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

Case No: 11116/2021

In the matter between:

KIM JACQUELINE PISTOR **Applicant**

AND

COALITION TRADING 390 CC
REG NO 2004/018402/23 **First Respondent**

GRANT GREGORY MACLENNAN PISTOR **Second Respondent**

JUDGMENT ELECTRONICALLY DELIVERED ON 8 JULY 2022

Introduction

1. The applicant, Kim Jacqueline Pistor, and the second respondent, Grant Gregory Maclennan Pistor, are the only two members of the first respondent, Coalition Trading 390 CC with registration number 2004/018402/23.

2. In this application the applicant seeks an order, in terms of Sections 36(1)(d) and 36(2) of the Close Corporations Act 88 of 1984, directing the second respondent to purchase her 50% member's interest in the first respondent.

3. The order is sought on the following terms:

3.1 In relation to the applicant's 50% member's interest in the first respondent, declaring:

3.1.1 That the purchase consideration payable be calculated as follows:

3.1.1.1 As the nett value of member's interest in the first respondent on the date of issuing of this application, adjusted with the second respondent's interest and loan accounts, if any, and all drawings made.

3.1.1.2 The nett value of the shares to be determined as the average of two independent valuations of two practising chartered accountants, each of not less than ten years standing, who shall neither be the auditors for the applicant nor the first or second respondents, having regard to:

3.1.1.2.1 The value of the movable and immovable assets of the first respondent, to be valued by two independent professional evaluators;

3.1.1.2.2 the intangible assets, including goodwill, as a multiple of revenue; and

3.1.1.2.3 the financial statements of the first respondent.

3.2 That the purchase consideration shall carry interest at the prescribed mora interest rate.

4. The alternative prayer to the prayer above is for the applicant to be provisionally wound up.

Factual Background:

5. The applicant and second respondent are married to each other out of community of property and they each hold 50% members interest in the first respondent.

6. The first respondent is a close corporation that administers a property portfolio and attends to the renting out and collection of rental income from its fixed properties which income pays the applicant's and the second respondent's salaries. The first respondent is managed by the applicant and the second respondent, it has no employees. They from time to time ask their eldest daughter to assist them.

7. The applicant and the second respondent's relationship became sour and as a result, they separated in 2019 and had an oral agreement that the applicant will attain full member interest in the first respondent and the second respondent will keep the rest of the assets.

8. Subsequent to the oral agreement, the relationship between the applicant and the second respondent deteriorated to such an extent that on 5 June 2020 the applicant was granted a protection order against the second respondent by Bellville Magistrates Court.

9. The second respondent retaliated by depriving the applicant access to their properties. He informed everyone, including their children, that the applicant

is not welcome on their premises. She was further humiliated when she was dropping off her son in Odendaal at one of the properties they co-own. She asked to use the bathroom and she was refused access. She was told that she is not allowed to enter the premises because she obtained a protection order against the second respondent. Further, the second respondent disempowered the applicant by shutting her out from managing, administering and even being physically present in any of their properties. Her daughter who assists them with the running of the first respondent refuses to give her access or any information about the activities of the first respondent. All the keys to all their properties, most of which are rented out to holidaymakers, are kept by the second respondent.

10. The applicant was instrumental in the establishment and development of the first respondent. She was active in all the ups and downs of building a reputable property portfolio which includes the property for holidaymakers. She avers that she has made a major contribution to the growth of the first respondent; she played a starring role in buying all the first respondent's properties from her previous employer, and her mother invested R290.000 in the first respondent. The second respondent is now refusing to pay her and insists that the applicant must pay to her mother the instalments due. Evidence of that is a copy of that loan agreement that was attached and marked as "KP7"

11. The applicant has since issued a divorce summons against the second respondent.

12. Attempts by the applicant for the parties to negotiate and settle the matter regarding their assets amicably has fallen on deaf ears. The second respondent is refusing to entertain her. This conduct by the second respondent has caused her to suffer as she does not receive any income from the first respondent. The first respondent's financial year ends on 28 February; she avers that she has not received the first respondent's financial statements since 28 February 2019, and therefore does not have information

regarding the current financial status of the first respondent. However, at the time she was involved, she had advised that they sell at least one property to keep afloat as the first respondent was not doing well. Annexure "KP6" of the applicant's papers shows that Knightsbridge Laundry is six months behind with its maintenance bills.

