Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15687 / 2022

In the matter between:

EDWIN JACQUES PIETERSEN	First Applicant
GREEN CHILD PROJECT (PTY) LTD	Second Applicant
and	
SHADOW ACADEMY GLOBAL NPC	First Respondent
SHADOW CAREERS (PTY) LTD	Second Respondent

Coram: Wille, J

Heard: 3 August 2023

Delivered: 18 August 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an application for the provisional winding-up of the two respondents in one composite application. The first applicant, as a former director, seeks the first respondent's liquidation because it is just and equitable to do so.[1] The first and second applicants seek relief against the second respondent because they say that the second respondent is factually insolvent and commercially insolvent.[2] In the alternative, the applicants allege that liquidating the second respondent is just and equitable.

[2] The respondents say that the application in respect of both respondents has no merit, constitutes an abuse of process and must be dismissed with a punitive costs order. The respondents make the point that the applicants do not dispute most of the factual allegations made by the respondents save in the form of general denials. Accordingly, the respondents' version must be accepted.[3]

Overview:

[3] The respondents' business focus is on job creation for unemployed youth. The idea of the 'shadow program' was the realisation of one of the founders who wanted to play an active role in alleviating unemployment in our country.[4] To bring this vision to life, the founder collaborated with individuals who shared the purpose of job creation for unemployed youth. Before meeting with the founder, the first applicant had no experience in this sector. After collaboration this idea came into being. The businesses were thus born and the applicant was assigned the task of curriculum refinement. The respondents were incorporated with four founding directors.[5] The first respondent is a non-profit company and the second respondent was a trading for profit company. The first respondent would, among other things, collaborate with the second respondent in the nature of their businesses.

---

1 In terms of section 81(1) (d) of the Companies Act 71 of 2008 ("the 2008 Act"). (the "new" legislation).
2 In terms section 344 (f) of the Companies Act 61 of 1973 ("the 1973 Act"). (the "old" legislation).
3 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para [13] and [23].
4 Mr Contumaccio.
5 Mr Cotumaccio, Mr Ayivor, Mr Ellis and the first applicant. (At a later stage, Mr Carbutt also joined as a director).

[4] The initial way in which the directors dealt with the respondent companies and the role to be played by them bears scrutiny. In summary, the founder described this as follows:

'…The team came together with the same understanding and expectation which was to fulfil the vision of both companies. Each founder brought their hearts and passion to make a difference, their individual skills, know-how and experience as well as their respective networks in order to assist in creating employment for vulnerable unemployed youth. There was no expectation of or discussion concerning reward for efforts. This was a project, at least initially, of altruism. The assumption by all founders was that each of us was contributing our areas of expertise into the business for the benefit of the businesses goals and the businesses themselves…'

[5] This was a matter of common cause and had a bearing on some of the grounds upon which the respondents dispute the alleged claim of the applicants. The respondent companies are now firmly entrenched and regarded as a catalyst for change. Prominent role players have hailed their contributions thus far. The shadow program has changed the lives of many poor and unemployed persons and has displayed significant potential to continue for many years.

Context:

[6] The applicants seek the liquidation of both respondents in a single application. The applicants' counsel relied on the jurisprudence of *Reebokskloof*[6] in support of the applicants' composite application. I don't see it this way because three separate applications were presented in this matter by way of a consolidated hearing. No doubt, this is permissible. This latter approach was a totally discrete process to that now envisaged by the applicants, which I believe, on the facts, is impermissible save by consent or where there is a complete identity of interests.[7] This rule or doctrine remains part of our jurisprudence.[8]

---

[6] *Absa Bank Ltd v Reebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C).
[7] *Brack and Another v Front Runner Racks* 2000 (Pty) Ltd [2011] ZAGPJHC 34 (4 May 2011).
[8] *Strutfast (Pty) Ltd v Uys and Another* 2017 (6) SA 491 (GJ) at para [31] and [32].

[7] The respondents have not consented, and there was no allegation in the founding papers that there is an identity of interests or even a substantial coincidence of interests. Manifestly, the applications are different, and no identity of interests exists on the facts. I say this because the applicants rely on certain provisions in our relatively new company legislation for the winding-up of the first respondent and on certain provisions in our old company legislation for the liquidation of the second respondent. The grounds upon which the winding-up orders are sought are also different. Regarding the first respondent, its liquidation is sought on just and equitable grounds. By contrast, it is primarily alleged that the second respondent is insolvent.

[8] While it may be permissible after a composite application has been launched, to withdraw against one respondent and keep the application alive against a single respondent, this election should be made at the outset.[9] Thus, in my view, the entire application at the instance of the applicants is irregular and impermissible and falls to be dismissed on these grounds alone.

