Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)

CASE NO: 13049/13

In the matter between:

NAVIGATOR PROPERTY INVESTMENTS (PTY) LTD	Applicant
and	
SILVER LAKES CROSSING SHOPPING CENTRE (PTY) LTD	1st Respondent
THE COMPANIES AND INTELECTUAL PROPERTY COMMISSION	2nd Respondent
MICHAEL JOHAN VON BACKSTROM N.O	3rd Respondent
MICHAEL GEORGE VON BACKSTROM N.O	4th Respondent
ALIDA-LOUISE VON BACKSTROM [In their capacities as trustees of the MICHAEL VON BACKSTROM FAMILY TRUSTReg. no. IT6582/1994	5th Respondent
ANNE –MARGARET VON BACKSTROM N.O	6th Respondent
ALIDA MARLYN HESTER VON BACKSTROM N.O [In their capacities as trusteesof the GEORGE VON BACKSTROM FAMILY TRUST Reg. no. IT 1209/1994]	7th Respondent

Date of hearing: **30 October 2013**
Date of judgment: **30 April 2014**

JUDGMENT

NDITA, J:

[1] This is an application for the winding up of the first respondent, a solvent company, in terms of the section 81(1) (d) (i) and (iii) of the Companies Act 71 of 2008 ("the Act") on the basis that the directors of the first respondent are deadlocked in the management of the company and the shareholders are unable to break the deadlock as a result of which the company's business cannot be conducted in the interest of creditors. Accordingly, the applicant contends that it is just and equitable that the first respondent be wound up. Alternatively, the applicant seeks an order placing the company under supervision and the commencement of business rescue proceedings in terms of section 131(7) of the Act. As a further alternative, the applicant applies, on account of alleged prejudicial conduct , for a receiver to be appointed to the company in terms of s 163 of the Act, to continue any part of the business of the company which may be necessary for its beneficial winding up. The relief is sought as a result of a deadlock

between the directors of the company and the overall breakdown of their relationship *inter se*. The application is not opposed by the company, the first respondent. The second respondent, The Companies and Intellectual Property Commission also does not oppose the application. No relief is sought against it. The rest of the respondents are the intervening parties and for ease of reference, they are for the purpose of this judgment, referred to as the respondents.

[2] The applicant is Navigator Property Investments (Pty) Limited, a company duly incorporated in accordance with the laws of the Republic of South Africa, with its registered place of business at Mazars House, Rialto Road, Grand Moorings Precinct, Cape Town. The applicant holds 50% of the issued share capital in the first respondent. The applicant is a subsidiary of Catalyst House Fund (Pty) Ltd which is part of the overall Catalyst Group of Companies ("the Catalyst Group"). The Catalyst Group consists of a number of companies whose operations encompass virtually every aspect of the property industry and was formed in 1998.

[3] The first respondent is Silver Lakes Crossing Shopping Centre (Pty) Limited, a company duly registered in accordance with the company laws of the Republic of South Africa with its registered office at Mazars House, Rialto Road, Grand Moorings Precinct, Century City, Cape Town. It carries on business as a property development and investment company and is the registered owner of an immovable property which comprises the Silver Oaks Shopping Centre, Life Healthcare Centre ("Phase 1"), Northern Lofts ("Phase 2"), McCarthy VW ("Phase 3"), Tiger Wheel and Tyre ("Tiger Wheel") as well as approximately 67132m2 of vacant land situated in Willow Acres, Gauteng. The directors of the applicant are Heather Wallace, Jonathan David Broll, Royden David du Plooy, Jason Keith De Wilde, Hannchen Elizabeth Louw and the deponent to the founding affidavit, Ian Charle Halle. The shareholding in the first respondent is held as follows:

1. The George von Backstrom Familie Trust – 25%. The sixth and seventh respondents are the trustees for the time being.

2. The Michael von Backstrom Familie Trust – 25%. The trustees are the third, fourth and fifth respondents.

According to the Shereholder's agreement concluded between the first respondent's shareholders, the trusts are entitled to appoint one director each to the first respondent's board and the applicant is entitled to appoint two directors to the said board. The applicant appointed as directors Edward Alan Wallace and Roux Petrus Johannes Gerber. The trust appointed the third respondent and George von Backstrom who, after his death was replaced by the sixth respondent. The current directors of the first respondent are the third respondent, the sixth respondent, Louw and Halle.

[4] The first respondent is a joint venture between the trust and the applicant and was formed in order to acquire and develop the land on which the shopping complex centre is situated. On 10 June 2005, the trust and the applicant concluded the shareholder's agreement. The shareholder's agreement reflects that it was the intention of the applicant and the trusts that the first respondent would acquire ERF 677, Extension 13, Willow Acres and Erven 679 and 680, Extension 14, Willow Acres ("the land") from a company known as MJW Ontwikkelings (Pty) Ltd ("MJW"). To this end, Clause 4 of the Shareholder's agreement reads thus:

"4. Development of the Immovable Property

4.1 The Shareholders shall procure that the Company carries out the development of the Immovable Property substantially in accordance with the Baseline Document.

4.2 There shall be no material deviation from the Baseline Document without the written consent of the Shareholders holding not less than 75% (Seventy Five percent) of all issued shares in the capital of the company which consent shall not be unreasonably withheld or delayed.

4.3 The company shall appoint Syfin as the development manager of this Development and Syfin shall act as the lead party in regard to the Development, but the management and control shall vest exclusively with the company."

