IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 48111/14

30/3/2016

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

30/3/2016 _____

DATE SIGNATURE

In the matter between:

PIETER DANIEL JACOBUS DU PLESSIS — APPLICANT

and

BONNOX (PROPRIETARY) LIMITED — 1st RESPONDENT

ANITA JULIA GENT — 2nd RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] In this application the applicant, Pieter Du Plessis, seeks to have the first respondent, Bonnox Propriety Limited, wound up in terms of section 344(h) of the Companies Act 61 of 1973 (the 1973 Act) read with item 9 of Schedule 5 of the Companies Act 71 of 2008 (the Act). In the alternative, the applicant seeks that the second respondent, Anita Gent, be directed to purchase the applicant's shares in the first respondent for an amount determined by an independent expert duly appointed by this court.

[2] In the notice of motion, the aforesaid is coupled with an order sought for the return of two wire fence making machines, namely the hinge joint no.250/1 machine and the hinge joint no.120 machine. This appears at prayer 8 of the notice of motion.

[3] From the outset the applicant conceded that the ownership of the machines mentioned above was riddled with factual disputes which could not be resolved on the papers. As such, the applicant requested that this portion of the dispute be referred to oral evidence. I will return to this issue latter in the judgment.

[4] This matter was initially heard on 7 October 2015. It transpired that the applicant had failed to serve the papers on the employee's and /or employee's union of the first respondent. A postponement was sought by the applicant with a tender to pay the costs as a result of their oversight. I granted the postponement for service to be effected upon the employees or their employer's union and I reserved the issue of the scale costs. The respondents naturally sought a punitive costs order, I do not propose to deal with the issue of costs at this stage but to I deal with it later in the judgment.

[5] All the papers were served upon the employees on 14 October 2015 and the employees filed their notice to oppose on 19 October 2015 together with their opposing affidavit. All the parties, inclusive of the employees, appeared before me on 23 November 2015 and the matter was argued. I now turn to the case at hand.

BACKGROUND

[6] A brief background is necessary to place things in perspective. Presently, the applicant and the second respondent are shareholders of the first respondent. The second respondent holds 53% shares whilst the applicant holds 47%.

[7] The first respondent was founded in 1962 by Mr Volker Harmen Shadewaldt (Shadewaldt) the father of the second respondent's father. The first respondent is in the business of making woven mesh fencing which are used at many game reserves.

[8] The applicant was employed by Shadewaldt from 1986 to 1994 when he obtained his first shares from Shadewaldt. By 2012 he had 47% shareholding having obtained the balance from other shareholders who sold their shares. The second respondent obtained her shares from her father in 1998 and was appointed as a non-executive director. The management of the business was in the hands of the both the applicant and Shadewaldt until Shadewaldt retired in 2010. The applicant managed the business on his own from 2010 until 2012 when he then became a director. He was the sole director until the second respondent actively took part in the business from 2013. Prior to 2013 Shadewaldt acted on her behalf until his retirement.

[9] The second respondent alleges that the applicant whilst in a position of trust opened up his own business, Blumnet, which produces a woven mesh fence called 'flower mesh', a product similar to that which the first respondent produces. Though business is in the applicant's wife name, the applicant is the master mind of this business, so the second respondent contends.

[10] The second respondent accuses the applicant of taking funds from the first respondent and depositing same in Blumnet's account as if it had been for services rendered. At some stage during the course of the applicant's employment with the first respondent there was a deal in place whereby the applicant had the first respondent manufacture the aforesaid fence on its behalf and sold it to Blumnet at a reduces rate, whilst Blumnet in turn sold it on the open labour market at more than 100% mark up to the public.

[11] The second respondent persists that the business that Blumnet conducts is similar to that of the first respondent and is in fact competing with the first respondent in that specific market.

[12] In 2013 business rescue proceedings were initiated by two of the first respondent's employee's. The application was not brought in the name of the applicant but in the name of two employees of the first respondent. He allegedly used his position of trust to lure these employee's to bring this application.