Consideration:

[9] Even if I am wrong in this connection, I now pass to deal with the grounds advanced by the applicants for the liquidation of the respondent companies. I will consider firstly the application chartered by the first applicant against the first respondent. The first applicant, in his personal capacity, seeks the liquidation of the first respondent on the basis that it would be just and equitable to grant such an order.[10] The first applicant was removed as a director of the first respondent shortly after this application was launched. Significantly, the notice for his removal was initiated before the launching of this application. Thus, the first applicant had no further involvement in the business of the first respondent, and he would be totally unaffected in any way by the continued existence or otherwise of the first respondent.

---

[9] *Business Partners v Vecto Trade 87 (Pty) Ltd and Others* 2004 (5) SA 296.
[10] In terms of section 81(1)(d)(iii) of the Companies Act (the “new” legislation).

[10] This bears scrutiny as it is difficult to discern how it may be regarded as just or equitable to liquidate the first respondent when it renders services for a public benefit and creates employment for previously disadvantaged communities. Nobody will gain anything from the winding-up of the first respondent, let alone the first applicant. A winding-up on these grounds includes considerations of broad conclusions of law, justice and equity. The just and equitable ground confers upon a court a true discretionary power, which is to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned.[11]

[11] The core complaint piloted by the first applicant against the first respondent concerns an allegation that the business of the first respondent violated two specific pieces of legislation.[12] Further, the first applicant complains that the first respondent violates its founding instrument.[13] These complaints are chartered with no specificity. In general terms, the first applicant avers that there is something sinister in the collaboration between the first respondent and the second respondent by making available the equipment and infrastructure of the first respondent to the second respondent under the auspices of a services agreement. This is so because it is alleged that the second respondent is a company for profit, and because of this 'status', there came into being a potential revenue violation.[14]

[12] Due to the complaint levelled by the first applicant against the tax affairs of the first respondent, the first respondent's remaining directors sought an opinion from the revenue authorities as to whether their operations were tax compliant. The revenue authorities determined that the respondents' operations and their interrelationship with one another and the services agreements between them were permissible, and they were compliant.[15] This opinion by the revenue authorities is undoubtedly not binding on the court.

---

[11] *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136.
[12] In contravention of section 30 of the Income Tax Act, 58 of 1962 read with Schedule of the Companies Act, 71 of 2008.
[13] It's Memorandum of Incorporation.
[14] More particularly section 30 of the Income Tax Act, 58 of 1962.
[15] Section 30 of the Income Tax Act, 58 of 1962.

[13] This notwithstanding, insofar as the first applicant seeks the winding-up of the first respondent based on the allegation that it is non-compliant, the attitude of the revenue authorities to this very question is a significant consideration in the exercise of the court's discretion. Put another way, where there is non-compliance with revenue laws, the revenue authorities will ordinarily seek enforcement of these laws by themselves and not due to the interference of outside third parties.

[14] Moreover, it is apparent from a conspectus of the papers before me that the activities of the first respondent are solely intended to be self-sacrificing and philanthropic. There is nothing on record which would suggest otherwise. Before a court will grant a winding-up order concerning a solvent company, it must be satisfied that all alternative means have been investigated and failed. As a matter of pure logic the winding-up on just and equitable grounds must of necessity, be a remedy of last resort.[16]

[15] Thus, nothing is before me and more importantly, nothing prevented the first respondent from referring his alleged complaints to a 'commissioner' for investigation in terms of our revenue legislation. This provides for the remedy which should and could have been adopted by the first applicant rather than seeking the winding-up of the first respondent. There is no explanation why the first applicant did not seek this alternative remedy, but rather sought a winding-up.

[16] The first applicant has nothing to gain from the liquidation of the first respondent as he is no longer a director and derives no financial benefit from the winding-up. Yet, the first applicant complains about non-compliance with the new company's legislation. In addition, the first applicant has an adequate remedy which could deal with the matter via the medium of an investigation.[17]

---

[16] *MWRK Accountants & Consultants (Pty) Ltd v HLB International* (72514/2018) [2019] ZAGPPHC 630 (15 November 2019).

[17] In summary, terms of section 168(1)(b) of the new legislation, any person may file a complaint in writing with the commission alleging that a person has acted in a manner inconsistent with the legislation or that the complainant's rights under the legislation or under a company's instrument or rules, have been infringed.

[17] Thus, in exercising my discretion to determine whether it would be just and equitable to liquidate the first respondent, I cannot find any facts or grounds to the first applicant's advantage and benefit which should cause the court to exercise such discretion in his favour. The application by the first applicant against the first respondent on this ground must accordingly fail.