According to the shareholder's agreement, the development was to be financed by way of a loan from a financial institution, but if the amount loaned proved to be insufficient, the shareholders were entitled to lend the shortfall funds to the respondent at Nedbank's prime overdraft rate plus 2%. The supplementary funds were provided by Rowmoor Investments 567 (Pty) Ltd, a wholly owned subsidiary of the applicant. Clause 21 of the shareholders' agreement regulates the relationship between the shareholders and provides as follows:

"21 Quasi-partnership

Shareholders shall owe to each other a duty of good faith at all times. Their relationship shall be construed as that of quasi_partners provided, however, that this agreement shall not constitute a partnership between the parties in any shape or form, nor shall any party be entitled to incur any liability or obligation on behalf of any other party save as expressly provided in this agreement."

[5] It is common cause that after the conclusion of the shareholder's agreement, the first respondent acquired land from MJW for an amount of R10 million. The acquisition and proposed development of the land was financed through a loan finance of R72 million obtained from ABSA bank. ABSA granted the first respondent a R22 million loan facility for the development of phase 3 and in April 2008, a further R6.1 million for the development of Tiger Wheel developments. The overall amount procured from Absa for development was R149,8 million. Taking the aforegoing into account, it stands to reason that the meeting of the shareholders and directors was pivotal for the administration of the first respondent.

[6] In terms of the shareholder's agreement, a quorum for any meeting of the first respondent's directors shall be three directors, provided that one director appointed by either one of the trusts and

one director appointed by the applicant are to be part of the quorum. Halle avers in the founding affidavit that for some considerable period, the holding of directors' meeting was problematic to such an extent that from September 2010 to August 2012, board meetings could not be held. Due to a dispute between the deceased George von Backstrom and the third respondent, the third respondent refused to attend board meetings. Nevertheless, the first respondent continued operating the business of the shopping centre. During the aforementioned period, the applicant's directors and the managing agent, Broll Property Group ("BPG") held eight meetings (termed 'Manco meetings') to which the third respondent and George were invited. The third respondent attended only one of those meetings. Although operational decisions were taken at the *Manco* meetings, no strategic or policy decisions could be taken regarding the first respondent. This is so because the *Manco* meetings could not replace properly constituted board meetings. After the death of George van Backstrom and the appointment of his daughter, the sixth respondent in his stead, a board meeting was held on 9 October 2012. However, subsequent to that meeting, both the third and sixth respondent refused to attend any further meetings. Halle alleges that

the non-attendance by the third and sixth respondents yielded negative consequences for the first respondent.

[7] In April 2006, the first respondent had purchased further immovable property from MJW, being Portions 130, 135, 136 and 133 of the farm Zwartkoppies 364 Willow Acres for an amount of R21 053 250.00 for the purpose of development. During 2008, the third respondent and George von Backstrom began to express dissatisfaction with the fact that the vacant land had not been fully developed. The third respondent as averred by Halle, was of the view that the failure to develop the land amounted to a breach of the *"baseline document"* referred to in the shareholder's agreement. According to Halle, although there is reference to such a document, a diligent search of the records was unsuccessful. Neither did the third respondent produce it. What Halle did find was a feasibility document setting out the different stages for the development of the land. It seems that the third respondent's main complaint with regard to the undeveloped land is that the purchase price paid by the respondent to MJW for the vacant land was too low as there had been no *'value add'* by Syfin as originally envisaged. Put differently, the third

respondent seeks what is referred to as the *'agterskot'* (top-up) for the undeveloped land. Halle states that various meetings were held between the shareholders in an attempt to find harmony between them as the *agterskot* issue had caused discontent, but no avail.

[8] On 26 June 2012, and at the request of the third respondent, a meeting was held. In attendance were Halle, two representatives of BMG as well as one representative of the applicant. Various issues pertaining to the running of the first respondent were discussed. Amongst the issues raised by the third respondent was the agterskot. At this meeting, the third respondent made it known that he would neither vote nor co-operate in regard to the sale of vacant land and future developments until such time that the agterskot issue had been resolved. At a subsequent meeting, the third respondent **levelled** accusations of fraud and embezzlement on BPG and called for its replacement as manager of the first respondent. He proposed that BGP be replaced by J\HI Property Management but the proposal was rejected. Several meetings were thereafter held wherein the sale of the shopping complex was raised and discussed. The third respondent was adamant that the trust would not agree to a sale until

the ‘agterskot’ dispute had been settled to his satisfaction. On 15 April 2013, an informal meeting of shareholders was again held and Broll presented an offer from the South African Corporate Real Estate Fund for the purchase of the Silver Oaks Shopping Centre and the Life Care Centre portions of development for an amount of R156 million. The third respondent once again refused to co-operate in the light of lack of resolution regarding the ‘agterskot’ dispute. Accordingly to Halle, the third respondent threatened that the first respondent would be placed in liquidation. The minutes of the meeting show that the third respondent stated that:

“Our tolerance with all your stalling has now reached the zero level. Be forwarned that we will place the Company in provisional liquidation by the snap of a finger if further provoked by any further Co issues.”

“The consequential financial damage suffered by us due to your stalling tactics on above matter has cost us dearly. Since the beginning of June 2012 till now 11 months have lapsed. Thus 30 flats @R5 500.00 pm x 11 months lack of revenue equals R1, 518 000.00 to date. All of this just because you are attempting to inflict pain due to our persistence of the Forensic audit against your company due to fraud and embezzlement brought onto yourselves. You have been withholding your signature representing only 1% additional shareholding so dearly needed by us in order to commence the launching of our project. All of that whilst you remain in breach of the Vacant Land Agreement.

"This very same financial loss will be discounted by us and recovered in whatever negotiation we might enter into in order for reaching a divide, justifiable or not. Whatever, I promise you there will be a rebound. That one can make such an issue of something so minute though so easily resolvable is really despicable reflection of your character."

. . .