13. She argues that it would be just and equitable for her 50 % interest or share to be acquired by the second respondent or by a third party at its market value. Alternatively, the first respondent may be placed in the hands of a liquidator, an independent person to liquidate and distribute the assets of the first respondent fairly between the applicant and the second respondent or be sold as an ongoing concern to any willing third party.

14. The second respondent does not dispute that the applicant has 50% share in the first respondent, however, he disagrees with the submission that the assets, shares and/or interest should be evaluated stating that evaluators are expensive. He also does not dispute that their daughters act as book administrators and are paid for their services. He avers that their payment varies according to how business fared but it is between R6000.00 and R12 000.00. He disputes that the applicant does not have access to the first respondent's bank accounts stating that in fact she has been making purchases since their separation in 2019.

15. The second respondent admits that he was rude to the applicant after finding out that she had a secret bank account for about 8 years funded by one of their joint properties. She thereafter obtained an interim protection order, and the final was unsuccessful.

16. The second responded avers that the company has been struggling to generate income due to the Covid-19 pandemic and its restrictions. Travelling was banned during that period and as a result some of their properties that operate as holiday rentals suffered a great deal. Justifying why he has not paid the applicant's salary, the second respondent avers that the company has not been able to generate any income to pay salaries. He alleges that

the position of the company's cash flow is dire due to the applicant's excessive expenditure, to which the applicant replied that, it has been for their household. The second respondent further alleges that the applicant traded in their company jet-ski and bought a boat in April 2010. He also indicated that the 2020 financial statements of respondent one were still pending. Further alleged by the second respondent is that the biggest spending by the applicant is for their son who is travelling from Durbanville to Langebaan every day to attend school.

Law and Analysis

17. Section 36 (1) of the Close Corporations Act 88 of 1984 provides that:

1.) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

...

(d) if the circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:
Provided that such application to a court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

Section 36 (2)

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

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

(b) The amounts (if any) to be paid in respect of the member's interest concerned or the claim against the corporation of that member,

the manner and times of such payments and the persons to whom they shall be made; or

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

18. Section 68 of the Close Corporations Act 69 of 1984 provides that A corporation maybe wound up by a court, if –

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

19. It is common cause that over a period of time the relationship between the applicant and the second respondent deteriorated for a variety of reasons and eventually culminated in an agreement in 2019 that the applicant should attain a full member interest, in the first respondent and that the second respondent shall keep the rest of the assets without prejudicing the facilities that they have over the related properties. It is further common cause that by 2020, a year later, both the applicant and the second respondent were unable to cooperate constructively in keeping their verbal agreement and in running their business. The applicant alleges that a protection order that she obtained at Bellville Magistrates Court exacerbated the volatile situation to such an extent that the applicant claims she is refused access to all their properties and the running of the business.

20. The second respondent in his papers corroborates the applicant's evidence that she has limited access to some of their properties. He avers that this depends on whether or not there are bookings. He confirms that the first respondent is being administered by their daughter (and her husband). It is clear that trust between the parties has broken down. The applicant accuses the second respondent of running the first respondent down by making unwise business decisions and the second respondent on the other hand accuses the applicant of being a spendthrift and inconsiderate of the first respondent's

debts or bonds. As a result of the deteriorating relationship between the parties, the first respondent's ability to function and flourish is negatively affected. The second respondent is of the view that he has to protect the first respondent by keeping the applicant away from it. What is strange is that the second respondent fails to constructively engage the applicant to dispose of her 50% interest in the first respondent.

21. In ***Ebrahimi v Westbourne Galleries Ltd 1972 (2) All ER 492 (HL) at 495 Lord Wilberforce*** made it clear that it was a fact of "cardinal importance" to the determination of that case that, prior to incorporation, the business had been carried on by the shareholders as a partnership, with each partner equally sharing the management and the profits of the firm. The equitable intervention of the court on the "partnership analogy" ground requires the satisfaction of two conditions: firstly, the existence of an undertaking that is in substance a partnership in the guise of a private company and secondly, a breakdown of the mutual trust and confidence upon which the original undertaking was founded. The relationship between the applicant and the second respondent has been marred by difficulty and disagreements. I can speculate that with pending divorce proceedings, there is slim chance of improvement in their relations.

