REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/20152

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2/12/2010
DATE

SIGNATURE

In the matter between:

RAVINSKY SHARLENE First Applicant

JANKELOWITZ LEON SELWYN Second Applicant

and

GOSSEL ROBERT First Respondent

GOSSEL'S RECORD CLUB (PTY) LTD t/a CRC PROPERTIES Second Respondent

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JUDGMENT

MASIPA, J:

INTRODUCTION

[1] This is the return day of a provisional order of winding up granted against the second respondent on 22 September 2010 by Claassen J. It was

granted at the instance of the applicants who are shareholders of the second respondent. I shall refer to the second respondent as the company.

[2] The statutory requirements having been complied with the applicants now seek a final winding up order of the company. The application is opposed.

[3] The relief is sought in terms of the provisions of section 344(h) of the Companies Act No. 61 of 1973 ("*the Act*"). The section provides for the winding up of a company if "*it appears to the court that it is just and equitable that the company should be wound up*".

[4] The applicants contend that a deadlock has arisen in the running of the company and accordingly it is just and equitable that it be wound up.

HISTORICAL BACKGROUND

[5] The company was established as far back as 1968 for the purpose of conducting a commercial rental enterprise. The founding members were the first respondent who owned 25% of the shares as well as the late Harry Gossel and Barney Jankelowitz who owned 25% and 50% membership respectively.

[6] Initially the company had three directors namely, Harry Gossel (the first respondent's late father), Barney Jankelowitz (the applicants' late father) and the first respondent. After Barney Jankelowitz passed away in 2002 the first applicant was appointed a director. Currently the first respondent and the first applicant are the only directors of the company although the Memorandum of Articles of Association provides for three directors.

[7] The immovable property owned by the company is in Industria West, an industrial area in Johannesburg. Currently there are eight shops of different sizes located on the property with a basement below one of the shops. The building itself is 36 years old and is currently occupied by seven tenants. The remaining vacant shop requires renovation. The tenants are of long standing and the company is profitable.

[8] The first respondent has been in management control of the company and the first applicant effectively served as non-executive director.

[9] The applicants inherited their shares from their late father. They each own 25% of the shares in the company. The first applicant has control over the second applicant's 25% shareholding by virtue of a power of attorney given by the second applicant in her favour.

[10] The applicants state that an impasse and deadlock has arisen by virtue of the fact that both directors have equal authority and power because of the 50% share each hold in the company. The applicants state that unless all

parties agree on any particular decision, which would then be unanimous, no resolution can be passed by a majority of the shareholders and a situation of a deadlock arises.

[11] The applicants state, further, that the first respondent only agrees to resolutions through which he can derive a benefit or assert a greater degree of control than his shareholding entitles him to. They complain that the first respondent has styled himself as "*Managing Director*" and is appropriating to himself the position of chairman of meetings of shareholders. They allege further that he uses a casting vote in terms of article 55 the Memorandum and Articles of Association to ensure that he has a majority so as to run the business as he sees fit without any input or contribution from the other director. The applicants allege that at ordinary meetings of the directors the situation is much the same. The only difference is that the chairman of that meeting does not have a casting vote. However, because both parties control 50% of the shares each the first respondent is able to block any resolution that does not suit him and his own interests.

[12] The applicants further allege that the first respondent runs the second respondent as if it is his own company; he engages in suspicious transactions and refuses to account for his conduct.

[13] The first respondent denies that there is any "*deadlock*" as alleged by the applicants. He states that in the history of the company there has never been any deadlock either at board level or at shareholder level. He states

specifically that he has never been at odds with the second applicant over any management or shareholder issue.

[14] The first respondent also states that there cannot be any deadlock since in terms of article 55 of the Articles of Association of the company the chairman has a casting vote at shareholder meetings. This takes care of any deadlock which may arise. The first respondent points out that in any event the chairman has never been called upon to exercise such casting vote as there has never been an instance of deadlock.

[15] The first respondent states that he has kept the first applicant fully informed of the affairs of the company and has also provided Mr K Braude, an independent accountant provided by the first applicant, with all relevant financial information and access to records of the company. No impropriety was found and for some time no complaints were directed by the first applicant or her representatives concerning the first respondent's management of the company or the contents of the documents after they had fully considered them.

[16] The first respondent denies that the first applicant is kept in the dark concerning the management and financial affairs of the company. He states that the first applicant's appointment as director was at his request and the purpose was to enable her to have access to financial information concerning the company. She was provided with updated information regularly and had direct access through the internet to the company's bank account records

since 2006. There is nothing to gainsay this allegation and I accept it as a fact.

[17] The first respondent states that the first applicant voluntarily signed an authorisation entitling him to conduct the banking matters of the company. The arrangement enables him to enter into, open, close and conduct any banking account, savings account, current account, credit and debit cards and any other financial activities that might be required for the operation of the company. He states that, consistent with what had always been the position, the first applicant was content to vest *de facto* control of the day-to-day management of the company in the first respondent. (I must state that although the first applicant denies that she gave any authorisation to the first respondent to run the company as alleged above such denial flies in the face of credible evidence placed before this Court on the papers.)