Halle avers that in consequence of the threats and accusations, the relationship between the applicant and the trust has completely broken down. On 2 May 2013, Broll was telephonically advised by attorneys E W Serfontein & Associates, (who he believed were acting for the third and sixth respondents) to the effect that they had received instructions to wind up the first respondent.

[9] A further notice of a proposed meeting of the first respondent's board of directors to be held on 19 July 2013 was circulated. The sixth respondent declined the invitation to attend the meeting as she had heard of it from the third respondent having not received any invitation. The third respondent in a letter dated 19 July 2013, stated that he would not be attending the meeting. He stated that:

". . .

I hereby record that, since both Ann and myself will not attend the meeting, there will be no required quorum of directors present at the meeting, either in terms of the Articles of Association of the company or the Shareholders Agreement. As you know, the Shareholders Agreement requires three directors to be present at any director's meeting, of which at least one should be appointed either by MVB Trust of the GBV Trust, which director must at all times be part of the quorum. Since you will not have the quorum, the meeting will not be able to proceed and cannot be held at all.

Apart from the aforementioned issues we have with the proposed directors meeting, I have on numerous occasions made it clear that I refuse to attend any director's meetings, since meetings held in the past have all culminated in a deadlock situation, due to the fact that Ann and myself differ from you and the other directors on material issues in regard to the company's affairs.

In fact, the impasse reached between Ann and myself on the one hand, and the directors appointed by Catalyst on the other hand has the management of the company impossible. Catalyst's directors apparently only have the interests of Catalyst at heart, with scant regard for that of the company in general. As far as I am concerned, the directors appointed by Catalyst are pawns controlled by Catalyst, who are manipulated to serve only the interests of Catalyst. I wish to record my disgust with the subjective, one sided and blatantly unfair manner in

which meetings have been conducted in the past by Catalyst's directors (even the minutes have been fabricated to suite Catalyst!).

I do not see my way clear in continuing working with the directors and there is absolutely no point in holding meetings. I have lost all faith and trust in my co-directors and as far as I am concerned, you have acted in breach of your fiduciary duties towards the company and there is quite clearly a conflict of interests since, as I have stated, you apparently consider the interests of Catalyst to be paramount to that of the Company.

. . .

Finally, I advise you that I have instructed my attorneys to proceed with the Liquidation of the company, or refer the matter to arbitration in terms of the Shareholder's agreement, in view of the clear deadlock in the management of the company as well the conflicts of interests to which I have referred above."

The sixth respondent addressed an email to the applicant on 29 July 2013 stating that:

". . . As for your comment pertaining to director's meetings, clearly you are fully aware of the total existing "deadlock" as well the reasons for such. You have been informed, on numerous occasions of our refusal to attend any further director's meetings, as Mr Halle,always makes sure, that our meetings are fruitless and ultimately, a waste of everybody's time. Our view has not changed on this, and I hereby implore you, not to call Director's meetings again. We will only be attending Shareholder's meetings."

[10] Halle avers that the impasse has affected the first respondent detrimentally in several ways. For example, the directors are unable to approve the annual financial statements for 2011 to 2012 of the first respondent. Similarly, there is a deadlock with regard to the appointment of auditors. The board is split evenly between the directors nominated by the applicant, on the one hand, and the directors appointed by the von Backstrom trust on the other. All of these factors result in the first respondent's business not being conducted to the advantage of its shareholders. In addition, the deadlock pertaining to the holding of the meetings renders it virtually impossible to effectively attend to the affairs of the first respondent. For all these reasons, according to Halle, it is therefore just and equitable that the first respondent be wound up due to the deadlock. If the winding up is not the proper course of action, it is equally just and equitable that an order be granted placing the first respondent under business rescue proceedings.

The Respondent's answering affidavit

[11] In opposing the application, the third to seventh respondents raise three points *in limine*. Firstly, the third respondent alleges that this court has no jurisdiction to adjudicate this matter as the first respondent's principal place of business is situated at Willow Acres, Gauteng Province. In the answering affidavit, the deponent, Michael von Backstrom states that:

"[A] company must continuously maintain at least one office in the Republic of South Africa and must register the address of its office or its principal office."

He further alleges that:

"At all relevant times the status quo was maintained:

11.1 The company's principal place of business and principal asset was the Silver Oaks Shopping Centre at Willow Acres, Gauteng.

11.2 All board meetings for the company was [sic] held in Pretoria.

[11.3 All administrative and management functions of the first respondent was [sic] conducted at Pretoria, firstly, at the office of the centre administrator at the shopping centre and thereafter, at an office block adjacent to the property of the first respondent in von Backstrom Boulevard, Silverlakes, Pretoria and thereafter, at the offices of the Broll Property Group."

Secondly, the respondents aver that the deadlock existing between the directors of the company is not a ground for winding up in terms of s 81(1)(d) of the Act. In advancing this contention, the respondents

rely on clause 13 of the Shareholders agreement which provided as follows:

"**13 DEADLOCK**

13.1 If in terms of the aforegoing provisions, if the required majority for the passing of a director's resolution cannot be obtained, such particular resolution only shall cease ipso facto to be within the directors' domain and shall be put to the shareholders.

13.2 If in terms of the aforementioned provisions, there is a deadlock between the shareholders, a dispute shall be deemed to exist between the shareholders which shall be dealt with as contemplated in clause 25. Any such deadlock shall not constitute a ground for the winding-up of the company.

13.3 Any dispute between the shareholders shall be subject to the same mediation and arbitration procedures under clause 25 hereunder."

