IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 11190/06

In the matter between:

THOMAS FREDERICK BOTHA	**Applicant**
and	
GEORGE SWITCHBOARDS CC	**Respondent**
and	
JOHANNES STEYL	**Intervening Party**

JUDGMENT DELIVERED THIS 23RD DAY OF FEBRUARY 2007

RILEY, AJ:

1. The applicant, Thomas Frederick Botha, one of two members of the respondent, George Switchboards CC (the intervening party being the other) launched an application for the liquidation of the respondent on 10th October 2006 which was heard on 26th October 2006.

2. The intervening party lodged an application to intervene, which was granted on 26th October 2006. In terms of the order of this court dated 26th October 2006 the application was postponed to 22 November 2006. The intervening party was given leave to file an opposing affidavit on/before 13 November 2006 and

the applicant was to file a replying affidavit on/before 20 November 2006.

3. Instead of filing opposing papers to the liquidation application, the intervening party launched a counter-application for an order that:

3.1 the applicant shall cease to be a member of the respondent from the date of this order; and

3.2 the applicant is ordered to pay the cost of this application as well as the cost of the liquidation application.

4. The counter-application was brought in terms of section 36(1) of the Close Corporations Act, No 69 of 1984 (hereinafter referred to as "the Act"). The applicant filed an answering affidavit to the counter-application raising two points *in limine*, namely that the intervening party failed:

4.1 to provide any or sufficient information to enable the court to exercise its discretion to make an order as contemplated in section 36(2) of the Act, which relates to the reasonable purchase price in respect of the applicant's members interest; and

4.2 to show that he would be in a position to pay any purchase price that the court may order to be paid in consideration for the applicant's members interest.

5. The intervening party filed a replying affidavit the day before the hearing on 22 November 2006, on which day, by agreement between applicant and the intervening party, the matter was postponed to the semi-urgent roll for hearing on 14 February 2007.

6. Even though provision was made for the filing of affidavits opposing the liquidation application by Friday 19 January 2007, no further papers have been filed.

7. At the commencement of the proceedings, Mr DC Joubert, counsel for the applicant, and Mr DJ Coetsee, counsel for the intervening party, advised me that both the applicant and the intervening party were in agreement that should the intervening party be unsuccessful in obtaining the order sought in terms of section 36(1) that I should make an order for the final liquidation of the respondent.

8. Mr Joubert brought two separate applications for the striking out of certain evidence from the founding affidavit in the counter-application deposed to by the intervening party and in respect of the replying affidavit in the counter-application deposed to by the intervening party.

9. For the reasons mentioned for the decision I have come to it is not necessary to deal with the applications to strike out separately.

10. The application for the liquidation of the respondent and the counter-application by the intervening party are set against the following background.

11. The applicant and the intervening party became business partners in 1995 when they purchased the respondent's enterprise. They both hold 50% members interest in the respondent.

12. The respondent is a manufacturer of electrical goods and also used to trade as a wholesaler of electrical goods and electrical products. As business partners and co-members of the respondent, they jointly managed the daily affairs of respondent. Applicant's duties related to marketing and the wholesale division, whilst the intervening party managed the production division, client relations and the financial aspects of respondent.

13. Over a period of time certain changes took place within respondent and applicant became more involved in the production division and with the employees of the respondent's factory. The intervening party remained in charge of finances, client relations and contracts, quality control and productions responsibilities. It is not disputed that this was the intervening party's forte and that he did well in the area under his control.

14. Over the course of the period that the applicant and the intervening party operated the respondent, it traded successfully and there has been good profits and growth. It is not disputed that respondent will continue to grow. At the time of the hearing of this matter it was argued that the annual turnover of respondent was R22 million.