[13] This application was heard on an *ex parte* basis and an order was duly granted in the absence of the respondent's. The second respondent contends that the applicant was the master mind behind a business rescue proceedings. This, so the argument goes, was the applicant's attempt take control of the first respondent and strip directors of their power.

[14] The *ex parte* order was granted and the respondents eventually succeeded in having the order set aside. The second respondent submits that even though this was done, the first respondent was placed in a risky position during the process of the business rescue. When the *ex parte* order was set aside a punitive cost order was granted against the two employees. In good faith and in order to reconcile with the applicant the second respondent states that she proposed that the dividends that they would have attained for that period be paid towards the aforesaid costs order. Thus it amounted to the first respondent providing the monies for the shareholders to pay for the costs order that had initially been designed to cripple the first respondent. The second respondent states that effectively she contributed 71% to these costs whilst the applicant 29%.

[15] Ultimately the applicant, as an employee, was charged by the first respondent, for other misconducts. A disciplinary hearing was held and he was subsequently dismissed. The applicant is now challenging these disciplinary proceedings in the interim, even though he is not actively involved in the first respondent he has received his dividends and from 2013 to 2014 he has attained a total of R8 400 000.00.

[16] The applicant contends that all was well whilst he and Shadewaldt were running the business, as soon as the second respondent took an interest in the business she changed the manner in which the business had been run by the applicant and her father.

[17] She even went so far as to give her husband a portion of her shares and appointed him as a director, as such he was ousted out as together they held the majority shares and votes. The applicant submits was engineered in order to facilitate his dismissal and his eventual removal as a director.

[18] The applicant states that as he was no longer involved as an employee, manager or director, the relationship between him and the second respondent is acrimonious and without trust. The applicant states that the disciplinary proceedings, his dismissal from the first respondent and his eventual removal as a director is the second respondent's systematic campaign to oppress him.

[19] The applicant submitted that this has resulted in a deadlock between them and their relationship has broken down irretrievably.

[20] It is without a doubt that the relationship between the two shareholders has broken down irretrievably and is unable to be resolved. There are too many incidents that span over the length and breadth of the 2000 papers that are before me which confirm that the relationship between the parties as such has broken down irretrievably to such an extent that it cannot be resolved.

[21] It must be mentioned that it is not in dispute that the company sought to be wound up is solvent and is still carrying on business and at no stage were dividends not paid out to the applicant since his removal.

[22] During the course of these proceeding but before the matter was heard an offer, buyout offer, was made by the first respondent to purchase the shares of the applicant, as the second respondent was not in a position to purchase the applicant's shares. This offer was however withdrawn citing financial concerns.

[23] This, the applicant states is indicative of an acknowledgement by the second respondent that their relationship has irretrievably broken down.

SECTION 344(h)

[24] The application to wind up is premised on section 344(h) of the 1973 Act read with item 9 Schedule 5 of the Act. This section provides for a company to be wound up if "it appears to the court that it is just and equitable that the company should be wound up". The onus rest with the applicant in seeking a final order to satisfy the court on a balance of probabilities that it is indeed just and equitable to wind up the first respondent. The determination of whether to grant a winding up for just and equitable reasons is a discretionary one. The court, in my view, needs to examine the circumstances before it and establish whether it will be just and equitable in the widest sense and as it's a final order that is sought the degree of proof is higher than seeking a provisional order.

[25] It is trite that there are two considerations that need to be taken into account when winding up a small or domestic company. The first is when there is "justifiable lack of confidence in the conduct and management of the company's affairs...grounded on the conduct of the directors" which lacks integrity. See *Loch v John Blackwood Ltd 1924 AC 783(PC) and Ebrahimi v Westbourne Galleries Ltd 1972 All ER 492 at 500b-c*. Here the onus is upon the applicant to found a prime facie case. The second is where there is irreconcilable breakdown between directors of the company and there is no hope for co-operation between them in the future as was held in *In re Yenidje Tobacco Co 1916 2 CH 426 CA*.

