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

CASE NO: 8552/21

In the matter between

AUDACIA STELLENBIOSCH MARKET (PTY) LTD APPLICANT

AND

DOWNING INVESTMENTS CC FIRST INTERVENING PARTY
AUDACIA WINES (PTY) LTD SECOND INTERVENING PARTY

Date of Hearing: 17 March 2022
Date of Judgment: 3 May 2022 (to be delivered via email to the respective counsel)

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

THULARE J

[1] Ordinarily it is not desirable, in my view, for judicial officers to make a statement in respect of criticism of their judgments, even in the context of an application for leave to appeal. Judicial Officers should speak once, for as long as it is necessary and as short as possible, on the issues relevant for the just determination of the case, in pronouncing their judgment. This application for leave to appeal is a classic example of why it is sometimes impossible not to speak, and in fact necessary for one to speak, on the issues after judgment.

[2] In the judgment on 7 February 2022 the court found that the onus was on Hendrikse to establish his authority to act on behalf of the applicant in bringing the

application and that in the absence of a resolution of the company, it was impossible to find that the company authorized Hendrikse to institute the proceedings. The court was unable to conclude that Hendrikse had the mandate to depose to a founding affidavit on behalf of the company and held that the *locus standi* of Hendrikse was not established. The court concluded that Hendrikse failed to show that the institution of the proceedings had been duly authorised by the company. For the same reasons, the court found that it could not be said that the confirmatory affidavit of Strydom was sufficient to conclude that the second intervening party was a shareholder of the company, and thus entitling the second intervening party to bring the application in that capacity.

[3] The second intervening party had passed a resolution which authorized it to intervene in the liquidation application and the appointment of the attorneys in furtherance thereof and authorized Strydom to sign all and any documentation relating to the application to intervene. In considering the resolution, the court found that the second intervening party at the time, was already aware that the authority of Hendrikse, Strydom and their attorneys to represent the company was disputed. A notice in terms of Rule 7 to this effect had been prepared on 21 July 2021 and served on them and they had already replied thereto in a reply dated 16 August 2021 and filed at court on 17 August 2021. The court found that the second intervening party did not authorize Strydom to seek the intervention in order to secure a provisional order of liquidation in its own name.

[4] In the application for leave to appeal, the applicant said that the application was brought in the name of the company by the one director, Hendrickse, and by the other shareholder, the second intervening party who was also a director. It is argued in the application for leave to appeal, that the extended *locus standi* provisions of section 157 (1) of the Companies Act, 2008 (Act No. 71 of 2008) (the Act) permitted an application for the winding up of the company by any party directly contemplated in the Act (the second intervening party both as creditor and shareholder) and secondly Hendrikse as director, being parties contemplated in section 81 of the Act and the deponent to the founding papers in the application for the winding up of the company. It was further argued that section 157 (1) of the Act also permitted any party (Hendrikse as director of the party) acting on behalf of a party directly

contemplated in the Act (in *casu* the company) who cannot act in their own name because of the deadlock, to bring the application on behalf of that party, being the company.

[5] The case was that on any basis, there was an application for the winding up of the company before the court, whether:
(a) by the company which could not act in its own name as it was not possible to pass a special resolution due to the deadlock, hence the need for Hendrikse, as one of the directors and the second intervening party as shareholder and creditor, to bring the application on its behalf; or
(b) by these two parties in their own rights.

[6] The case is that the Act in any event permitted one or more directors or one or more shareholders to bring the application and that is what Hendrickse and the second intervening party were doing, if not in form, in substance. It is argued that section 81 of the Act specifically provided for the winding up application to be brought and the situation was the one directly contemplated in section 81 and fell within the first category of standing contemplated in section 157(1)(a) of the Act and that section 157(1)(b) was also applicable given that the company could not act in its own name due to the deadlock. It was argued that the court erred in dismissing the application for the winding up of the company on the authority point alone and in not considering the merits of the winding up application and not granting the provisional order sought.

[7] The first intervening party opposed the application for leave to appeal. It highlighted two factual findings of the court which were not disputed or challenged in the application for leave to appeal. In the first, the court found that Hendrikse stated in the founding affidavit that he was duly authorized to depose to the affidavit and to bring the application and that he did so with the support of the 50% shareholder. The first intervening party argued that Hendrikse's statement under oath was incompatible with the submission now being advanced in the application for leave to appeal, that Hendrikse was acting in terms of the extending standing to apply for remedies in terms of section 157 of the Act. Section 157 envisaged a situation where the company could not act in its own name, whilst Hendrikse stated under oath that

he had been authorized by the company to both depose to the affidavit and bring the application which showed that on his version the company could act in its own name.

[8] The second factual finding was that the onus was on Hendrikse to establish his authority to act in bringing the application and that in the absence of the resolution of the company, it was impossible to find that the company authorized Hendrikse the institute the proceedings. It was argued that the applicant did not dispute that the application was brought on the basis that the company had authorized Hendrikse and further not disputed that this authorization had in fact not been given by the company. According to the first intervening party, that was the end of the matter.