[18] Passing now to the application against the second respondent. The applicants seek the winding up of the second respondent because it cannot pay its debts and further on the basis that it would be just and equitable to do so. The first applicant says that the second respondent owes him a salary. He first claims an amount of R1 980 000,00 due being the aggregate amount of unpaid salary in an amount of R110 000,00 per month for eighteen months, for which he alleges that he was working full-time for the second respondent. The second respondent disputes this claim because the company's founders got involved without expecting a salary. Instead, they were allocated an aliquot shareholding in the second respondent.

[19] Further, it was argued that only once the second respondent reached a scale that justified the employment of directors their employment contracts would be concluded, and salaries would be negotiated and paid. The first applicant was made aware of this before the institution of this application, and the basis of the dispute was accentuated in correspondence. Moreover, the first applicant needed to demonstrate clear evidence supporting his salary claim. The first applicant could not refer to any authentic financial document which revealed an accrued salary liability due to him. Instead, the first applicant attempts to seek refuge in two documents, namely; (a) he refers to an income and expenses projection in which appears a provision made for salary for directors at an amount of R110 000,00 per month, and (b) he refers to the budget which makes provision for the salaries of directors.

[20] On the face of it, these documents do not support each other. I say this because the one document is no more than a business plan and in the other document, only R100 000,00 per month was allocated to directors in the form of salaries.

[21] The salary claim by the first applicant is also inconsistent with the alleged quantum of his salary from his original contention of R100 000,00 per month to the currently contended R110 000,00 per month. This is not engaged with and is never explained on the papers. The respondents argue that the objection to the claim is *bona fide* and reasonable. Rogers J (as he then was) summarised the legal test concerning disputed claims in *Gap Merchant Recycling*[18] as follows:

'….A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and bona fide grounds…'

[22] Given this context, *bona fides* has primarily to do with the belief on the part of the litigant as to the truth or falsity of his factual statements.[19] By way of application, the first applicant has yet to convincingly demonstrate his claim for his unpaid salary by the second respondent. Thus, on this ground his application must fail.

[23] Turning now to the case chartered by the second applicant against the second respondent concerning the claim of R 903 450,00 for using the second applicant's intellectual property. Again, this claim is disputed. Similarly, the second applicant was aware that this claim was disputed. Despite this, the second applicant launched this application based on this hotly disputed claim. The second respondent avers that the payments made by the second respondent to the second applicant were payments for the use of premises and infrastructure and had nothing to do with any intellectual property rights. Further, the second respondent submits that even on the first applicant's version, the payments concerned infrastructure, not intellectual property.

---

[18] *Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) par [20].*
[19] *Standard Bank of SA Ltd v El-Naddaf & Another 1999 (4) SA 779 (W).*

[24] Moreover, it is alleged that the payments that were being made to the second applicant were payments at the instance of a totally discrete entity.[20] Thus, the first applicant must rely solely on an alleged verbal agreement for the intellectual property claim. The details of this alleged verbal agreement could not have been more vague, and there was not a scintilla of evidence produced to support this alleged verbal agreement. In addition, no financial allocation or provision for any accrued liability concerning any debt to the second applicant appears in any financial documentation of the second respondent.

[25] In summary, the second applicant's claim fails to meet the test that there was an agreement for the alleged claim. I believe that on the facts it is impermissible for the second applicant to use the mechanism of winding-up to attempt to enforce a disputed copyright claim, knowing such claim was disputed on *bona fide* and reasonable grounds.

[26] Passing now to the claims that the second respondent cannot pay its debts when they fall due and is factually and commercially insolvent. This liquidation ground is underpinned by the alleged validity of the claim by the second applicant against the second respondent for the payment of its intellectual property.[21] A consideration of the annual financial statements of the second respondent demonstrates that the net current asset position is significantly positive rather than revealing any commercial insolvency. The second respondent is a start-up company rendering an essentially altruistic service.

[27] Further, the annual financial statements do not make any provisions for the deferred salary claims or the accrued license fees, which the second applicant alleges are due by the second respondent. A perusal of the balance sheet of the second respondent reveals a favourable asset position in excess of any of the purported claims against it.

---

[20] "Changing Directions". The invoice itself makes no mention of the charge being in relation to intellectual property.
[21] I have already determined that this claim has not been established on the papers.

[28] Moreover, historically shareholders have demonstrated a willingness to fund the second respondent, and any deficit would be made up via shareholder loans. Most importantly, the second respondent demonstrated that it is current with all its creditors. Thus, the applicants must demonstrate that the second respondent is either factually or commercially insolvent. This, they still need to do.