[26] It is common cause that the first respondent is a solvent domestic company and as such it substratum, as set out above in the background, was that akin to a partnership. The applicant and Shadewaldt having been personally involved in the running of the business and sharing mutual confidence in each other in doing so.

[27] Even so it is still a company, as was stated by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd at 500a-h* " A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in." A domestic company, like the first respondent, may be wound up if it is found to be just and equitable in the particular circumstances. See *In re Yenidje Tobacco Co* and *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd and another 2008 (5) SA 615 SCA at para [18]* where Malan JA said "...Where there is in substance a partnership, in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding-up of the company under the just and equitable provision."

[28] It is in this in the above that the applicant finds solace in seeking a winding up of the first respondent on the premise that it is just and equitable in the circumstances of this domestic company.

APPLICANT'S CONTENTIONS

[29] The applicant contends that he is desirous of selling his shares in the first respondent. He alleges that the oppressive conduct of the second respondent towards him and the irreconcilable differences between them has placed him in a situation similar to a deadlock and his only option is to sell his shares.

[30] It is argued on behalf of the applicant that the second respondent has systematically ousted him from management and decision making of the first respondent. His suspension leading to his eventual dismissal and the refusal of the second respondent to supply him with management and financial information all contribute to oppressive conduct by the second respondent towards him.

[31] The case of the applicant is that the relationship of trust, honesty, mutual confidence and good faith, between he and the second respondent, has irretrievably broken down.

[32] What is notable is that each one blames the other for this breakdown.

RESPONDENT'S CONTENTIONS

[33] According to the respondent's the applicant is the one who brought about the situation that has resulted in the irretrievable breakdown of trust between the parties. The respondent's contend that the applicant comes to seek the winding up with unclean hands having been the instigator that caused the breakdown in the first place.

[34] It was argued for the respondent's, that in terms of clause 11(d) of the articles of association of the first respondent, the applicant has an alternative remedy. After giving the respondent's the right of first refusal, and having obtained a bona fide offer for his shares from a third party, he is not precluded from selling his shares to a third party. In this instance, so the argument goes, the applicant has not even attempted to pursue this avenue prior to seeking to wind up the first respondent.

[35] The respondent's contend that there are far too many factual disputes on the papers that cannot be resolved and as such an application for the winding up of the respondent should not be granted.

CLEAN HANDS

[36] It is well established that the party seeking relief to have a company wound up based on the just and equitable provision, needs to ensure that they come to court with clean hands. This however is not an absolute bar, as one need to look at this factor together with other factors of a specific case and then weigh all the factors in the general matrix of things. See *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA) at para [27] to [29].*

[37] In the case at hand the conduct of the applicant taking into account the *ex parte* business rescue application, the rescission application that had to be brought to have the rescue order set aside, the costs of the rescission which had to be paid from the company coffers and the fact that the applicant has a company in direct competition with the first respondent, these factors to my mind demonstrate that the applicant's conduct has been careered deliberately to bring about this irretrievable situation. Having done so he is now using this situation to his advantage to obtain the winding up of the first respondent.

DEADLOCK

[38] In *Thunder Cats Investments 92 (Pty) Ltd and Another at para [10]* Malan JA stated that "... The ordinary meaning of 'deadlock' is 'condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement or equal opposing forces". In this case the company has not come to a standstill, and is still being run on a daily basis eliciting a profit as dividends have been declared from year to year. The shareholding capacity of the applicant and the second respondent are not equal which could have resulted in a stalemate position, however even in light of the predicament that the company faces it has still been progressive, even in the face of the irreconcilable relationship.

[39] Further, clause 11(d) of the memorandum makes provision for the applicant to sell his shares to a third party once there has been a refusal to purchase from the respondents. The applicant has not even tried to venture down this path in finding a third party to sell his shares to.

[40] In these circumstances I cannot find that a deadlock exists to warrant a just and equitable resolve for the winding up of the first respondent as there is a solution to the sale of the applicant's share.

