

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Reportable: No
Of Interest to other Judges: No

6 Oct 2023 Vally J

Case No.: 20073/2022

In the matter between:

D, L

Applicant

and

Mitchcam Property Investments (Pty) Ltd

First Respondent

D, T Michael

Second Respondent

Case No.: 28546/2022

T M D

Applicant

and

Mitchcam Property Investments (Pty) Ltd

First Respondent

D, L

Second Respondent

JUDGMENT

Vally J

[1] There are two applications before court. The facts in both applications are in most material respects the same. The two main protagonists in both applications are Mrs L D (Mrs D) and Mr T M D (Mr D) who are married to each other. They are in the process of securing a decree of divorce from this court. The divorce proceedings commenced in 2017. Many issues relating to the financial consequences of the divorce are hotly contested, as a result of which the divorce proceedings have dragged on for five years.

[2] The first application is brought by Mrs D. It is brought in terms of s 165(5) of the Companies Act, 71 of 2008 (Act) (s 165 application). She seeks, in the main, leave to institute derivative proceedings on behalf of the second respondent, Mitchcam Property Investments (Pty) Ltd (Mitchcam), against Mr D. She and Mr D are co-directors of Mitchcam. The second application is brought by Mr D. He asks that Mitchcam be placed in final, alternatively provisional, winding-up. The application is brought in terms of s 79(1)(b) read with s 81(1)(d)(iii) of the Act.

[3] Before delving into the matter it is necessary to record that a few days before the hearing Mrs D brought an application to file a supplementary affidavit. The application I find has no merit. It stands to be dismissed. The order below will reflect this finding. I will later in this judgment give brief reasons for the finding.

Background to both applications

[4] During the early days of their marriage, Mr and Mrs D decided to form a

company. The company ultimately came to be Mitchcam. The name is a combination of the names of their two children. The shareholding of Mitchcam is held by two trusts, a T D Trust and a L D Trust on a proportion of 50% each. Upon forming Mitchcam, Mr and Mrs D agreed that Mr D would be its sole director.

[5] Sometime in 2003 Mitchcam purchased a property in Salt Rock, Kwa-Zulu Natal (Salt Rock property). The property was leased on a short-term basis to tenants in order to earn an income. Mr D was the sole signatory to the bank account of Mitchcam. On 6 October 2016¹ Mrs D was made a director of Mitchcam. Thereafter she secured signing rights on its bank account, and gained access to the bank accounts of Mitchcam. By this stage she was also actively involved in managing Mitchcam's affairs, such as collecting the rental revenue due to Mitchcam, paying out the rates, taxes and other obligations including utility bills. In 2017 Mr D instituted a divorce action. Mrs D opposes the action. The main dispute between them relates to proprietary consequences of the divorce.

[6] Upon scrutinising the bank account of Mitchcam, Mrs D discovered that Mr D was utilising its revenue to pay for expenses 'and/or other capital acquisitions' that were not related to Mitchcam or to Salt Rock. She made an attempt to find out what these expenses were for, but was unsuccessful in her endeavours. She was never presented with the Annual Financial Statements (AFS) of Mitchcam until 2017. She had a number of *Subpoenae Duces Tecum* issued for parties with information about the affairs of Mitchcam. The documents she received were the AFS for the 2012 to 2014 and 2016 years. She received these at the end of October 2020. All the AFS

¹ A letter written by Mrs D's erstwhile attorneys to Mitchcam says that she was appointed on 25 November 2016, but in the papers it is alleged that it was 6 October 2016. Nothing however turns on this.

were signed off by Mr D. She discovered that Mr D had taken a loan from Mitchcam. Her erstwhile attorneys, purporting to act on behalf of Mitchcam, issued a letter of demand to Mr D calling on him to repay Mitchcam the sum of R14 734 607.00. The letter of demand was inappropriate as the attorneys were acting for her and not for Mitchcam.

[7] The 2016 AFS records a loan in the amount of R14 593 025.00 given to Mr D by Mitchcam. This loan constitutes the single largest asset of Mitchcam. The loan is recorded as being unsecured.

[8] A wholly-owned subsidiary of Mitchcam, Erf 7 Extension 6 Longmeadow (Pty) Ltd (Longmeadow), owned a property which was sold during the 2013 financial year for R12,5 million (twelve million, five hundred thousand rand). However, only R6 million (six million rands) of this money was transferred from Longmeadow to Mitchcam during the February 2013 year. Mrs D was able to establish that the monies were disbursed in various ways, but none of these, it seems, were related to the business affairs of Mitchcam. A similar trend had established itself with the Mitchcam Bond Account, where monies were deposited into and withdrawn from this account without much explanation. The withdrawals were not made in order to meet any of Mitchcam's financial obligations. Mr D was the sole signatory on the Mitchcam Bond Account.