[18] The first respondent avers that the first applicant may have an ulterior motive for wanting to liquidate the company. He avers the following:

18.1 Between May and May 2006 the applicants informed the first respondent of their intention to sell their shares to him and an informal "*heads of agreement*" was signed by the parties. The transaction did not materialise. It was the failure of this transaction that appeared to bring animosity on the part of the first applicant toward the first respondent.

18.2 The first respondent states that the first applicant has, since then, become increasingly hostile towards him as can be seen from various demands addressed to him.

THE LEGAL BASIS FOR THE APPLICATION

[19] The basis upon which the winding up is sought is to be found in section 344(h) of the Companies Act 61 of 1973 as amended.

[20] The applicants allege that a "*deadlock*" has arisen in the running of the company and that, therefore, it would be just and equitable that the company be wound up.

[21] Henochsberg[1] deals with this topic fairly extensively. The following is stated:[2]

> "*In the case of a 'domestic' company, ie a company with a small membership (it could be a public company but would usually be a private one), winding-up is just and equitable where the 'deadlock' principle, derived from* ***In re Yenidje Tobacco Co Ltd*** *[1916] 2 Ch 426 (CA), can be applied; this 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. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly co-operation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to*

1
2 Henochsberg on the Companies Act, 5th Ed. Page 704.

> *claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership' – per Trollip J (as he then was) in* ***Moosa NO v Mavjee Bhawan (Pty) Ltd*** *1967 (3) SA 131 (T) at 137-138 (and see* ***Apco Africa Incorporated v Apco Worldwide (Pty) Ltd*** *[2008] 4 All SA 1 (SCA) at para 18). The destruction of the relationship may result in literal deadlock, ie where the factions hold equal voting power in general meeting, in which event winding-up must ordinarily inevitably ensue (Yenidje case supra at 435); but it is not necessary to establish literal deadlock: it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement between the members (****Yenidje*** *case supra at 431;* ***Moosa*** *case supra at 138;* ***Marshall v Marshall (Pty) Ltd*** *1954 (3) SA 571 (N) at 579;* ***Apco*** *case supra at para 21."*

Various examples of situations of this type of deadlock are then given. Two of these are as follows:

> *"Constant quarrelling between the only two shareholders with voting rights as such, who are also the only two directors, leading to a situation where they are not on speaking terms ...*
>
> *[T]he irregular exclusion of a member and director from any participation in the management of the company (In re Davis & Collett Ltd [1935] Ch 693)."*

[22] Relying on the above, in support of their case, the applicants alleged that the deadlock in the present case is the deadlock of the kind envisaged in the *In re Yenidje Tobacco Co Ltd* case.

[23] It was submitted on behalf of the applicants that:

1. The company in the present case was similar to a domestic company and

2. It was not necessary to establish literal deadlocks as it suffices to show that as a result of the particular conduct there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement.

[24] For this last submission the first applicant relied on *Marshall v Mashall (Pty) Ltd* 1954 (3) SA 571 (N) at 579. There the court was dealing with a family concern where the only members were a father and his two sons. It was said that a state of animosity between the parties had arisen beyond all reasonable hope of reconciliation and friendly co-operation.

[25] I am not persuaded that this is an instance where the relationship between the shareholders and directors is analogous to a partnership. We are here not dealing with a family concern and it has not been established that the company is a "*domestic company*" within the meaning assigned in the cases referred to above.

[26] This is not an instance where a particular personal relationship of confidence and trust is required to exist between "*parties*" in regard to the "*partnership*" business and where a destruction of the relationship may result in deadlock.

[27] In this case no instance of deadlock at shareholder level has been shown to exist and no deadlock at board level has been established. Counsel for the respondent, correctly, stated that even if deadlock had been

established, this would not in itself justify the winding up as being just and equitable.

[28] Whether winding up is "*just and equitable*" would depend on all the circumstances and facts of the case and not simply upon ill feeling on the part of the first applicant towards the first respondent (as is apparently the case in this matter).[3] Whether it is just and equitable for the company to be wound up entails a factually intensive enquiry.

[29] In *Kanakia v Ritzshelf 1004 CC t/a Passage to India* 2003 (2) SA 39 (D) Jali J, following the *dictum* of Leon J in *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D), held that the existence of a deadlock between the members of a corporation does not *per se*, justify a winding up of a corporation on the grounds that it is just and equitable to do so, but was one factor to be taken into account in the light of all the circumstances of the case.

[30] In *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) Coetzee J (as he then was) stated that the just and equitable ground is not some kind of "'*catch all' ground ... the 'just and equitable' is rather a special ground under which only certain features of the way in which a company being run or conducted can be questioned to the point of requesting the court to wind it up*".

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[3] *Moosa v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T); *Ebrahim v Westbourne Galleries Ltd* [1973] AC 360 (HL); *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W); *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W).