[9] The first intervening party's case was that the bringing of the liquidation application in the name of the company, under the circumstances, was untenable for at least three reasons.
(a) it results in there being no party cited as the respondent.
(b) it complicates the question of costs
(c) it attempts to avoid the requirement that an applicant comes to court with clean hands.
In first intervening party's view to do so under these circumstances where there is a deadlock and dispute between co-directors and co-shareholders constitutes a clear abuse of process.

[10] It was further argued that section 157 did not make provision for a party to bring an application in the name of the other party. It provided for a person to bring an application in their own name of behalf of another. In this matter, according to the first intervening party, this was not a case where the company could not act in its own name as envisaged in section 157(1)(b) of the Act. The factual position was that the company did not want to do so as half of the persons in control of the company were opposed to the liquidation. No leave was sought for an application to be brought by a person acting in the public interest, for purposes of section 157(1)(d). Both Hendrikse and the second intervening party qualified in terms of section 81(1)(d) to apply to court for an order to wind-up the company in their own names and they accordingly both had an alternative remedy.

[11] The first intervening party argued that the court's finding that the second intervening party did not authorize Strydom to seek the intervention in order to secure a provisional order of liquidation in its own name, was not disputed by the second intervening party in its application for leave to appeal. In the second intervening party's notice of motion it did not ask anything more than it be allowed to intervene in the liquidation application as co-applicant in so far as this may be necessary. It neither asked for a provisional order of liquidation in its own name, nor made out a case for such relief to be granted to it. It was further argued that fatal to the request for a provisional order being granted at the second intervening party's instance was the fact, which was conceded by the second intervening party at the hearing of the liquidation application, that no Master's report was filed on its behalf. It was argued that accordingly, the second intervening party neither asked for, nor complied with the requirements for a stand-alone liquidation application. The first intervening party's conclusion was that there was no merit in the application for leave to appeal.

[12] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 2013 (Act No. 10 of 2013) provides as follows:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that: -

(i) The appeal would have a reasonable prospect of success; or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[13] The sacred principle of our law, *audi alteram partem,* translates in that even abusers deserve an equal opportunity to be heard. For that reason one deems it prudent to engage with the arguments advanced and pronounce oneself thereon, in its proper context, that is whether, having regard thereto, the applicants would have a reasonable prospect of success or it offered some other compelling reason why the appeal should be heard.

[14] Furthermore, where the initial judgment did not deal exhaustively with a ground of appeal relied upon in the application for leave, it is highly desirable for the presiding officer, in the judgment on the application for leave to appeal, to indicate

that the evidence was carefully considered [*Parkes v Parkes* 1921 AD 69 at the bottom of page 74]. It has been held, in the context of a Rule 51(8) of the Magistrates' Courts Rules of Court, that a response of the judicial officer to grounds of appeal served to assist the court of appeal in dealing with the appeal in a speedy, efficient and cost-effective manner. This was because the parties would be informed with precision as regards the points on which to prepare for the appeal [*S v M* 1978 (1) SA 571 [NPD] at 573A-D] and this would also enable the court to cut to the heart of the appeal and finalise it [*Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (WPA) at 990C-E]. There is no compulsion to say anything if everything that needed to be said was said in the substantive judgment and the judicial officer considered the reasons to be adequate, however, a failure to give proper reasons on grounds provided might work an injustice to one or both parties [*S v M, supra,* at C].

[15] Section 81(1)(d) of the Act provides:

"81. Winding-up of solvent companies by court order. –

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

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

(i) the directors are dreadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock.

(ii)the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) It is otherwise just and equitable for the company to be wound up;"

[16] Section 157(1)(a) and (b) of the Act provides as follows:

'157. Extended standing to apply for remedies.

(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the

Commission, the right to make the application or bring the matter may be exercised by a person –

(a) Directly contemplated in the particular provision of this Act;

(b) Acting on behalf of a person contemplated in paragraph (a) who cannot act in their own name;"

[17] The material parts of the first five paragraphs of the founding affidavit to the main application read as follows:

"I, the undersigned

WYNAND HENDRIKSE

Do hereby make oath and state:

1. I am an adult male businessman and a director of the Applicant.

2. …

3. I am duly authorized to depose to this affidavit and bring this application for the winding-up of the Applicant. I do so with the support of the 50% shareholder of the Applicant, whose confirmatory affidavit as aforesaid is filed herewith.

The Parties:

4. The applicant is Audacia Stellenbosch market (Pty) Ltd, with registration number: 2012/005367/07, a company duly registered and incorporated in accordance with laws of the Republic of South Africa with its registered address at Audacia Wines, R44 Highway, Stellenbosch, 7613 Western Cape Province. A copy of the company search of the Applicant is annexed marked "WHI".

Relief Sought:

5. This is an application for the winding-up of the Applicant on the basis that it has lost its substratum, is dormant and no longer functioning, its directors and shareholders are deadlocked on resolving to do so themselves and the winding-up would be just and equitable."