[9] On 3 July 2020, Mrs D's erstwhile attorneys sent a letter of demand to Mitchcam calling on it to commence legal proceedings against Mr D to recover all the monies unlawfully withdrawn from Mitchcam's accounts.

'1 We act on behalf of Leanne D, a director of Mitchcam Property Investments Proprietary Limited ("the company"). This demand is made on behalf of Mrs D in her capacity as a director of the company, as contemplated in s 165(2)(b) of the Companies Act 71 of 2008 ("the Act").

2 Mrs D's appointment as a director of the company took effect on 25 November 2016. From the time that the company was incorporated until Mrs D's appointment, T M D was the sole director of the company. Since Mrs D's appointment, there have been two directors, Mrs D and Mr D.

...

4 Mr and Mrs D are currently in divorce proceedings. In that context, Mr D has made available to Mrs D certain sets of the company's financial statements relating to the period prior to her appointment as a director. We emphasise that these are not a complete set, and that the information in this letter is based on the limited information that has been made available.

5 From the information made available, our client has become aware of conduct of Mr D in his capacity as a director of the company that appears to constitute (i) a contravention of the provisions of s 45 of the Act; and/or (ii) a breach of his fiduciary duties to the company, including an attempt to take advantage of an opportunity or information of the company's (contrary to s 76(2)(a) of the Act) and/or the abuse of his position as director by exercising his powers other than in the best interests of the company (contrary to s 76(3)(a) and (b)); and/or (iii) a contravention of s 75 of the Act.

... [Evidence in support of the allegations is referred to]

12 Section 45 of the Act prohibits company loans to directors unless, amongst other requirements (i) the shareholders have approved the loan by special resolution; (ii) the board is satisfied that the solvency and liquidity tests would be satisfied immediately after the making of the loan; and (iii) the board is satisfied that the terms under which the loan is made are fair and reasonable to the company.

13 When each of the loans (or loan increases) described above was made, Mr D was the sole director of the company. In the circumstances, the assessments referred to in (ii) and (iii) of paragraph 12 were required to be performed by the shareholders, i.e. by the LD Trust and the TD Trust.

14 None of the loans (or loan increases) described above was presented to the trustees of the LD Trust (who, as indicated, included Mrs D over the relevant period) for their approval and the LD Trust did not approve any of the loans. Nor did the trustees of the LD Trust satisfy themselves regarding the company's solvency and liquidity position or whether the making of the loans was on terms fair and reasonable to the company. (Regarding whether the loans were on fair and reasonable terms: As a general rule, the making of very substantial interest-free loans would not be fair and reasonable to the company. As at the end 2016 financial year, the company's loan claim against Mr D was its biggest asset by a considerable margin.)

15 The loan is therefore void.

16 Mr D has also breached the provisions of s 75 and ss 76(2) and (3) of the Act in relation to the loan.

''''

18 A letter of demand was sent to Mr D on behalf of the company on 10 June 2019 calling for the immediate repayment of the loan, then standing at R14,734,607. ... That demand was ignored.

19 In the circumstances, the company has a claim against Mr D for the recovery of all unlawful payments made to him, as well as a claim in terms of the provisions of s 77(2)(a) and (b) of the Act for any losses or damage that the company has sustained, notably by lending money on grossly unfavourable terms.

...

25 In the premises, our client demands that the company commences legal proceedings against Mr D to recover the loss or damage described above and to take any other steps appropriate to protect the company's legal interests..'

[10] The letter, which complies with the requirements of s 165(2) of the Act, failed to elicit any response from Mitchcam. Consequently, Mrs D launched the present proceedings in her capacity as director of Mitchcam.

[11] Three months later, on 11 October 2020, Mrs D opened a criminal case against Mr D alleging that he had committed a fraud on Mitchcam and had stolen monies from it. She deposed to an affidavit on that day in support of her claims. She claims that she was compelled by s 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (Precca) to report on his alleged criminal conduct. In that affidavit she avers:

‘I am aware that [Mr] D is in the process of moving his assets abroad, *inter alia* by making use of the TLMC Legacy Trust which is an off-shore trust and the M and C Legacy Trust which is a locally registered Trust.