Furthermore, the applicant launched the present application without invoking the deadlock-braking mechanisms provided for in the shareholder's agreement. Thirdly, the alternative relief sought by the applicant, namely, that the first respondent be placed under business rescue is inappropriate as the first respondent is not in financial distress. Fourthly, the further alternative relief requiring the appointment of a receiver in terms of the provisions of s 163 (1) of the

is not appropriate as the said provisions are not applicable because the section primarily protects the interests of minority shareholders and the applicant is not.

[12] The main reason advanced by the respondents for opposing this application is that the winding up of the first respondent on the basis of deadlock on the part of the directors is unjustified. According to the respondents, notwithstanding the deadlock between the directors, the first respondent functions normally and profitably on a day-to-day basis. This is the case even without any intervention by the auditors, as is provided in the shareholder's agreement. At this point, I divest, to deal with the allegation made by the respondents in paragraph 35 of the answering affidavit to the effect that the allegations made by Halle fall outside the scope of his personal knowledge and ought to be struck out and be disregarded as they are irrelevant and unfounded and constitute no more than inadmissible hearsay evidence. It must be stated from the outset that no formal application was brought to strike out those paragraphs alleged to constitute hearsay evidence. Furthermore, the averment relating to the striking out lacks sufficient particularity to enable this court to

discern with precision the aspects of Halle's evidence which falls outside the scope of his knowledge.

[13] At the heart of this application is the dispute between the shareholders with regard to the undeveloped vacant land and the 'agterskot'. The development of the land was, according to the respondents, supposed to have been completed by December 2007 but the undeveloped land to date totals +- 67 133 square metres. The respondents aver that in the prospectus for the development of the Silverlake Crossing Shopping Centre (Pty) Ltd, it was specifically recorded that clause 1.2.9 of the shareholder's agreement would be amended by the deletion of the existing clause and replacement thereof with the following:

"1.2.9 Baseline document means any document or documents prepared by the development manager from time to time detailing the concept and feasibility of a development in respect of one or more of the immovable properties, and approved in writing by all shareholders."

The respondents aver that the above is proof of the existence of the baseline document. They suggest that the applicant is in possession of the said baseline document, and in order to restore normalcy in the relationship between the parties, the applicant must produce it. In

addition, once the issue of the regarding the development of land is squarely addressed and resolved, the relationship between the directors should improve. Besides, the fact that no further development was done placed the first respondent at a disadvantage.

[14] The respondents concede that the director's meetings have been problematic for quite some time. The third respondent alleges that this is largely due to the directors appointed by the applicant, who made it impossible for fruitful director's meetings to be held. One of the problems giving rise to the deadlock according to the applicants is the appointment of the BPG, 'a related company to the applicant', as the management agent of the first applicant. The respondents allege that it has been proved that BGP has been overcharging the applicant. Even though BGP has made repayment for its overcharging to an amount of R886, 180.92 to the first respondent, a further amount of R849, 594.41 is, according to the third respondent's calculation, due.

[15] Responding to the threats of liquidation allegedly made by the third respondent, he stated that:

"I am of the view that the breakdown does not really lie between the shareholders, but rather between the present directors of the first respondent. I was very upset as certain issues had been dragging on for a long time and had not been resolved. The directors appointed by the applicant to the board of the first respondent do not have any real mandate and not contribute meaningfully to directors' meeting."

. . .

"At the time I was extremely upset. I have changed my mind. I have, in fact, always attempted to advance the interests of the first respondent and will in future continue to do so."

The tone of the respondents' averments is simply that although there are numerous issues causing discontent within the management of the first respondent, and these have not been resolved, but that does not justify the liquidation of the first respondent.

The Replying Affidavit

[16] In reply, the applicant assailed the respondent's reliance on the shareholders' agreement provision stating that deadlock shall not constitute a ground for winding up. According to the applicant, the provision cannot override the statutory relief the applicant is entitled to. The applicant further reiterated that the first respondent cannot operate without a functional and effective board. The applicant

attached to the replying affidavit certain documents indicating ongoing communication between the parties' attorneys relating to the sale of the shopping centre, the undeveloped land, the baseline document and the request by the third respondent for certain documentation in terms of the Promotion of Access to Information Act whilst these proceedings were still pending. For the purpose of this judgment, I do not intend to make much reference to these documents as the issue before this court is crystal clear, it is whether or not the relationship between the parties at the time of the hearing was deadlocked to the extent that the winding up of the first respondent is justified.

[17] The applicants deny that there has been any attempt by the intervening party to resolve the dispute that resulted in the deadlock amicably and states that despite the allegations of an existing dispute, no formal claim against the applicant has ever been made which would be capable of resolution by way of the provisions of the shareholder's agreement. Regarding the 'agterskot' claim, the applicant stresses that this claim would lie in the hands of MJW, the seller of the land, not the respondents. In similar vein, any such claim

would lie against the first respondent as the purchaser of the land, not against the applicant. In any event, so avers the applicant, the dispute falls outside the dispute resolution mechanisms contained in the shareholder's agreement. Even if it did, numerous shareholders' meetings were held but did not result in the resolution of the situation. Furthermore, that the first respondent trades profitably does not form the basis of the present application. The applicant denies that Broll advances the interests of the applicant.

The points *in limine*

[18] I have indicated in this judgment that the respondents raised several points *in limine*. I deem it prudent to first deal with the first one relating to this court's lack of jurisdiction because if this court finds that it is well-taken, it is dispositive of this application. The main thrust of this contention is that in terms of s 23(3) of the Act, a company must continuously maintain one office in the Republic of South Africa and must register the address of its offices or its principal office if it has more than one office. To this end, it was argued that the first respondent's principal place of business and principal asset is the Silver Oaks Shopping Centre situated at Willow

Acres, Gauteng. In addition, all its administrative and management functions were conducted in Pretoria. For this reason, the principal office is in Gauteng.

