of the shareholders."*

78. Maharaj's founding affidavit asserts that he is a creditor of the company for the sum of R7 570 000,00, and had issued summons for this amount. In its answer, Reuben asserts that the company intends to defend this action.

79. Reuben admits that Maharaj is a creditor and that he and Narsi are also creditors. He mentions the facts that certain payments had been made to the shareholders. In support of this, he refers to the various distributions which took place between May 2009 and December 2009.

80. At paragraph 12.13 of the answering affidavit, Reuben states:

"The applicant has accordingly been repaid the sum of R2.2m. The balance thus owing by the company to the applicant on loan account is therefore R4.8m."

81. In reply, Narsi disputes the amount owing to him. He refers to a different amount of R8 967 119,00 (without any detailed corroboration) and avers that, after deducting R2,2 million from this, the balance comes to R6 767 119,00. He relies on what he terms a "detailed calculation", which is patently devoid of detail. He asserts that his start up capital was R8 967 119,00, without providing any independent corroboration for this.

82. Reuben avers that, in May 2012, when further monies were received when Ehlobo Resources sold its interest in Umcebo Mining, the net proceeds being R6 295 853,00, it was proposed that the shareholders distribute the sum of R2 000 000,00 to Reuben (for New African Alliance Holdings), to Narsi, (for New African Alliance Holdings), and to Maharaj, with the balance to be held in trust by the auditors, AMA. Maharaj refused to sign the resolution and contended that he remained a 50% shareholder. In his reply Maharaj avers that *"a deadlock ensued between the company's members"* and that he was *"uncomfortable and not prepared to sign the resolution for obvious reasons."*

83. On the subject of Maharaj's removal as director of the company, Reuben avers that this is irrelevant. Maharaj replies that his removal took effect from 27 March 2013, immediately after the funds of some R6,2 million were paid to attorneys EB and after he had disputed the dilution of the shareholding in the company.

He was removed as a director to enable Messrs Reuben and Narsi to access their advances. Maharaj comments in reply:

"This issue goes to the very heart of the deadlock which came about between the members and shareholders of the Respondent. It is disingenuous and dishonest to allege that no deadlock exists."

84. Maharaj goes on to contend that he is at least a 20% shareholder in the company. In answer, Reuben concedes that Maharaj is a 20% shareholder.

85. It is important to note that Reuben asserts in his answer at paragraph 24.3 that

"There are no other creditors of the company who have not been paid and the company is indeed able to pay its debts as and when they fall due for payment."

86. In conclusion, Maharaj states at paragraph 21:

"Not only is the Respondent company commercially insolvent and unable to pay its debts, it is just and equitable that the Respondent company be wound up for reasons that include the fact that the company is not conducting any business. There is a deadlock in the management of the Respondent company as the directors of the Respondent company does not get along at all and cannot manage the Respondent Company's affairs."

87. The essence of the company's answer is this: the application is stillborn because, for a winding up on just and equitable grounds, Messrs Reuben and Narsi should have been joined as co-respondents. There is no deadlock in the management as Reuben and Narsi manage the company alone. They are the directors and there is no deadlock between them. The suggestion that Maharaj has been oppressed is unsubstantiated.

88. Maharaj asserts at paragraph 22 of his founding affidavit that the company has no employees other than its directors. The company does not deny this.

89. Between 19 November 2014, and the hearing of this matter on 2 November 2016, there is no explanation of any developments between the parties. This application was enrolled for hearing on 1 August 2016, but was postponed to 31 October 2016, with no order as to costs, and argument was heard on 2

November 2016. After hearing argument, I gave an order granting the final winding up of the company, I undertook to provide reasons for my judgment in due course.

90. I turn to an analysis of the law as it applies to the facts in this application. While Counsel for both parties referred me to a plethora of authorities and advanced various arguments, I have resolved to confine this judgment to matters which are strictly germane to the material issues.

91. There is insufficient evidence in the papers to substantiate a conclusion that the company is insolvent. I cannot rely on Maharaj's rather crude calculations concerning this issue, despite the fact that the company failed to produce any annual financial statements to motivate its solvency.

92. I accept that Maharaj was at a disadvantage since he was no longer privy to the company's financial affairs after his removal as director in May 2013, and even before then. There is no objective evidence from which any inferences as to insolvency may be drawn.