I have little doubt that Mitchcam will not be able to obtain repayment of the loan from [Mr] D.

I have taken steps in terms of section 165 of the [Act] for [Mitchcam] to claim repayment from [Mr] D of the amount misappropriated, but Even then [Mr] D’s estate, or what remains of it in South Africa will most probably be sequestered and Mitchcam will recover nothing of, or best, very little of the “loan” of more than R14 million.’

Subsection 165(5) of the Act

[15] Subsection 165(5) of the Act provides:

‘(5) A person who has made a demand in terms of subsection(2)may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if—

(a) the company—

(i) has failed to take any particular step required by subsection(4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand, as contemplated in subsection (4)(b)(ii); and

(b) the court is satisfied that—

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case maybe.'

Does Mrs D comply with the provisions of ss 165(5) of the Act

[12] There is no question that Mrs D has satisfied the requirements set in subsection 165(5)(a). As for those set in subsection 165(5)(b), Mr D denies that she has satisfied any of the three requirements.

[13] He claims that the intended action is brought to gain an advantage in the divorce action and is therefore not brought in good faith. It will not 'involve a trial of a serious question of material consequence to' Mitchcam as Mrs D was at all material times aware that he had been withdrawing monies from Mitchcam's account in order to meet their joint household expenses. Lastly, it will not be in the best interest of Mitchcam to commence proceeding as it will not recover any monies from him.

[14] The first objection of Mr D is without merit. By his own account he has withdrawn monies from Mitchcam and utilised them for purposes not related to the affairs of Mitchcam. Further, the 2013, 2014 and 2016 AFS of Mitchcam, which have been signed-off by Mr D, reflect that it holds an asset in the form of a debt owed to it by Mr D. The debt is recorded as a loan made to Mr D. Despite its reflection as a loan in the AFS, Mr D denies that such a loan exists. There is no explanation by him as to why it is reflected as a loan in the AFS, and why he signed-off the AFS. For purposes of this matter it has to be accepted that Mitchcam has loaned him the considerable sum of R14 593 025.00. In any event, this issue would, if the derivative action is authorised, be the focus of those action proceedings. And, should it be found that it is a loan, then Mr D would have to repay it. At this point, it is important to note that Mr D does not deny that the loan (should it be found to be one) was not made in accordance with the provisions of s 45 of the Act. The same would apply to the transactions made on behalf of Longmeadow and those on the Mitchcam Bond Account. In essence and by definition, the action would benefit not Mrs D but Mitchcam.

[15] There is no doubt that Mrs D honestly believes that a good cause of action exists. She cannot believe otherwise, as Mr D has admitted to unlawfully withdrawing monies from Mitchcam. His explanation that Mitchcam has not loaned him any monies is of no assistance to him on this score. Mrs D was not a director of Mitchcam at the time the monies were withdrawn, and therefore did not owe Mitchcam a fiduciary duty. But she does so now as she is a director. Proposing a resolution that Mitchcam institutes legal proceedings against Mr D would be acting in compliance with her fiduciary duty towards Mitchcam. However, that she would

not get the Board to pass a resolution to institute proceedings against Mr D is accepted, and reflected in the opposition to her s 165(5) application. This is because Mr D enjoys an equal share of the vote on the Board, and will not support the resolution. As they are the only two directors, the Board is clearly deadlocked on this issue.

[16] The second objection is similarly without merit. The unlawfulness of the withdrawals cannot be ignored. They do not become lawful simply because Mrs D may have agreed to them. By unlawfully taking monies from Mitchcam he has harmed the interests of Mitchcam. That Mitchcam is duty-bound to take whatever steps are necessary to protect its interests is not open to debate. It has to institute proceedings against him, and by commencing with legal proceedings it would certainly be raising 'a serious question of material consequence' to itself.

[17] The third objection, however, is a different matter. On 11 October 2020, Mrs D averred in an affidavit that Mitchcam will either not recover any monies from Mr D, or will recover very little of the 'more than R14 million' owed to it by Mr D. In the circumstances, while she quite understandably believes that Mitchcam has a good cause of action against Mr D, she at the same time recognises an order in favour of Mitchcam is likely to be of little value. As a result, it cannot be in the best interests of Mitchcam that she be granted leave to commence the proposed action proceedings. For this reason only, her application fails.

