

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 83256/2014

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
<u>26 August 2016</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

MULTIFAB ENGINEERING & FABRICATION CC

Applicant

and

TURBO TECH PUMPS (PTY) LTD

Respondent

J U D G M E N T

TSOKA, J:

[1] The first applicant, Multifab Engineering & Fabrication CC (Multifab) and the second applicant, Jason Kester Bryden (Bryden) seek the final winding up of the respondent, Turbo Tech Pumps Proprietary Limited (Turbo Tech), on various grounds, but mainly on the basis that it is just and equitable to do so.

[2] Turbo Tech purportedly opposes the application. I say purportedly, advisedly, as it will appear hereunder that the application is in fact unopposed.

[3] The facts giving rise to the application are uncomplicated and common cause. Prior to 1 February 2012, Turbo Tech was registered as Ultimate Solutions for Mining Proprietary Limited which changed to Hidro-Tech Sales Imports Proprietary Limited until on 1 February 2012 when it changed its name to Turbo Tech. It has 1000 shares of which 120 were, on 23 August 2012, issued to –

3.1 Craig Douglas Harrison (Harrison)

3.2 Stephen Molefe Nkgadima (Nkgadima)

3.3 Bryden, the second applicant.

Each of the shareholders held 40 shares of the 120 issued shares.

[4] Multifab's business comprises of sales and maintenance of industrial and mining steel fabrication, stainless steel piping and fittings and ancillary equipment like valves while Turbo Tech's main business comprises of sales and maintenance of industrial and

mining pumps. A joint venture between Multifab and Turbo Tech was entered into in terms of which the latter would supply pumps to the former's customers at 2,5 % commission. What would happen is that Multifab would supply the pumps to customers but issued invoices to Turbo Tech who would either leave the commission in the latter's account or off-set the commission against Bryden's loan account in Turbo Tech, its managing director. Turbo Tech would, however, still establish its own client base by selling the pumps in order for it to be profitable.

[5] As it became difficult for Turbo tech to be profitable, the shareholders agreed to fund Turbo Tech through shareholder loans and loans from the other entities, hence the involvement of Multifab. Although the loans were interest free, they were, however, repayable on demand. From commencement of business in August 2012 until March 2014 Turbo Tech was funded in this way. In addition, Bryden was appointed the Managing Director of Turbo Tech. As the latter was unable to pay Bryden's monthly salary, the salary accrued as a loan account in Turbo Tech. As at the date of the application, the loan accounts of Multifab and Bryden in Turbo Tech amount to R594 498,84 and R588 903,70 respectively.

[6] During October 2013, the other shareholders in Turbo Tech left it to Bryden to fund and run the business of Turbo Tech resulting in a net loss for the financial year end of 2013 in the amount of R315 530. During this period, Harrison and Nkgadima, the other shareholders, started excluding Bryden from the management of Turbo Tech. This resulted in the latter being unable to pay rental for the premises it operated from and

also being unable to furnish the annual financial reports. Turbo Tech's creditors were owed moneys for goods sold and delivered. In spite of giving undertakings to the creditors to settle the debts, these remained due and unpaid.

[7] Subsequent to the ousting of Bryden from running Turbo Tech, and contrary to the articles of association, new 'directors' were appointed to run the affairs of Turbo Tech. Unlawful resolutions were passed by Turbo Tech with the result that Harrison and Nkgadima were divested of their shareholding in Turbo Tech with the new shareholders coming in. Bryden was then charged by the new 'directors' with misconduct of unlawfully disobeying orders of the new directors. This resulted in him being dismissed as a director of Turbo Tech. He and Multifab, however, remained as shareholders in Turbo Tech. It is on this basis that Bryden contends that the company has been hijacked and that it is just and equitable that the company be wound up as it unable to carry on business and take lawful decisions.

[8] The application is resisted by Turbo Tech on the basis of an answering affidavit deposed to by the daughter of a 'shareholder' in the former, whose contention is that her father ceded his shareholding in Turbo Tech to her.