15. It is common cause that over a period of time the relationship between applicant and the intervening party deteriorated for a variety of reasons and eventually culminated in a joint decision in November 2005 that they should terminate their business relationship. It is further common cause that by November 2005 the parties were unable to cooperate constructively in the running of the business. The parties attempted to resolve the termination of their working relationship

without having to approach the court for an order for the winding up of the respondent, but to no avail. The main dispute between the parties is the value to be attached to applicant's 50% members interest.

16. Almost a year has however gone by and the parties have failed to reach an agreement in respect of the value to be attached to the 50% members interest applicant holds in respondent. Mr Joubert, on behalf of the applicant, has contended that his client has done everything practically possible to resolve the matter, but was forced to approach the court for the winding up of the respondent on the basis that it would be just and equitable to do so.

17. Section 68(4) of the Close Corporations Act, No 69 of 1984, provides that:

"A corporation may be wound up by a court if - ...

(d) it appears on application to the court that it is just and equitable that the corporation be wound up ..."

18. The intervening party admits that a deadlock exists between himself and the applicant. In considering whether or not it is just and equitable that a close corporation is wound up a court is conferred with wide discretionary powers which must of course be exercised judicially taking into account all the relevant circumstances. (See Meskin Henochsberg on *The Companies Act* at p701).

19. I am mindful of the fact that it would not be just and equitable to wind up a commercially solvent company at the instance of a member who is also a creditor as in the present instance merely because of the existence of a deadlock between the members of a corporation. I accept that the existence of

a deadlock between members is but one of the factors to be taken into account in the light of all the circumstances.

20. With reference to the present matter, it is important to have regard to the reported cases dealing with the concept "*deadlock*". The principles regarding winding up of a "*domestic*" company, i.e. a company with a small membership where there is deadlock as a result of a collapsed relationship, is equally applicable to a close corporation. In *Moosa NO v Mavjee Bhawan (Pty) Ltd & Another* 1967(3) SA 131 (T) at 137-138, Trollip, J (as he then was) stated that:

> *"The 'deadlock' principle 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 relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running of the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement one or more of the members destroy that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up in the same way as, if they were partners they could claim dissolution of the partnership."*

The above approach was followed by our courts in *De Franca v Exhaust Pro CC (De Franca intervening)* 1997(3) SA 878 (SECLD) at 897A-B; *Geaney v Portion 117 Kalkheuwel Properties CC & Others* 1998(1) SA622 (T) 629I-630F and *Kanakia v Ritzshelf 1004 CC t/a Passage to India* 2003(2) SA 39 (D&CLD) at 46C-F and 54D-H.

21. In the present case the "*deadlock*" is illustrated by constant quarrelling between

the two members to the extent that there is reference to physical altercations, the members are not on speaking terms and essentially a total collapse of the relationship between the parties exist.

22. Mr Coetsee, who appeared on behalf of the intervening party, contended that even if I found that a deadlock exists between the parties that I was not obliged to make an order for the liquidation of the respondent.

23. Before dealing with the intervening-party's counter-application, it is necessary to look at the law relating to section 36 of the Act relating to the cessation of membership of a member of a close corporation by order of court:

> *"**36. Cessation of membership by order of Court.** –*
>
> *(1) On application by any member of a corporation a court may on any of the following grounds order that any member shall cease to be a member of the corporation.*
>
> *(a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;*
>
> *(b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;*
>
> *(c) that the member so conducts his or her in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or*
>
> *(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:*
>
> *Provided that such application to a court on any ground mentioned in paragraph (a)*

or (d) may also be made by a member in respect of whom the order shall apply.

(2) A court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to –

(a) the acquisition of the members' interest concerned by the corporation or by members other than the member concerned; or

(b) the amounts (if any) to be paid in respect of the member' interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

(c) any other matter regarding the cessation of membership which the court deems fit."