[31] Although there appears to be animosity between the first applicant and the first respondent there does not seem to be any irresoluble disputes or acrimony between the second applicant and the first respondent. The allegation about there being a deadlock, in the running of the company, therefore, lacks any substance in my view.

[32] Of significance is that the company is solvent, viable and remains able to realise its object.[4]

[33] In the *Bayly* matter the Supreme Court of Appeal stressed that a court will avoid "*except in the most extraordinary circumstances*" a liquidation where this would "*destroy a perfectly viable company*".

[34] In the present case the company is profitable and fully functional. The applicants have not shown that the conduct of the rental enterprise is inappropriate. Over the years there have been numerous tenants and there has been no criticism of the manner in which the building has been run. There has also not been any query regarding tenancy or the rentals that have been derived from the tenants. There is evidence that dividends have been distributed to shareholders right up until June 2010. I can find no extraordinary circumstances which warrant a winding up of a company that is clearly in a sound financial position especially as there are other viable alternatives to winding up.

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[4] See *Bayly & Others v Knowles* 2010 (4) SA 548 (SCA), 557G-I.

[35] Although the applicants allege that they tried and considered alternative remedies I am not persuaded that such remedies have been exhausted.

[36] The court's power to grant a winding up order is a discretionary power irrespective of the ground upon which the order is sought[5] which must be exercised on judicial grounds.[6]

[37] In the exercise of its discretion the court must have regard to the grounds and the reasons for the proposed winding up.[7]

[38] In the present case it is clear on the applicants' version that the first applicant is dissatisfied with the manner in which the first respondent runs the company. This is hardly a basis for a winding up order on the grounds "*it is just and equitable*". There is evidence that the "*complaints*", that the first applicant relies on to support the application, have never been tabled before any meeting of directors or shareholders. The failure to do so by the first applicant is strong indication that these "*complaints*" are not genuine. However, even if they were genuine I am of the view that they cannot form a basis for a winding up on the grounds that it is just and equitable that the company be wound up. I say this because justice and equity demand that all competing interests be taken into account. The provision relied upon confers

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5 *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D) at 844; *Re JD Swain Ltd* [1965] 2 All ER 761 (CA) at 762: *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) at 373.

6 *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 244.

7 *Leca Investments (Pty) Ltd v Shiers* 1978 (4) SA 703 (W) at 705.

upon the court a wide discretionary power which must of course be exercised properly after taking into consideration all relevant circumstances.

[39] In the present case I consider the following, *inter alia*, to be relevant: The tenants are of long standing and the company is fully operational. It is also profitable and has substantial cash reserves in the bank and monies invested in interest-bearing accounts. It is clear, therefore, that liquidation in the circumstances would be prejudicial to the interests of the tenants whose leases would be in jeopardy.

[40] Apart from the above there is no proof that the company is being managed improperly.

[41] Other than one resolution no other resolutions have been tabled by either the first applicant or the first respondent for consideration by the directors.

[42] The numerous allegations by the applicants that there was abuse in the management of the company's affairs are without substance. I say this because notwithstanding investigators being involved (including two lawyers and two accountants) at the instance of the first applicant, nothing untoward has been established that can be laid at the door of the first respondent.

[43] Apart from their failure to lay any basis of any complaint in relation to the manner in which the first respondent is conducting the affairs of the company the applicants failed to fault the manner in which the first respondent has allocated expenses. I am of the view that if there was anything amiss the accountant and the company's independent auditors would have unearthed it. It is, therefore, difficult to imagine on what basis the applicants claim that there is a deadlock in relation to the company and its operation.

[44] Counsel for the applicants sought to persuade this Court that because a provisional order had been granted this Court had enough facts to grant a final order. He argued that since the first respondent had not come with new facts this Court was entitled to grant a final winding up order.

[45] The submission loses sight of the fact that for a provisional winding up order all that the applicant needs to prove is a *prima facie* case. A court cannot grant a final winding up order simply because a provisional order was granted. Something more is required. In *Wackrill (supra)* Margo J, in dealing with a final winding up order, stated the following on page 285H:

> "... *as indicated in the Pakistan Bus Service*[8] *case supra, the Legislature could not have intended that the requirements of s 347 (1) of the Companies Act would be satisfied in respect of a final winding-up order by the adduction of evidence sufficient only to prove a mere prima facie case. Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of viva voce evidence,*

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[8] *Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (N).

where that may be necessary, to resolve material disputes on the affidavits."

[46] In the present case the applicant has failed to prove its case on a balance of probabilities and on the facts placed before this Court, I am unable to reach a conclusion that a winding up order would be just and equitable. Accordingly the application cannot succeed.

[47] Accordingly I grant the following order:

1. The provisional order of winding up granted by Claassen J on 22 September 2010 is discharged.

2. The application for a final winding up of the second respondent is dismissed.

3. The applicant is ordered to pay costs, including the costs occasioned by the engagement of senior counsel.

T M MASIPA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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