Section 23(3) provides that:

'(3) Each company or external company must –

(a) continuously maintain at least one office in the Republic; and

(b) register the address of its office, or its principal office if it has more than one office-

(i) Initially in the case of-

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) and external company, by providing the required information when filing its registration in terms of subsection (1); and

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.'

[19] The Act does not define the term 'principal office'. Binns-Ward J in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) para 18 considered the meaning of the term and held that:

"Section 23(3) of the 2008 Act makes it clear that the registered office must be an office maintained by the company, and not the office of a third party used for convenience as a registered office."

Both the applicant and the respondents allege that their respective offices are the principal offices. In the founding affidavit, the applicant makes the following averments:

"The first respondent's centre of administration and principal office is at the Catalyst head office situated at 4th Floor, Protea Place, corner Protea Road and Dreyer Street, Claremont Cape Town. All of the audit field work in respect of the first respondent, the drawing up of the first respondent's accounts, and its company secretarial work takes place in Cape Town. The first respondent prepares VAT and Income Tax returns for submission to SARS In Cape Town. The respondent's bank account is managed and administered at the ABSA Capital division in Cape Town. All negotiations with the first respondent's bankers in regard to the financing of the development and all annual reviews also take place in Cape Town."

The applicant admits that the first respondent carries on business as a property development and investment company and is the owner of immovable property, **including the first respondent**, in Gauteng. A Companies and Intellectual Property Commission report reflects that the company's registered office is at Mazars House, Rialto Road, Grand Mooring Precinct, Century City, 7441. It therefore is not in

dispute that in terms of s 1 of the Act, Cape Town is the office registered by the company in terms of s 23 as its 'registered office'. It is however similarly not in dispute that there are functions performed by the company's managing agent, BPG, which are conducted on-site in Gauteng. The Act requires that the registered office must be the company's only office. In *casu*, it is clear that the registered office is not the company's only office. Section 23(3)(b) provides that if a company has more than one office, it must register its principal office. It must therefore be determined on these papers where the principal office of the respondent is. In *Sibakhulu, supra,* para 21, the court stated thus:

"The determination of where a company's principal place of business or principal office is situated is a question of fact (cf, for example, *Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C) at 782 A-H). It is thus possible to approach the interpretation of s 23 of the 2008 Companies Act holding that its requirement that a company's registered office be at the place of its principal office does not exclude the possibility as a matter of fact that a company may, in breach of the requirement register as its registered office an address which is not the address of its principal office; and that it would follow in such a case that that the conclusions in Dairy Board and Bissonboard would still hold true: the company would be legally and factually resident at two places, notwithstanding the evident intention of the legislature that a company's legally chosen place of

residence should be the same as its factual place of residence for jurisdictional purposes. It is, however, also possible to reason that to so hold would defeat the apparent object of the provision, which appear s to be to end the potential of a company to have more than one place of residence for jurisdictional purposes, and that the statute should not be interpreted in a manner that would defeat its evident objects. Construed in the latter manner s 23 of the 2008 Companies Act provides a materially different statutory backdrop to that which applied when *Daily Board* and *Bissonboard* were decided."

A company therefore can reside only at the place of its registered office, which must also be the place of its principal office. Counsel for the applicant relying on the *Sibakhulu* judgment, submitted that should the company's registered address not be at its principal office, this falls to be corrected administratively by the second respondent and not by a court hearing a liquidation application. The court in *Sibakhulu* para 26 surmised as follows:

"[T]he effect of the statutory provisions, construed in the manner in which I hold that the legislature intended, is directed at minimising the prospect of courts having to determine factual disputes on points of jurisdiction concerning companies. The place of a company's registered office is objectively ascertainable. Any dispute as to whether the registered office should be at a different address, by reason of an argument that the actual location of the company's principal office is elsewhere, is matter that is not – primarily at least –

intended to be one to concern the courts; being a matter, if it arises, falling instead to be determined and corrected administratively by the Companies and Intellectual Property Commission under the provisions of Part D of ch 7 of the 2008 Act. It is hoped that the prospect of administrative fines and criminal sanctions in respect of failures by companies or their directors to comply with the provisions of the Act, and any compliance notices issued thereunder by the Commission will encourage companies to comply faithfully with the provisions of s 23 (3) of the Act."

It follows from the above passage that the respondents were obliged to correct administratively the Cape Town address reflected in the second respondent's records. The respondents must bear the consequences of their omission. The point *in limine* must in the result fail.

[20] The second point *in limine* raised by the respondents as earlier alluded to in this judgment, is premised on the fact that clause 13 of the shareholder's agreement concluded between the trust and the applicant specifically provides that deadlock shall not constitute a ground for winding up. Clause 13 reads thus:

"13.2 If in terms of the aforegoing provisions there is a deadlock between the Shareholders, a dispute shall be deemed to exist between the Shareholders

which shall be dealt with as contemplated in clause 25. Any such deadlock shall not constitute a ground for winding up of the company."

Clause 25 contains mediation and arbitration steps to be followed by the shareholders in the event of a dispute arising. It reads as follows:

"Mediation

25.1 Any challenge of the auditor's decision in terms of this agreement and any other dispute between any of the parties and/or the shareholders of the Company in regard to the carrying into effect of any of the parties' rights and obligations arising from this agreement or the interpretation thereof, on termination or purported termination thereof, the parties agree to negotiate with each other in good faith in an effort to resolve such dispute after any party has given notice in writing to the other parties to invoke the provisions of this clause.

25.2 If such negotiations fail or do not occur within 7 (Seven) days after the dispute arises, the dispute shall not become the subject of litigation or arbitration until it has been heard by a mediator.