93. The only basis on which the company in casu may be wound up, therefore, is for just and equitable reasons. The starting point is section 81(1)(d)(iii) of the 2008 Companies Act, which provides for the winding up of a solvent company where:

"(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....."

94. In **Apco Africa Incorporated v Apco Worldwide (Pty) Ltd and another (2008) 4 All SA 1 SCA**, the Court expostulated two principles which applied to a winding up on just and equitable grounds. They were where:

a. there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors in regard to the company's business;

b. in small domestic companies, there exists amongst its members a particular personal relationship of confidence and trust similar to that existing between partners in a partnership and if, by the conduct of one or more members, the relationship is destroyed.

95. In the case of **Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and others 2014 (5) SA 1 SCA**, the SCA found that the Court a quo had quite correctly granted a winding up order against the appellant on just and equitable grounds.

96. The SCA considered section 344(h) of the 1973 Companies Act as analogous to section 81(1)(d)(iii) and held that the just and equitable ground in the latter section retained its wide scope.

97. At paragraph 15 at page 9B to F, the Court had the following to say on the subject:

"There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground. In Sweet v Fairbairn 1984 (3) SA 441 W, it was said:

'The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not ejusdem generis with the other grounds specified in s344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable"'.

98. And at paragraph 16 E to F, page 9 of **Thunder Cats**:

"*Some of the categories that have been identified are the disappearance of a company's substratum; illegality of the objects of the company and fraud connected in relation to it; a deadlock; oppression; and grounds similar to the dissolution of a partnership. A 'deadlock' which, because of a divided voting power at both the board and general meetings, affected the management of the company could also found a liquidation order on this ground. No doubt these categories remain under the new Act and may be extended.*"

99. At paragraph 17 A to B, page 10 of **Thunder Cats**:

"The 'deadlock' principle, on the other hand, 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.'"

100. At paragraph 28 H to I, page 11 and paragraph 29 A to B page 14 of **Thunder Cats:**

"(28).....A court should thus assess the respective contributions to the breakdown to determine whether it is just and equitable to liquidate. But a party's fault should not necessarily deter a court from winding up-

'so that the paralysis.....may be eliminated, a competent functionary (in the person of a liquidator) may be placed in control of (the company) and that functionary may address the question of where the best interests of (the company) lie.'"

"(29) Vermeulen AJ found that the blame for the breakdown in the relationship could not be apportioned with precision. He nevertheless held that the respondents' blameworthiness was no greater than that of the appellants. An equal apportionment of blameworthiness he thought might be somewhat charitable to the appellants but not an outright injustice to the respondents. I cannot fault his reasoning."

101. Finally, I refer to the precepts established by **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 SCA**. Where final relief is sought and there is any dispute of fact relating to relevant issues, an applicant may rely on the respondent's averments, so much of the applicant's averments as are admitted by the respondent, and not denied by the respondent, and not genuinely denied by the respondent. In my view, there are no bona fide, genuine, material disputes of fact which would preclude final relief in casu.

102. I return to the facts in casu. In granting a final winding up order, I am satisfied, on a balance of probabilities, that the applicant had discharged the onus of proving that just and equitable grounds justified such an order.

103. I have taken cognisance of the following salient facts. On the company's own admission, Maharaj is a shareholder of 20% of the shares in the company and is owed at least R4,8 million. His locus standi is incontrovertible. (Maharaj maintains that he remains a 50% shareholder). On the company's own version, a "deadlock" between the directors resulted in the removal of Maharaj as a director on 8 March 2013. Maharaj disputes the validity of his removal as director. His removal occurred at a time when Maharaj disputed the dilution of his shareholding on irregular grounds. Maharaj had also insisted that he, Reuben and Narsi should have joint signing powers on the bank account of the company, so that all three of them should authorise any transactions. Reuben and Narsi disagreed with this. On the version advanced by Reuben, under oath, in 2013, the reinstatement of Maharaj as director would have resulted in the company being unable to conduct any business at all.

104. On the objective facts, since March 2013, Maharaj has not attended any meetings of directors or shareholders of the company.

105. The preservation order granted by Ms Justice Potterill on 23 October 2013 had the effect of preserving a substantial amount of money accruing to the company, namely, R6 295 853,00. Significantly, Reuben had admitted that in March 2013: *"currently however (the company) is not trading and its only asset is an amount of cash held in trust by (Edelstein-Bosman Inc)."*

106. Reuben's attempt to later retract this statement by averring that a further R3 million to R4 million might become payable to the company appears disingenuous, a fortiori so in the absence of any detail or corroboration to substantiate this bald allegation.