The application by Mr D to wind-up Mitchcam

[18] Mr D says that as both he and Mrs D are deadlocked over the fate of the Salt

Rock house, the purpose for the existence of Mitchcam is no more. And, as they are not able to amicably work together, it is just and equitable that Mitchcam is wound-up. He relies on the provisions of ss 81(1)(d)(iii) of the Act for this relief.

[19] Section 81 of the Act attends to the voluntary winding-up of a solvent company. Subsection 81(1)(d) provides as follows:

‘A court may order a solvent company to be wound-up if-

...

- (d) the company or 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 deadlocked 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.’

[20] There is clearly a deadlock at the Board of Directors. The trust relationship between Mr and Mrs D has broken down. Nevertheless, Mr D for good reason does not rely on ss 81(1)(d)(i). This is so because there is no irreparable damage suffered by Mitchcam as a result of this deadlock or breakdown in the trust relationship between the two directors. Mr D alleges that Mrs D may be inflating the

expenses of Mitchcam to reduce its tax liabilities, but there is no evidence to support this allegation of unlawful conduct on her part. The evidence, on the other hand, shows that Mitchcam's operations remain unaffected by the conflict at the Board level. It is drawing an income by renting the Salt Rock property. In compliance with an order of this court issued in the rule 43 application (rule 43 order), some of the income is drawn upon by Mrs D on a monthly basis. The expenses of the company are regularly paid. Should this court issue a winding-up order, the Master of this court will appoint a liquidator to oversee the winding-up process. The cost of the process will be borne by Mitchcam, placing in jeopardy the receipt of monies by Mrs D in terms of the rule 43 order. A more than likely consequence would be a revisitation of the rule 43 order.

[21] Further, Mitchcam will no doubt feature in the divorce proceedings. Its fate will be one of the proprietary consequences of the divorce.

[22] In the circumstances, it would not be just and equitable to order that Mitchcam be wound-up and placed into the hands of the Master.

The application by Mrs D to file a supplementary affidavit

[23] She avers in that affidavit that it is necessary for her to bring to the attention of the court certain information that only came to light in June 2023. She was only able to verify the correctness of the information in August 2023. As mentioned, the application was brought a few days before the hearing of the matter. There are two very disturbing aspects of the application that bear mentioning, (i) the supplementary affidavit that is sought to be admitted is badly presented - none of

the paragraphs are numbered thus making it impossible for Mr D to respond meaningfully to each paragraph, and (ii) Mr D was given a few days only to respond to the application, making it impossible for him to respond meaningfully to each of the allegations made therein.

[24] The information sought to be introduced by the supplementary affidavit is merely further evidence of a claim she made in her founding affidavit. In her founding affidavit she averred that Mr D transferred about R14,593,000.00 (fourteen million, five hundred and ninety-three thousand rand) from the bond account of Mitchcam into his private account. The information in the supplementary affidavit takes the matter no further. It merely provides evidence of the transfers that took place. The evidence is of various transactions undertaken by Mr D for and on behalf of Mitchcam. They demonstrate that Mr D withdrew substantial amounts of money from Mitchcam during years when he had sole control of its affairs. But this evidence, albeit without the detail that is contained in the supplementary affidavit, was already contained in the founding affidavit of Mrs D. There is therefore no basis for admitting the supplementary affidavit. Accordingly, the application should be dismissed.

Costs

[25] This matter is linked to a matrimonial dispute. Both parties were successful in their respective opposition to each other's application. In the circumstances it would be fair and just for no order as to costs to be made. Mrs D failed in her quest to file a supplementary affidavit. Mr D asks for a costs order on a punitive scale. The application was well-intentioned, albeit misconceived. A fair approach would be

to make no order as to costs.

Order

[26] The following orders are made:

- a. The applicant's application to file a supplementary affidavit is dismissed.
- b. The application for leave to institute derivative proceedings on behalf of the first respondent against the second respondent in case no. 20073/2022 is dismissed
- c. The application for a final, alternatively provisional, winding-up order in case no. 28546.2022 is dismissed.
- d. Each party is to pay her/his own costs in each of the cases.

Vally J
Gauteng High Court, Johannesburg

Date of hearing: 30 August 2023

Date of judgment: 6 October 2023

Case No.:20073/2022

For the applicant: L de Wet
Instructed by: Barter McKellar Inc
For the second respondent: A Govender with K Iles
Instructed by: Webber Wentzel

Case No.: 28564/2022

For the applicant: A Govender with K Iles
Instructed by: Webber Wentzel
For the second respondent: L de Wet
Instructed by: Barter McKellar Inc