25.3 Such disputes shall be referred to mediation before a mediator within 7(Seven) days after the dispute arises. The mediators shall be appointed by the parties or failing agreement by them as to the mediator shall be nominated by the chairperson for the time being of Alternative Dispute Resolution Association of South Africa."

[21] The respondents allege that the clause is applicable to the dispute between the parties. The applicant on the other hand contends that the provisions of the shareholder's agreement must, to the extent that they are in conflict with the provisions of the Act, be regarded as *pro non scripto.* Counsel for the applicant relied for this contention on the provisions of s 15(7) of the Act which state that:

"The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency."

[22] This provision gives effect to what has been long recognized in our law, namely, that parties are free to contract as they will, subject to limits which may be imposed by common and statutory law. In assessing whether the provision in the shareholder's agreement relating the statutory provision must be examined in the context of s 81(1)(d)(i) of the Act which specifically lists unbreakable deadlock in the management of the company, and shareholders as a ground for winding up of a solvent company. Although the Act does not

outrightly prevent this particular form of agreement, it is clear that the deadlock provision effectively negates the provisions of s 81(1) (d). Even in the absence of a prohibition, to my mind, the legislature could not have intended the parties to contract contrary to a statutory provision. It stands to reason that clause must be declared *pro non scripto*. On this basis alone, the point *in limine* must fail. That said, it must be mentioned that *Meskin et al*, Henochsberg on the Companies Act 71 of 2008, Vol 1, 248 state that a shareholder's agreement may provide that a deadlock at a meeting of directors or shareholders will not constitute grounds for the winding up of a company, however, such a provision does not preclude a shareholder from applying for the winding-up of the company where he is able to make out a case that is nevertheless just and equitable that the company be wound up, eg, that the deadlock is of such a nature that there is no longer any reasonable possibility of running the company consistently with the basic arrangement between the shareholders, and there is no other mechanism (in the shareholder's agreement or otherwise) whereby, notwithstanding the deadlock, the company is still able to function and achieve its objectives.

[23] The second leg requires a determination of whether the jurisdiction of the court has been ousted by the clauses 13 and 25 of the shareholder's agreement. The respondents argued that it does, whereas the applicant, relying on *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) submitted that it does not. In *Peel* the court in holding that an arbitration agreement applicable to a dispute between the parties cannot oust the jurisdiction of the court said at para 68:

"The present application is brought under the provisions of s 163 of the new Companies Act. The entity that is supposed to conduct the arbitration process, namely, AFSA, clearly does not have the powers to grant the relief as envisaged in s 163 of the new Companies Act, only a court does. . . . Section 166 (3) defines the term 'accredited entity'. AFSA is not such an accredited entity."

[24] It is well established that although parties may expressly agree that any dispute arising from their contract be determined by arbitration, they may not by so doing oust the jurisdiction of the court, and neither is any party precluded from initiating proceedings to have the dispute adjudicated by a court. Courts enjoy a discretion, taking into account all relevant factors, whether or not to enforce an arbitration clause. A court may, in the exercise of its discretion, stay

the proceedings pending the outcome of arbitration. In *Foize Africa (Pty) Ltd v Foize Beheer* BV and Others 2013 (3) SA 91 SCA, the court succinctly reaffirmed this position by stating at para 21:

"It can now be regarded as settled that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question."

In the present matter, the dispute involves a question of law rather than of fact. The applicant seeks a winding-up of the first respondent based on substantial statutory grounds. I am not of the view that dispute is readily capable of being dealt with by way of arbitration. It is plain therefore that the second leg of the point in *limine* must also fail.

[25] The respondents raised *in limine* two more other issues but because they are inextricably linked to the merits of this application, I deem it prudent to first consider the winding-up application. The next question for determination is whether the deadlock between the

directors of the first respondent is of such a nature that it prejudices the company (irreparable harm as a result of the deadlock) and that it is just and equitable that a winding-up order be granted.

The Winding-up

[26] The applicant seeks the winding up of the company on the basis of s 81(1)(d)(i) or s 81(1)(d)(iii) which provide as follows:

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

. . .

(d) the company, or 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 speak to 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) it is otherwise just and equitable that it be wound up.

It is common cause that the respondent is a solvent company and that the applicant, as a shareholder has *locus standi* to bring this application. The gravamen of the applicant's winding-up application is

that due to the deadlock between the board of directors, the first respondent, the company is unable to function or conduct its affairs in several ways, beyond the day-to-day operations.

[27] In analysing the application of the provisions of s 81(1), it is prudent to first consider s 344 (h) of the old Companies Act 61 of 1973 and the jurisprudence that developed . In terms of section, a company could be wound up by the court if it appeared to it to be just and equitable that it be wound up regardless of whether it was solvent or insolvent.

[28] The respondents, whilst acknowledging that there is a strained relationship between the applicant as a 50% shareholder and the two intervening trusts, each being a 25% shareholder, contend that the relationship can be normalised by the implementation of dispute resolution mechanisms provided for in the shareholder's agreement. When I dismissed the second point *in limine*, I dealt fully with the effect of the arbitration clause on these proceedings. During argument, a different angle on this issue was presented. Counsel for the respondent sought to persuade the court that the deadlock was

not unbreakable, and that an alternative dispute resolution mechanism would facilitate a better return for the creditors and or shareholders of the company. Furthermore, the injury to the company is not irreparable in that the company was being managed profitably. To this end, a statement of intent and request for the referral of the matter to arbitration to resolve all disputes between the shareholders and or directors of the first respondent, duly signed by the third and sixth respondents as directors of the first respondent as well authorized representatives of the two trusts that are shareholders thereof, was handed up to court. In the statement, the third and sixth respondents undertook to sign the annual financial statements for 2011 and 2012.