107. On 20 October 2014, the preservation application was dismissed under circumstances in which there is a dispute concerning whether due notice of the enrolment was given to Maharaj's attorneys. While I have not addressed these facts in detail, the very fact that a material dispute arose concerning whether proper notice was given to Maharaj is yet another factor I may take note of as evidence of the dire nature of the deadlock between the parties.

108. Four days later, on 24 October 2014, the monies were paid by EB into the bank account of the company.

109. On 13 November 2014, Mr Justice Tuchten interdicted the dissipation of funds from the company's bank account pending finalisation of this application.

110. In the interim, however, between 30 October 2014 and 12 November 2014, already R5 181 978,46 had been paid out by the company. Reuben and Narsi had each received R1 880 000,00. These amounts included management fees of R380 000,00 payable to Reuben and Narsi. The sum of R1 030 230,93 had been paid in toto to attorneys CDH and NM in November 2014. In addition, in December 2013, CDH had received R100 000,00 and NM had received R60 000,00. The legal fees paid in December 2013 and November 2014 to CDH and NM total the amount of R1 190 230,93.

111. It is noteworthy from the company's schedule of disbursements that substantial fees were also paid to auditors AMA in December 2013 and

November 2014, totalling R282 005,23, without the company ever having tendered sight of its annual financial statements to Maharaj, this despite the issues of insolvency raised by him in this application.

112. In the final analysis, it will probably turn out that the fees of a liquidator will pale into insignificance when compared with the fees paid by the company for legal fees in fighting the disputes with Maharaj over the past five years, which disputes have had no constructive end.

113. No money was paid to Maharaj when the November 2014 distribution took place. In the company's answering affidavit in this application, a tender was made to pay the sum of R1,5 million to Maharaj after the deduction of the attorney and own client costs of CDH and NM for costs orders against Maharaj which had not even been taxed and which were therefore not due, owing and payable. Set off could therefore not apply in any event. It was correctly rejected.

114. Maharaj vacillates about the precise amount owing to him by the company, and is uncertain of the company's solvency (which is understandable considering his removal qua director and his distancing from its affairs). But these facts do not militate against the patent and irredeemable deadlock which has arisen amongst the shareholders.

115. From the proven facts, fortified by the version advanced by the company in its affidavits in the preservation application and in this application, there is no longer any relationship of respect, trust or confidence between Maharaj, on the one hand, and Messrs Reuben and Narsi, on the other. Maharaj has been treated as an oppressed shareholder. There is no communication at all amongst the parties.

116. There has been a multiplicity of litigation, involving several applications before this Court, and a pending action in the South Gauteng High Court. Legal costs of great magnitude have already been incurred, (they exceeded R1 million in November 2014), and these costs were owing as far back as two years ago. Further costs will have been incurred for the two year period since November 2014.

117. There has been no constructive resolution to the prevailing impasse. There is no evidence in the papers of any employees being employed by the company, nor of any creditors who may be prejudiced by the grant of a final winding up order.

118. It is just and equitable for the company to be finally wound up, and without further delay. There is only one mechanism by which the paralysis may be alleviated and that is by the appointment of an independent liquidator, to take control of the affairs of the company and to investigate the veracity of all disputes raised by Maharaj in respect of, inter alia, irregularities in the dilution of his shareholding, the distributions to Reuben and Narsi, including the payment of management fees to them, the payment of all other disbursements, and the manner in which its affairs have been conducted generally.

119. The liquidator will also be seized with the duty to distribute amounts owing to creditors, equitably, in accordance with the laws of insolvency, having due regard to the concursus creditorum, and to distribute any residue to the shareholders in the appropriate proportions.

120. Judgment was accordingly granted on 2 November 2016 as follows:

a. The respondent is placed under a final winding up;

b. The costs of the application are costs in the winding up of the respondent.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA
15th **14 November 2016**

Appearances

Counsel for Applicant:	Adv JH Sullivan
Instructed by:	Attorneys Garlicke and Bousfield
For the Defendant:	Adv Singh assisted by Adv Singh
Instructed by:	Attorneys Naidoo Maharaj Inc