

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **7th June 2023** Signature:

CASE NO: 32917/2021

DATE: 7TH JUNE 2023

In the matter between:

PRINGLE, GLEN ANDREW

Applicant

and

VITAL SALES GROUP (PTY) LIMITED

First Respondent

PRINGLE, DODDS BEAUMONT

Second Respondent

VITAL SALES CAPE TOWN (PTY) LIMITED

Intended Intervening Party

Neutral Citation: *Pringle v Vital Sales Group and Another (32917/2021)* [2023]

ZAGPJHC 656 (07 June 2023)

Coram: Adams J

Heard: 27 February 2023

Delivered: 07 June 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 07 June 2023.

Summary: Liquidation – company – application for final winding-up order in terms of section 344(h) of the 2008 Companies Act – a Court may wind up a company if it is just and equitable that the company should be wound up – shareholders and directors continuously fighting and consistently at loggerheads – impossible to convene shareholders’ meetings – company unable to take any decisions – therefore, just and equitable to liquidate company – Section 163 of the 2008 Companies Act – relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company – conduct complained of – not conduct of a ‘related person’ – Final winding-up order granted – counter-application in terms of s163 dismissed.

ORDER

- (1) The first respondent, Vital Sales Group (Pty) Limited, with registration number 1999/005997/07, be and is hereby finally wound-up and placed under final liquidation in the hands of the Master of the High Court, Johannesburg.
- (2) The second respondent shall pay the applicant’s costs of the liquidation application, such costs to include the costs of two Counsel, one being Senior Counsel (where so employed).
- (3) The second respondent’s counter-application is dismissed with costs, such costs to include the costs of two Counsel, one being Senior Counsel (where so employed).
- (4) The application to intervene in these proceedings by the Intended Intervening Party (Vital Signs Cape Town (Pty) Limited) is dismissed with costs, such costs to be paid by the second respondent and are to include the costs of two Counsel, one being Senior Counsel (where so employed).

JUDGMENT

Adams J:

[1]. The applicant ('Glen') and the second respondent ('Dodds') are brothers and they have been in business together for many years. I refer to these parties in this judgment by their first names as it is convenient to do so, since they share the same surname and not because any disrespect is intended. Since 1999, they have been equal shareholders – each owning fifty percent shareholding – in the first respondent ('VSG'), a company which does not actively trade, owns no assets and is merely a majority shareholding company. They have also since 1999 been and presently are the sole directors of VSG, which is a seventy percent shareholder in a company by the name of Vital Sales Cape Town ('VSCT'), together with an unrelated third party, a Mr Thorpe, who owns thirty percent shares in the said company. Dodds is the sole director of VSCT.

[2]. The relationship between Glen and his older brother, Dodds, has, to put it euphemistically, soured. From during 2018, when a business related dispute escalated into a physical altercation, during which Dodds shot and wounded Glen, they have been embroiled in ongoing fights and never-ending rather acrimonious litigation. By all accounts, they do not see eye to eye and doing business together has become nigh impossible – especially so in their relationship as co-directors of and joint shareholders in VSG, which needless to say adversely affects the running of VSCT.

[3]. Before me is an application by Glen for the final winding-up of VSG, which application is opposed by Dodds, who has also brought a counter-application in terms of s 163 of the 2008 Companies Act¹ *inter alia* for an order that the majority shareholding held by VSG in VSCT be transferred to him. A third application by Dodds, on behalf of VSCT to intervene as an applicant in the counter-application, is also before me. In my view, a consideration of and a

¹ The Companies Act, Act 71 of 2008;

decision relating to the liquidation application would also take care of the other two applications and I therefore deal with the former application first.

[4]. The main question to be considered in this matter is whether Glen has made out a case for the liquidation of VSG, which application is premised on the basis that it would be 'just and equitable' to wind-up the said company and is brought in terms of section 344(h) of the 1973 Companies Act², as read with s 81(1)(d)(iii) of the 2008 Companies Act, which provides as follows: -

'81 **Winding-up of solvent companies by court order –**

(1) A court may order a solvent company to be wound up if –

... ..