[18] The following paragraphs are material to the second intervening party's application. The deponent to its founding affidavit said:

"I, the undersigned,

TREVOR GORDON STRYDOM

Do hereby make oath and say that:

1. I am an adult male business man and director of Audacia Wines (Pty) Ltd and c/o Audacia Wines, R44 Highway, Stellenbosch.

2. I am duly authorized to depose to this affidavit and bring this application for leave for Audacia Wines (Pty) Ltd, as a 50% shareholder of Applicant, to intervene in the above application in so far as may be necessary pursuant to the provisions of section 81(d) of the Companies Act, Act 71 of 2008. A resolution to that effect is annexed marked "TS1".

3. …

4. I bring this application in an abundance of caution.

5. …

6. As appears from paragraph 3 of the founding papers in that application I deposed to the founding affidavit in the winding up application in order to express my support on behalf of the Audacia Wines (Pty) Ltd, both as 50% shareholder of the Applicant and as creditor, in the bringing of the application.

7. …

8. Audacia Wines (Pty) Ltd, in its capacity as a creditor of the company, therefore also has a direct interest in the winding up of the company and insofar as it needs to be joined in its own name ***in order for it to support the application currently before court on its behalf in any event, it seeks leave to be so joined/intervene."*** (bold, italics and underlined for my own emphasis).

[19] There was no special resolution by the company to be wound up by the court or a special resolution by the company to apply to court as regards its winding up. The court provided reasons I deem adequate as to why it was not established that the company applied for the order sought in the main application. The authority of Hendrikse to act on behalf of the applicant was disputed and the court found that it was not established. There was no application before the court by Hendrikse as a director or by the second intervening party as a shareholder and creditor of the company. Basic necessaries for such an application, like the Master's report in respect of an application by Hendrikse or the second intervening party were not filed, simply and primarily because they were not necessary for what was before court. This is the reason why the judgment of the court did not pronounce itself on the

standing of Hendrikse, in his name as a director, or the second intervening party in its name as a shareholder and creditor, to bring the application.

[20] The fact that the directors are deadlocked in the management of the company or that the shareholders are deadlocked in voting power may be a ground for a court to order that a solvent company be wound-up, but on its own does not confer *locus standi* on a director or a shareholder to unilaterally act on behalf of the company. This is not how I understand section 81(1)(d) of the Act and by extension section 157(1)(a) of the Act. The well- established grounds of *locus standi* should still be met. I understand the sections, read together, to provide for a director or shareholder to bring an application in their own name on behalf of the company. Hendrikse and the second intervening party did not have standing, as envisaged in section 157(1)(a), to act on behalf of the company in the company's name.

[21] I understand section 157(1)(b) to include persons in the position beyond those provided for in section 81 of the Act in respect of the winding up of solvent companies by a court order. What the section envisaged is a departure from the common law approach to this type of litigation which is individualistic, to an African jurisprudential approach which is communal. It is a provision which champions a cause which includes that when a winding-up of a solvent company is considered by the courts, the interests of the applicants should not be narrowly construed but should be widely construed. In other words, the character of a winding-up application of a solvent company must be inclusive and not exclusive. In interpreting standing, I understand this part of our law to favour freedom from technical and formalistic restraints of access to court proceedings through an extended construction of the law. This in my view envisaged the inclusion of any person not covered by section 157(1)(a), who could not ordinarily obtain instructions from or authority from the person envisaged in section 157(1)(a). In the founding affidavit, such person should set forth grounds to the satisfaction of the court explaining:
(a) their relationship with the person envisaged in section 157(1)(a),
(b) why they were acting on behalf of the person contemplated in section 157(1)(a) and
(c) why the person envisaged in section 157(1)(a) cannot act in their own name.

[22] Section 157(1)(b) was not designed to provide a multiplicity of opportunities for persons envisaged in section 157(1)(a) of the Act. It was intended to be an extension of the foundations of *locus standi* to persons not covered by section 81 in respect of applications for winding up of companies that were still solvent. Even if I am wrong on this point, a party purporting to be acting on behalf of a person contemplated in section 157(1)(a) who cannot act in their own name, must clearly identify themselves and it must be clear as to the person in whose stead they are acting, properly, in the citation of the parties including in the particulars of the claim. It must be clear that the party referred to in section 157(1)(b) is a party as envisaged in that section. In my view, a person covered by section 157(1)(a) cannot simply decide to jump out of a provision specifically designed for their *locus standi,* without explaining why that provision is not appropriate in their case. An interested party like the first intervening party deserves, in our law, to have an opportunity to fully engage with the particulars in (a) –(c) as set out in paragraph 21 of this judgment, in assisting the court to determine the issues.

[23] For these reasons I make the following order:

(a) The application for leave to appeal in respect of the company is dismissed. Wynand Hendrikse is to pay the costs on attorney and client scale.

(b) The application for leave to appeal in respect of the second intervening party is dismissed. The second intervening party to pay the costs on attorney and client scale.

DM THULARE

JUDGE OF THE HIGH COURT