24. In his discussion on section 36(1) of the Act, Meskin Henochsberg on the *Close Corporations Act*, Issue 3, com 82, states that:

"A corporation is essentially a partnership between the members which as such (and unlike a partnership at common law) is a separate legal persona. The legislature's recognition of this fact is the reason for the enactment of these provisions. Its purpose is to empower the court to dissolve the association between the members without winding up the corporation on the ground that such would be just and equitable, as envisaged by S.68(d), in circumstances which, in the context of a partnership, would warrant its dissolution."

25. In *Kanakia v Ritzshelf 1004 CC t/a Passage to India, supra* at 48E Jali, J stated the following as far as section 36 of the Act is concerned:

"The provisions of section 36 may be invoked by a member of the close corporation. A member who makes the application under section 36(1) has the onus of proving that he is entitled to the relief which he seeks and it is incumbent upon him to place before the court the necessary evidence not only to enable the court to decide whether it should grant an order in terms of section 36(1)(a), (b), (c) or (d), but also to make any further order envisaged in section 36(2). (See Geany v Portion 117 Kalkheuwel Properties cc & Others, supra, at 631H-632A).

It is apparent that the enactment of the aforesaid provisions was to empower the court to dissolve the association between members without winding up the corporation on the grounds that such would be just and equitable as envisaged by section 68(d) in circumstances which, in the context of a partnership, would warrant its dissolution. (See Meskin Henochsberg on Close Corporations Act, Vol 3 (para 36.1)".

26. Similar sentiments are expressed by Nepgen, J in *De Franca v Exhaust Pro CC (De Franca Intervening)*, *supra*, at 896, where he stated:

"In fact it is in my view that it is highly probable that by enacting section 36 of the Act one of the purposes of the legislature was to create a mechanism whereby the inevitability of winding up can be avoided where a 'deadlock' situation exist between members. Even if that was not the specific intention of the legislature section 36 of the Act clearly has such result. A member who makes the application envisaged by section 36(1) bears the onus of proving that he is entitled to the relief which he seeks and it is incumbent on him to place before the court the necessary evidence not only to enable the court to decide whether it should grant an order in terms of section 36(1)(a), (b), (c) or (d), but also to make any further order envisaged by section 36(2) ... Similarly a member who opposes an application by another member for the winding up of the corporation on the grounds that a remedy other than winding up is available to the application or that the applicant is acting unreasonably bears a similar onus of proof to that envisaged by section 347(2) of the Companies Act. The applicant should also set out by way of notice of motion or other appropriate manner the precise relief sought."

(1) (See Meskin Henochsberg on *The Close Corporation Act*, Vol 3, Issue 2, com 83).

27. Mr Coetsee, however, argued that the intervening party had made out a case for an order in terms of section 36(1) of the Act on the basis that:

27.1 the applicant had absconded from the business; and

27.2 that even though applicant had absconded respondent was making a profit;

27.3 respondent provided employment for 41 people; and

27.4 the intervening party had been operating the business on his own for six months.

28. He argued further that the intervening party need not establish conduct of the nature referred to in section 49 of the Act, namely conduct affecting him, but rather that applicant's conduct is affecting the business of the respondent.

29. Mr Coetsee argued that applicant's conduct towards the intervening party has caused respondent to be affected and that since the applicant's departure respondent has been doing better than before.

30. Mr Joubert contended, on behalf of applicant, that it was not clear on which subsection of section 36 the intervening party relied on. He correctly argued that based on the facts of this case that the provisions of section 36(1)(a) requiring permanent incapacity is eliminated as the intervening party's 's cause of action.

31. In regard to the further subsections of section 36 it is clear that to succeed the intervening party is required to show a degree of culpability on applicant's part. There exists numerous disputes of fact between the parties as to who and/or what precisely the cause is of the breakdown in their business relationship. I am, however, satisfied that the disputes of fact are such that it does not require me to refer this matter for oral evidence if I have regard to the evidentiary rule applied in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

32. On the evidence I find that applicant's explanation that he had withdrawn from the business as the situation had become completely intolerable due to the lack of communication and the tension between them, the arguments between them and the undermining of his authority, is completely reasonable. In any event on the intervening party's own version, applicant's absence from the business has not affected the business prejudicially at all. On the intervening party's version the business has in fact done better in the absence of applicant. I am accordingly not satisfied that the intervening party has proved culpability on the part of the applicant as envisaged by the provisions of subsections (b), (c) and (d) of section 36.