[29] The parties in these proceedings elected to conduct their joint venture through a company. In terms of s 66(1) of the Act, the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act of the Company's Memorandum of Incorporation provides otherwise. For this reason, an effective board

is pivotal to the business of the company. The applicant and the trust undertook that they would owe each other a duty of good faith at all times and that their relationship would be construed as that of quasi partners. In line with the averments of the applicant, clause 21 of the shareholder's agreement enjoins the parties to exercise good faith in dealing with each in the furtherance of the objectives of the first respondent. The relationship of the parties which is alleged to be irreparable broken must therefore be assessed against the provisions of clause 21. In *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* 2008 (5) SA 615 SCA para 19, the court in applying the provisions of s 344 (h) of the 1973 Act, examined the principles which must guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership and stated thus:

"There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Lock v John Blackwood Ltd* [1924] AC 783 at 788, is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being outvoted on the business affairs or

on what is called the domestic policy of the company, but is justifiable if in addition there is lack of probity in the director's conduct of those affairs. The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that the relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up."

. . .

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

[30] As earlier alluded to in this judgment, this application is brought in terms of s 81(1)(d)(iii) of the Act. Section 81(1)(d)(iii), as correctly observed by Counsel for the applicant, postulates a broad conclusion of law, justice and equity as a ground for winding-up. In *Scania*

Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carries CC and Another Case 2013 (2) 439 (FB) at para 22 interpreted the ground of just and equitable as envisaged in s 81(1)(d)(iii) and held:

"[T]he ground of just and equitable as used in s 81 must be interpreted more widely than was the case in the previous disposition. The legislature has specifically included grounds which were traditionally considered grounds that made it just and equitable to grant a winding-up order, as substantial grounds that made it just and equitable to grant a winding-up order, as substantial grounds on which a court may liquidate a solvent company. Section 81(1)(d) now specifically caters for the directors who are deadlocked to apply for the winding-up of a solvent company. Section 81(1)(d)(iii), however, provides, in addition to the director's deadlock that prejudices the company (irreparable harm as a result of the deadlock), that the court may grant a winding-up if it is otherwise just and equitable for the company to be wound-up."

Similarly, in *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) at para held:

"A domestic company or quasi-partnership, or a company akin to a partnership maybe liquidated due to a complete breakdown in the relationship, of reasonableness, good faith, trust, honesty and mutual confidence which should exist between the directors and/or shareholders thereof. . . . Recently the Supreme Court of Appeal considered the just-and-equitable ground . . . [and] the court found that if one of two partners threatens civil and criminal action, including prosecution for fraud, it will not be possible for them to work together as

they ought to do. The court found in para 30 that, on analogy of partnership law, that the company was in a state which could not have been contemplated by the parties when it was formed, and that it ought to be terminated as soon as possible."

[31] Counsel for the applicant submitted that the conduct complained of satisfies the requirements for the relief sought under either the current or previous dispensation. It is necessary to reiterate that the directors of companies are empowered by s66 of the Act, as well as by their company's articles to manage the company's business, to transact on its behalf and to delegate their powers and functions. They exercise their powers collectively, by majority vote, as a board. In terms of the Act, the ultimate power in a company is now with the board of directors, and not with the shareholders. A company with a non-functioning board is non-functioning company. (See *Meskin et al* Henochsberg on the Companies Act, 71 of 2008 Vol 1 248).

[32] The above exposition of the law must be applied to the facts of this matter as borne out by the papers. I have summarised the averments made by the parties in the papers. It is clear that there is

no dispute of facts with regard to the status of the company and its functioning. It will be recalled that the respondents' main contention is that the relationship can still be restored and that the first respondent has been operating profitably on a day-to-day basis. It is equally plain that one of the biggest issues which have caused the parties to lock horns is the *'agterskot'*. I turn to examine the impact it has had on the relationship between the parties.

[33] It is well to recall that the 'agterskot' was tabled for discussion by the representatives of the first respondent, at the instance of the third respondent on 26 June 2012. It related to two agreements for the sale and development of land in 2005. According to the third and sixth respondents, in terms of the sale agreements, the immovable property was sold at below the market rate in breach of the 'baseline document'. It is not befitting these proceedings to determine whether or not the third and sixth respondents are entitled to an 'agterskot' or that there has been a breach of the baseline document. Suffice to point out that the parties are miles apart with regard to the said entitlement. The applicant's stance is that neither the trust nor the applicant were party to the sale agreements and for that reason, the

third and sixth respondents have no entitlement to the ‘agterskot’. What is relevant for the purpose of this application is that the third and sixth respondents flatly refused to attend the company’s director’s meetings, in the result that the board could not effectively discharge its function. Notably, the ‘agterskot’ issue has for several years been a bone of contention between the parties without any resolution.

[34] I have emphasised the importance and need for properly constituted board meetings to address the business of the company. The effect of the third and sixth respondents’ refusal to attend board meetings has impacted negatively on the business of the first respondent. For example, at a meeting which took place on 18 February 2013, the directors agreed that the property on which the development is situated would be subdivided in order to facilitate the sale thereof, and that the managing agent, Broll, would seek offers for the Shopping Centre [and Life Health Care] portion. When Broll presented what the applicant perceived to be a reasonable offer, the third respondent refused to agree to the sale until the ‘agterskot’ issue was resolved to the satisfaction of the trust. This was followed

by intemperate remarks and threats to liquidate the company. Due to the impasse, the offer to purchase could not be considered, notwithstanding the fact that the applicant and the trusts, as well as their respective directors were in broad agreement that the property should be sold. Shortly after the threats of liquidation, the third respondent and later the sixth respondent unequivocally stated that the applicant should not call any director's meetings as they will not attend them. Put in context, the first respondent's board is made up of two directors nominated by the applicant and two nominated by the trust. The split over whether the director's meetings will take place is even. It is between those directors nominated by the applicant on the one hand and those nominated by the trust on the other. Clearly if the board cannot meet, the board cannot vote. Consequently, it is unable to conduct the company's affairs.