22. Up until the time of the hearing, the parties have failed to reach an agreement in respect of the value to be attached to the 50% interest of the applicant in the first respondent. The applicant also applies for an evaluation of the movable and immovable assets, tangible and intangible assets; including good will as a multiple of revenue and the financial statements. The applicant told the court that she has done everything possible to try and resolve the matter but the second respondent is not cooperating, leaving her with no choice but to approach the court to order the second respondent to evaluate and buy her 50% interest; in the alternative, the court to order for the winding up of the first respondent for reasons that it is just and equitable to the first respondent to be wound up.

23. In ***Moosa NO v Mavjee Bhawan (Pty) Ltd & Another 1967 (3) SA 131 (T) at 137, Trollip J,*** as he then was, stated that "the deadlock principle is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement express, tacit or implied, there exists between the members in regard to the company's affairs a particular relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually, that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in the running of the company's affairs. If by conduct which is either wrongful or not as contemplated by the agreement one or more of the members destroy that relationship, the other members or members are entitled to claim that it is just and equitable that the company should be wound up in the same as, if they were partners they could claim dissolution of the partnership".

24. In the case before me, the parties are not cooperating with each other, there is a hostile relationship between the two members, such that the applicant obtained a protection order against the second respondent. The second respondent in turn retaliated by refusing the applicant entry into their fixed properties. He denied her access to the first respondent's administration books and bank accounts. As a result of the above conduct, the relationship between the parties has been destroyed, I find it just and equitable for the first respondent to be provisionally wound up.

25. In ***Kanakia v Ritzshelf 1004 t/a Passage to India 2003 (2) SA 39 at 46 F and 54 D-H Jali J held*** "The provisions of Section 36 may be invoked by a member of the close cooperation. A member who makes the application under section 36 (1) has the onus of proving that he is entitled to the relief which he seeks and it is incumbent upon him to place before the court the necessary evidence not only to enable the court to decide whether it should grant an order in terms of section 36 (1) (a), (b), (c) or (d), but also to make any further order envisaged in section 36 (2).

26. Having regard to the above case law, it is clear that the obstructive conduct of both the parties does not help the first respondent. Settlement negotiations are floundered due to the boiling blood of the second respondent. The evidence shows that the parties have an unhealthy relationship, mutual disillusionment and distrust and the consequent breakdown of the relationship between the parties as shareholders has paralysed the first respondent.

27. Success of any shareholder agreement requires both parties to cooperate for the entity to function optimally. Ideally, under normal circumstances, the second respondent should purchase the 50% interest of the applicant, alternatively parties should have agreed to sell the 50% to a third party. Since it is not possible for the parties to meet due to their irretrievably broken-down relationship, this court finds that it is just and equitable that the first respondent be wound up.

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

    28.1 The first respondent is hereby placed under provisional liquidation in the hands of the Master of the Western Cape High Court.

    28.2 A *rule nisi* is hereby issued calling upon all interested persons to show cause, if any, to this court on 13 September 2022 at 09h30 or as soon as thereafter as the matter may be heard, why the first respondent should not be placed under a final liquidation order.

    28.3 Service of this order shall be effected as follows:

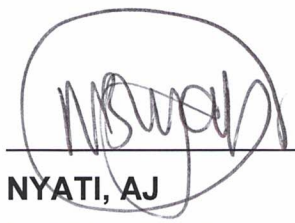
        28.3.1 at the registered office of the first respondent;

        28.3.2 at the office of the South African Receiver of Revenue by the sheriff or his deputy;

28.3.3 by registered post to all known creditors of first respondent with claims in excess of R20.000 and;

28.3.4 By one publication in each of the Cape Times and Die Burger.

29. Costs be costs in the liquidation.



NYATI, AJ

ACTING JUDGE OF THE HIGH COURT