[9] As pointed out earlier, in reality the application is unopposed. The affidavit deposed to, suggests that it was deposed to a Commissioner of Oaths in terms of the Justices of Peace and Commissioners of Oaths Act 16 of 1963 (Promulgated in Government Gazette 3619 Government Notice R1258 of 21 July 1972). A closer

examination of the answering affidavit reveals that, although it was deposed to by a female 'shareholder', a male person appeared before the Commissioner of Oaths. As this court in *ABSA Bank v Botha NO 2013 (5) SA 563 (GNP)* at 567B-568C-E pointed out, no reliance could be placed on an affidavit such as the one in issue. That being the case, there is no proper affidavit filed opposing the application.

[10] Although the deponent became a director of Turbo Tech in August 2013, as a result of the cession allegedly entered into between her and her father, she testified about matters that occurred long before she became a director in Turbo Tech. The answering affidavit filed in opposition is mainly hearsay and unreliable. The application is resultantly not opposed on *bona fide* and reasonable grounds. The attempts by the 'shareholders' of Turbo Tech in filing confirmatory affidavits are unhelpful and irrelevant. They were deposed to before the answering affidavit came into existence. On this basis, they cannot be regarded as confirmatory of a fact that was not existence at the time. The unreliable hearsay evidence remains. It is on this basis that, in my view, the application for final winding up is unopposed.

[11] The relationship between the directors of Turbo Tech is analogous to that of partners. It is founded on confidence and trust which are a prerequisite for the successful operation and existence of the company. Absent such confidence and trust, Turbo Tech cannot exist. Its operation to realise its objective for its existence would be hamstrung and paralysed. It would exist in name only.

[12] In the present matter, Bryden complains that the former directors of Turbo Tech imposed new shareholders and directors on him. Shares in Turbo Tech were transferred to third parties contrary to the Articles of Association of the company. He, as the managing director of the company, was not consulted. Neither was his consent sought and obtained. The illegal board of directors purportedly adopted resolutions, which ostensibly, would bind the company. The resolutions taken in the absence of Bryden, are therefore unlawful. They cannot be resolutions of Turbo Tech.

[13] Although Bryden was the managing director of Turbo Tech, he was unlawfully removed from this position and other persons appointed to act in his position. The appointment of the new managing director was not only contrary to the founding documents of the company and the Companies Act but was not with his consent too. Persons who are unrelated to the company chaired the board and passed resolution on behalf of the company. All these actions are carried out without his knowledge and consent. Monies were illegally siphoned off from Turbo Tech's bank account without his consent. The unlawful activities of the new shareholders have since been followed with threats of physical harm and death. In particular Bryden states that a hit was organised on him while his wife would end up '...in some kind of accident such as being pushed off the road or worse...'

[14] In the circumstances, Bryden alleges that Turbo Tech has been 'hijacked'. He, as the driver of the company, has been pushed out from conducting the affairs of Turbo

Tech. It is on this basis that he contends that it is just and equitable that the company be wound up.

[15] In *Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc.* 2008 (5) SA 615 SCA at para 18, the court reasoned that '*...just and equitable provision is not limited to cases where substratum of the company has disappeared or where there has been a deadlock. Where there is in substance a partnership, in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding-up of the company under just and equitable provision...*'

[16] In the present matter, Turbo Tech was in substance a partnership between three equal partners. The relationship amongst them having irretrievably broken down; the lack of confidence and trust in conducting the business of the company having disappeared, it is, in my view, just and equitable that the company be wound up.

[17] All the statutory requirements having been complied with, the following order is made –

17.1 The respondent is placed in final winding up;

17.2 It is ordered that the costs of the application shall be costs in the liquidation of the respondent.



M TSOKA

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING:

25 July 2016

DATE OF JUDGMENT:

30 August 2016.

COUNSEL FOR APPELLANT:

Adv. J Du Toit, SC

INSTRUCTED BY:

Blake Bester, De Wet & Jordaan Inc.

COUNSEL FOR RESPONDENT:

Adv. Vorster

INSTRUCTED BY:

AMMM Inc.