OPPRESIVE CONDUCT

[41] The allegations that the second respondent complains of being treated in an oppressive manner by the respondent's, in my judgment, has no merit. The applicant has not demonstrated that the first or second respondent's conduct towards him has been oppressive, unfairly prejudicial or his interests have been unfairly disregarded. See *Grancy Property and Another v Manala and others 2013 (3) All SA 111 (SCA)*.

[42] I concur with the respondent's that the "loss of confidence in the manner in which the company's affairs are conducted or the resentment at being outvoted or mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency" does not fall within the meaning of section 163.

[43] In the circumstances the applicant is not at liberty to invoke section 163 of the Act. This section empowers a court to grant relief to that party affected by the oppressive conduct of a company, director, or the business of the company.

[44] It would seem that the more involved the second respondent became in the management and affairs of the first respondent, the more she unearthed his misconducts committed during his reign at the helm. This in turn caused him to cry foul with regards to alleged oppressive conduct.

DISPUTES OF FACTS

[45] It has clearly been advanced by both parties that there are many disputes as regards the facts of this case. Both parties blame each other for not doing all and sundry in the best interest of the first respondent. It is trite that motion proceedings are not the correct forum to determine or resolve facts that are in dispute. See *National Directorate of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26].*

[46] This brings me to the relief sought by the applicant to have that portion of the disputed facts dealing with the return of the two machines referred to trial; this is exactly the nature of the other disputes that permeate these papers.

[47] Having recognised the need for this issue to be referred to trial it is evident that the respondent does not take issue on condition that the winding up is not granted as there will be no practical reason to do so if the winding up is granted. These machines being assets of the company will have to be accounted for by the liquidator, thus if there is a dispute then the winding up would need to be suspended until the latter dispute is resolved.

COSTS

[48] In these proceedings I am mindful that the employee's opposed the application and filed their necessary opposing papers. They also engaged the services of counsel who made submissions on their behalf.

[49] There is also the matter of the postponement that was granted to the applicant in order to serve the papers in this matter upon the employee's and/or employee's union. Those costs I had reversed the scale to be determined at this stage.

[50] I have considered the facts before me and I cannot come to the conclusion that a punitive cost order be issued for the postponement. It was, in my view, purely an administrative oversight and no mala fides was intended by the applicant. There is no basis for me to award punitive costs for the postponement. Thus the costs occasioned by the postponement are awarded on a party and party scale.

CONCLUSION

[51] For the reasons set out above the winding up application is dismissed with cost such costs to include the employment of senior counsel where such was employed. The employees who were also a party to the proceedings are entitled to their costs in opposing this application such costs to include the employment of counsel.

[52] The dispute regarding the ownership of the two machines, the hinge joint no.250/1 machine and the hinge joint no 120 machine, which are in the possession of the first respondent, is referred to trial.

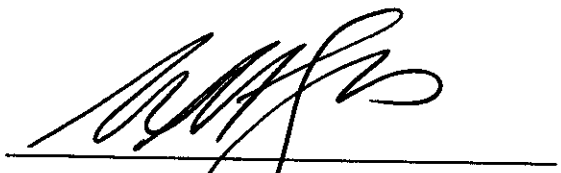
[53] Consequently the following order is made:

[53.1] The application to wind up the first respondent, BONNOX PROPRIETY LIMITED, is dismissed with cost. Such costs are granted on a party and party scale and are to include the employment of senior counsel.

[53.2] The applicant is ordered to pay the employees costs in opposing this application on a party and party scale and such costs are to include the employment of counsel.

[53.3] The applicant is to pay the costs of the postponement, granted in order to allow the applicant to serve this application on the employee's, on a party and party scale.

[53.4] The dispute with regard to the ownership of the two machines namely, the Hinge joint no.250/1 machine and the Hinge joint no.120 machine, is referred to trial.



W. Hughes
Judge of the High Court Gauteng, Pretoria

APPEARANCES:

For the Appellant:	Adv. A Subel SC
Instructed by:	David Bam Attorneys
For Respondent:	Adv. M P Van der Merwe
Instructed by:	VDMA Attorneys Inc.
Date of judgment:	30 March 2016