(d) the company, 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 –

... ..

(ii) it is otherwise just and equitable for the company to be wound up.'

[5]. Section 344(h) of the 2008 Companies Act simply provides that 'a company may be wound up by the Court if ... it appears to the Court that it is just and equitable that the company should be wound up'.

[6]. This issue is to be decided against the factual backdrop of the matter as per the facts set out in the paragraphs which follows.

[7]. It is common cause between the parties that a formal and substantive deadlock exists between Glen and Dodds – both as directors and as shareholders of VSG. They have not been able to convene as a board of directors for a considerable period of time. When Glen was able to convene a board meeting, they were unable to agree on the passing of any resolutions, notably those ones relating to the holding of an ordinary shareholders meeting or a special shareholders meeting.

[8]. On this basis alone, VSG should be wound-up. As was held in *Thunder Cats Investment 92 (Pty) Ltd and Another v Nkonjane Economy Prospecting and Investment (Pty) Ltd and Others*³:

² The Companies Act, Act 61 of 1973;

³ *Thunder Cats Investment 92 (Pty) Ltd and Another v Nkonjane Economy Prospecting and Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA);

'A liquidation application based on the said general rule postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up.'

[9]. The point *in casu* is simply that, in the circumstances of this matter, the ineluctable conclusion is that it is just and equitable for VSG to be wound up. The shareholders and the directors of that company find themselves in a 'complete deadlock', as well as in 'substantive deadlock' as envisaged by *Cilliers NO and Others v Duin & See (Pty) Ltd*⁴. The directors on the first level and the shareholders on the next level are deadlocked and it is impossible for the company to take a decision. (*Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others*⁵).

[10]. Moreover, VSG can safely be described as small domestic company. This means that there probably exists or should exist 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. By their conduct the members of VSG have destroyed that relationship, which, in turn, means that a member is entitled to claim that it is just and equitable that the company should be wound up.

[11]. It bears emphasising that the two brothers have had physical altercations (the shooting incident), pursuant to which Glen obtained a final domestic violence interdict against Dodds. They are and have been embroiled in numerous litigation against each other in both their personal and representative capacities (as directors and as shareholders). There can be little doubt that there is an irretrievable breakdown in their relationship and that there is no longer a possibility of managing VSG through the majority shareholders' vote in terms of and in accordance with the basic arrangement between the shareholders. Dodds has clearly indicated that he can no longer trust Glen and has no confidence in him as a director. It is not disputed that Glen and Dodds, in their capacity as the only two directors of VSG, have been unable to pass a resolution material to the shareholding of VSG in VSCT, thus stifling in a serious way the operations of the latter company.

⁴ *Cilliers NO and Others v Duin & See (Pty) Ltd* 2012 (4) SA 203 (WCC);

⁵ *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others* [2014] JOL 32101 (WCC);

[12]. In sum, the evidence before me confirms that the relationship between the two brothers has been destroyed and irretrievably broken both at the level where they are the only two directors, as well as at the level where they are the only two shareholders of VSG. It is not possible for VSG to take any decision on the management of the company. Taking into account competing interests, the broad conclusions of law, justice and equity, I am of the view that I ought to exercise my discretion in favour of the winding-up of VSG.

[13]. For these reasons, the second respondent's counter-application, which is brought in terms of the provisions of s 163 of the 2008 Companies Act, should also be dismissed. The point is simply that the company stands to be liquidated so that the interest of the members can be realised.

[14]. There are other reasons why the counter-application should be refused.

[15]. Section 163 of the 2008 Companies Act reads as follows:

'163 Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

- (1) A shareholder or a director of a company may apply to a court for relief if –
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

[16]. The starting point for a discussion on s 163 has to be the fact that the conduct of the majority shareholders must be evaluated in light of the fundamental corporate law principle that, by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders. Therefore, not all acts which prejudicially affect shareholders or directors, or which disregard their interests, will entitle them to relief – it must be shown that the conduct is not only prejudicial or disregardful but also that it is unfairly so.