[35] It is not in dispute that as a result of the third and sixth respondents' non-attendance of meetings and the averment by the third respondent that he has lost all trust and faith in his co-directors, the company's financial statements from 2012 could not be signed. In addition, the third and sixth respondents have specifically stated that

they would not do so as the statements do not reflect their claim for the ‘agterskot’. The non-signing of financial statements has caused the first respondent to be in breach of its obligations towards ABSA bank. The first respondent is in terms of the loan agreement with ABSA obliged to produce financial statements. I now turn to consider the impact of the third respondents’ emotive outbursts on the relationship between the members of the board.

[36] I have summarised the contents of the applicant’s founding papers. It bears mention that even if there were problems between the directors of the first respondent, one could still form an impression that the relationship could still be repaired or salvaged. In this matter, I hold a different view. An examination of the correspondence from the third respondent, as well as the minutes of the meetings confirms that the third respondent has lost trust, confidence and respect for his co-directors. The third respondents as far back as July 2013 alleged that Broll had made itself guilty of misappropriation of funds on a large scale as well as other irregularities during the course of their duties as property managers of the shopping centre. In addition, he stated that he and the sixth respondent believe that the director’s

meetings culminated in a deadlock situation. Of note are the following remarks:

"Our tolerance with all your stalling has now reached zero level. Be forwarned that we will place the Company in provisional liquidation by the snap of a finger if further provoked by and further Co issues."

"The consequential financial damage suffered by us due to your stall tactics on above matter has cost us dearly."

"Did you really expect his [that is] Mike von Backstrom's] pants to shiver? This was a declaration of war."

And on 2 May 2013, Broll was telephonically advised by the trust's attorney, Mr Serfontein that he had received instructions to wind up the company. These assertions were coupled with the non-attendance of director's meetings on the part of the third and sixth respondents for a considerable period. To my mind, the conduct and the utterances show without a doubt that the third and sixth respondents have no faith, trust and confidence in their co-directors. Bearing in mind that the directors had in clause 21 of the shareholder's agreement agreed that their relationship is akin to a partnership, which by its nature necessitates that there exist mutual confidence, honesty and trust, I am of the view that the

disagreements abundantly represent the destruction of mutual faith and trust to the extent that it will not be possible for them to work together as they ought to. Furthermore, that the directors cannot agree to the property management company as well the threats of liquidation by the third respondent demonstrates a deadlock that cannot be resolved by the shareholders.

[37] The respondents' contention that the company is being managed profitably on a day to day basis such that it is not necessary to wind it up must also be considered. Section 81(1) (d) (iii) provides for the winding up of a solvent company on the ground of deadlock. That the company's daily operatives are unaffected by the deadlock must be assessed in the context of s 66(1). The business affairs of a company are not limited to its day to day operations. The legal requirement is that such business affairs must be managed by its directors. The applicant has amply demonstrated that due to the deadlock, the sale of the shopping complex could not be concluded, financial statements had not been filed and director's meetings were not being held. The relationship between the directors is integral to

the management of the company. The very fact that the first respondent is solvent is indicative of the fact that its day to day operations are functional, but it cannot, in my view, be elevated to the point of rendering the deadlock relating to the conduct of the affairs of the first respondent inconsequential. It follows that I view this contention as unmeritorious.

[38] The respondents persisted with their request for the stay of the proceedings and referral of the matter to an alternative dispute resolution mechanism such as arbitration. It is necessary when considering this submission to again recap some of the facts of this case. The founding affidavit reveals that after the death of George von Backstrom, followed by the appointment of the sixth respondent as his replacement after the meeting of 9 October 2012, there were problems with the attendance of the first respondent's board meetings. The acrimony escalated to the point where the third respondent threatened on more than one occasion to bring winding-up proceedings against the first respondent. Yet, none of the parties had throughout this period, and despite the obvious problems besetting the management of the first respondent, invoked the

arbitration clause. I consider it ingenuous of the third respondent to give instructions to his attorneys to move an application for the winding-up of the first respondent, and when presented with the same application at the instance of the applicant, it suddenly dawns on him that there is shareholder's agreement providing that deadlock shall not constitute a ground for winding up. Given the irreparable breakdown of the relations between the parties, as explained in this judgment, no purpose will be served by the referral of the deadlock to arbitration.

CONCLUSION

[39] I have in this judgment held that the deadlock in the company's board is unbreakable and cannot be resolved by the shareholders. As a conclusion of law, justice, and equity, I am satisfied that it is just and equitable that the first respondent falls to be wound up in terms of s 81(1)(d)(iii) of the Act. In the result, the following order is issued.

ORDER

[40] It is therefore ordered that:

1. The first respondent be placed under provisional liquidation.

2. That a *rule nisi* be issued calling upon all persons interested to show cause, if any, to this court on 10 June 2014:

2.1 why the first respondent should not be placed under final liquidation; and

2.2 why the costs of this application should not be costs in the liquidation.

3. That service of the order be effected:-

3.1 by one publication in each of the Cape Times and Die Burger newspaper;

3.2 by service on the registered office of the first respondent at Mazars House, Rialto Road, Grand Moorings Precinct, Cape Town;

3.3 by service on the South African Revenue Services at 22 Hans Strijdom Avenue, Cape Town, Western Cape.

_____

T.C NDITA
JUDGE: HIGH COURT OF SOUTH AFRICA