[29] Alternatively, the applicants further seek the winding-up of the second respondent because they say it is just and equitable to do so. They say this because they allege that the second respondent is unlawfully utilising the funds of the first respondent to advance its own business and that it is without substratum. The core complaint is that the second respondent would be without substratum if it cannot utilize the intellectual property allegedly owned by the second applicant.

[30] Further, it is advanced that the loss of substratum would result in the second respondent being unable to benefit from the accreditation status vesting in the second applicant.[22] A company would be without substratum if it is established that it has become impossible to achieve its objectives.[23] An analysis of the papers demonstrates that the current shadow program has thirty-seven training modules. Only three of these modules were contributed by the second applicant and are being rewritten. Thus, the withdrawal of the intellectual property allegedly vesting in the second applicant would have little or no effect on the second respondent's program.

[31] In addition, the second respondent has never itself been accredited. The second respondent initially sought accreditation but because subsequent agreements were concluded it no longer required the accreditation so bitterly complained of by the second applicant. The absence of the second respondent's accreditation would not result in a loss of substratum as it is no longer required by the second respondent to perform its core business.

---

[22] The second applicant is accredited with SETA.
[23] *Atkinson v Rare Earth Extraction Co Ltd* 2002 (2) SA 547 (C) at 552.

Costs:

[32] The respondents seek a punitive costs order against the applicants. The award of costs on a punitive scale is made where the court considers it to be just that a successful litigant should not be out of pocket where there are exceptional circumstances arising either from the circumstances which give rise to the application or from the conduct of the losing party.[24] The award of costs is a discretionary one. The respondents motivate their request for punitive costs for the following reasons: (a) the respondents render a philanthropic service; (b) the applicants have proceeded against the second respondent in respect of claims that were *bona fide* disputed on reasonable grounds and (c) the nature of the disputes was well known to the applicants before the application was launched.

[33] The respondents contend for costs on a punitive scale for the entire application. I don't see it this way. However, some costs should be paid on an attorney and client scale. One of the fundamental cost principles is indemnifying a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[25] The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[26] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[27] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are exceptional circumstances.[28]

---

[24] *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.
[25] *Union Government v Gass* 1959 (4) SA 401 (A) 413.
[26] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) para [16].
[27] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F- G.
[28] *Fripp v Gibbon & Co* 1913 AD 354 at 364.

[34] Costs follow the event in that the successful party should be awarded costs.[29] This rule should be departed from only where reasonable grounds for doing so exist.[30] In all the circumstances, a punitive costs order is warranted for some of the reasons accentuated by the respondents. Whilst I have some deep suspicions about the applicants' alleged conduct during this litigation, I cannot visit upon the applicants the requested attorney and client cost order sought by the respondents since the inception of this litigation, absent further evidence.

[34] That being said, it must have dawned on the applicants shortly after the fourth set of papers was filed (at the instance of the respondents) that their applications were doomed to failure. For this reason, a portion of the costs awarded in this matter will be on the scale between attorney and client. Thus, the applicants shall be liable for the costs of and incidental to the application, jointly and severally (the one paying the other to be absolved) on a party and party scale as taxed or agreed, from the inception of this matter until 26 April 2023. In addition, the first and second applicants shall be liable for the costs of and incidental to the application, jointly and severally (the one paying the other to be absolved), on an attorney and client scale as taxed or agreed, from 27 April 2023 and after that.

[35] Further, all the wasted costs incurred in connection with all the appearances and postponements in this matter shall be on the scale between party and party. These costs shall be paid jointly and severally by the first and second applicants (the one paying the other to be absolved), as taxed or agreed.

Order:

[36] Thus, the following order is granted:

1. That the fourth set of affidavits filed in this matter (with the responses thereto) are admitted into the record for the hearing of this application.

2. That the applications are dismissed.

---

[29] *Union Government v Gass* 1959 (4) SA 401 (A) 413.
[30] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C).

3. That the applicants shall be liable for the costs of and incidental to the application, jointly and severally (the one paying the other to be absolved) on a party and party scale as taxed or agreed, from the inception of this matter until 26 April 2023.

4. That the first and second applicants shall be liable for the costs of and incidental to the application, jointly and severally (the one paying the other to be absolved), on an attorney and client scale as taxed or agreed, from 27 April 2023 and after that.

5. That the wasted costs incurred with all the appearances and postponements in this matter shall be on the scale between party and party. These costs shall be paid jointly and severally by the first and second applicants (the one paying the other to be absolved), as taxed or agreed.

E. D. WILLE
(Cape Town)