33. I now turn to the issue relating to the payment of 50% members interest held by applicant in the respondent. One of the solutions to the deadlock was for applicant to sell his members interest in the respondent to the intervening party. The parties are in agreement that this was the only practical way to deal with the problematic situation they found themselves in. The parties could, however, not reach an agreement as to the value to be attached to the 50% membership interest held by applicant in the respondent.

34. What appears from the papers is that the parties had considered selling the respondent to a third party at a purchase consideration of R10 million. Nothing, however, came of those negotiations. The intervening party then offered applicant R5 million less his half share of respondent's liabilities in settlement of his 50% members interest. The applicant was, however, adamant that he would accept no less than R5 million for the 50% of his members interest. This caused

a "*deadlock*" between the parties as to the value of applicant's 50% members interest.

35. The intervening party averred that applicant was holding up the settlement process by refusing to sign the 2006 financial statements, whilst applicant averred that since he required further information relating to how the financials were prepared that he was not prepared to sign it. I am not convinced that the signing off of the 2006 audited financial statements would have assisted or resulted in the determination of a value to be attached to the applicant's 50% members interest in respondent.

36. What is clear is that up until the stage that the matter was argued in court that neither of the parties had obtained an independent valuation of the 50% members interest of applicant in the respondent. Mr Joubert argued in this court that since it was the intervening party who requested the cessation of applicant's membership and since he, by implication, wanted to acquire the 50% members interest, that the *onus* was on him to obtain such a valuation, to present to this court.

37. In the present matter the intervening party has merely asked the court to make an order that applicant ceases to become a member of the respondent. Mr Coetsee argued that once I exercise my discretion in favour of ordering a cessation of applicant's members interest that I should then exercise my discretion to make further orders as is provided for in section 36(2) of the Act. He argued that based on the financial reports for the years 2004 and 2005 I should find that the net asset value of the respondent is not R10 million, but in

fact R5.8 million as at 31 March 2006. He stated that I should rely on the signed financial reports for the years 2004 and 2005, as well as unsigned financial reports for the year 2006. This, he argued, would place me in a position to make a finding as to whether the intervening party should pay applicant his members interest and , if so, how much.

38. In the event of an application in terms of section 36 proceedings, the court must also be placed in the position to be able to consider whether or not to make an order in terms of section 36(2) of the Act which decision, according to the judgment in *De Franca v Exhaust Pro CC*, *supra*, at 896G-H:

> *"... can only be exercised if there is sufficient information before the court to enable it ot decide whether or not to make such order."*

39. In *Geaney v Portion 117 Kalkheuwel Properties cc & Others*, *supra*, Kirk-Cohen, J stated at 631H that:

> *"A member of a close corporation seeking to invoke the provisions of section 36(1)(d) quite obviously bears an onus to prove the relief he seeks. He must set out the relevant facts to place the court in a position:*
>
> *(1) to decide whether on the facts it can and should grant an order in terms of subsections (1)(a), (b), (c) and (d);*
>
> *(2) to carry out its functions in terms of subsection (2) and, in particular, to decide what financial adjustments should be made ..."*

further at 632B-C:

> *"The furthest the second respondent has gone is to tender an amount which he claims to be equal to the applicant's loan account ... The second respondent has not placed any evidence before this court upon which an order can be made in terms of section 36(2) ..."*

40. I agree with Jali, J in *Kanakia v Ritzshef 1004 cc t/a Passage to India*, *supra*,

where he states at 50I-50A:

> *"If the second respondent wants to purchase the applicant's interest, he should offer an amount which he can prove to be the correct amount payable in lieu of the applicant's interest. I agree with Mr Harcourt that this approach by the second respondent smacks of a member of a close corporation who wants the court to hand over the close corporation to him without paying any consideration for the members interest. It is clear that, in terms of the provisions of the Act on which he relies, he bears the onus of making out a case to this court as to the basis of his order and the nature of the order which he seeks."*

41. In the present case I agree with Mr Joubert that the intervening party has not only failed to provide sufficient information other than referring to the financial statements as at 31 March 2004, 31 March 2005 and 31 March 2006, but has conceded that "*the amount of such payment for the applicant's members interest has not yet been determined*".

42. I find that this concession on its own is fatal to the intervening party's counter-application. A court should not be required to speculate or guess what the value of a members interest is. The value of the 50% members interest should be clear from the information provided by the intervening party. I would certainly not be exercising my discretion judicially should I determine the value of applicants 50% members interest based on the information provided to me by the intervening party.

43. Mr Joubert contended that there was a second compelling reason why the intervening party's application should fail. He was of course correctly referring to the requirement that an applicant who asks for an order in terms of section 36(1) of the Act must show that he has the financial means to pay whatever

consideration the court finds to be appropriate. (See in this regard *De Franca v Exhaust Pro cc*, *supra*, at 894I-895B).

44. In the present case, the intervening party has not only failed to provide evidence of his ability to pay such consideration, but admits that he is *"at this stage not able to state that I would be able to pay that price in cash"*. This statement in itself illustrates the uncertainty about the intervening party's ability to comply with the obligation he has in terms of section 36(2) should the court have made an order in terms of section 36(1) of the Act.

45. If this court is to grant the order sought in the counter-application the court must be satisfied that all the evidence which is placed before the court leads the court to the conclusion that it would be appropriate for it to grant such an order.

46. I am not satisfied with the evidence that the intervening party has placed before me as I am unable to make a determination of the value of applicant's 50% members interest. I am accordingly satisfied that for the reasons mentioned above that the counter-application, in terms of section 36 of the Act, must fail.

47. I am convinced that based on the facts and circumstances hereinbefore set out that the relations between the applicant and the intervening party has broken down irretrievably and that the deadlock cannot be resolved. Accordingly, I find that based on the principles referred to hereinbefore that it is just and equitable on this basis to wind up the respondent.

48. I find that applicant has shown a *prima facie* case for a provisional winding up

order in respect of the respondent.

49. In the result, I make the following order:

49.1 The respondent close corporation is hereby placed under provisional liquidation in the hands of the Master of the High Court.

49.2 A *rule nisi* is hereby issued calling upon all interested persons to show cause, if any, to this court on Thursday 12th April 2007 at 09h30:

49.2.1 why the respondent close corporation should not be placed under a final liquidation order; and

49.2.2 why the cost of the application should not be costs in the liquidation.

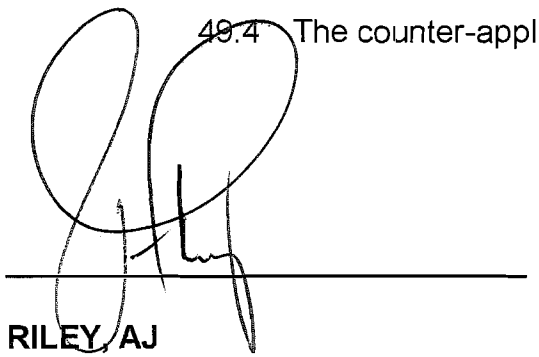
49.3 Service of this order is to be effected as follows:

49.3.1 at the registered head office of the respondent;

49.3.2 by one publication forthwith in each of the Cape Times and Die Burger; and

49.3.3 by registered post on each of the known creditors of the respondent (including SARS) with claims in excess of R5000,00.

49.4 The counter-application is dismissed with costs.



RILEY, AJ