[17]. The conduct of the majority shareholders should also always be judged in the light of the principle that ‘... by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder’. (*Sammel v President Brand Gold Mining Co Ltd* 1969⁶; *Louw and Others v Richtersveld Agricultural Holdings Company (Pty) Ltd and Others*⁷; *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others*⁸).

[18]. The factual basis on which Dodds, as director and shareholder of VSG, relies for an order in terms of s 163 is that, according to him, Glen has been prejudicial to VSG, has unfairly disregarded his (Dodds’) interest to and in the said company and/or that Glen has been prejudicial to VSG.

[19]. In my view, there is no evidence proffered by Dodds in support of his case in that regard. Moreover, as was contended by Mr Malan SC, who appeared in the matter on behalf Glen with Mr Van Rhyn van Tonder, in his founding papers in the counter-application, Dodds failed to disclose a cause of action. I say so for the simple reason that in terms of VSCT’s Articles of Association, its other shareholder, Mr Thorpe, who, it will be recalled, owns thirty percent of the shareholding, has the right of first refusal in respect of the sale of shares in VSCT by VSG. Mr Thorpe has not been joined in these proceedings and for that reason alone, the counter-application by Dodds is fatally defective. He should at the very least have been given notice of the claim for a transfer of the shares to Dodds from VSG, and he ought to have been given the option to make an equal to or better than the proposal as per the counter-claim.

[20]. In any event, howsoever one views this matter and Dodds’ averments in the counterclaim, it cannot possibly be said that Glen’s conduct (complained of

⁶ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 678 and 680-681;

⁷ *Louw and Others v Richtersveld Agricultural Holdings Company (Pty) Ltd and Others* [2010] JOL 26358 (NCK) par 36;

⁸ *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC);

by Dodds) constitute conduct of a related person for purposes of granting any relief in terms of s 163. Simply put, and as submitted on behalf of Glen, there is no evidence before the court that Glen directly or indirectly controls either VSG or VSCT. Because, if he did, there would have been no reason for him to bring the application for the liquidation of VSG, which, by all accounts, is presently rudderless. It cannot make any decisions, let alone important ones, as has been demonstrated by the attempt by Glen to convene a shareholders meeting, which attempts failed. How then, I ask rhetorically, can it be said that the Glen control either VSG or VSCT?

[21]. Whether a person has control will depend on the circumstances. The question is unavoidably a factual one. It can include the situation where the controlling person, a minority or equal shareholder, has *de facto* control to materially influence the policy of the company, akin to a person who has *de jure* majority control. Thus, it is possible for a person to control a juristic person despite not having *de jure* control or the majority of controlling votes in the company. In that regard, see *De Klerk v Ferreira and Others*⁹.

[22]. That is clearly not the case *in casu*. Glen is not a related person in terms of s 2 of the 2008 Companies Act. This then means that Dodds is not entitled to the relief he seeks in terms of s 163 of the 2008 Companies Act. What is more is that Glen's alleged unlawful behaviour and/or conduct (of which Dodds complains in his counter-application) does not transcend to VSCT. It bears repeating that it is VSG, and not Glen, which is the seventy percent shareholder of VSCT. It (VSG) is therefore a 'related party' to VSCT for purposes of section 163., read with section 2, of the Companies Act. In other words, VSG exercises direct or indirect control over VSCT. I reiterate that the fact that VSG has historically been unable to effectively exercise this control is the proximate cause as to why it falls to be wound-up, which application is premised on the existence, as found *supra*, of both the formal and substantive deadlock.

[23]. In sum, the point is simply that a consideration of s 163(1) of the 2008 Companies Act – for purposes of the counter-application and the exercise of the Court's discretionary sanctions as stipulated in s 163(2) – requires oppressive,

⁹ *De Klerk v Ferreira and Others* 2017 (3) SA 502 (GP) para 80;

prejudicial or unfair practice or conduct to occur within VSG or ‘the related party’, being VSCT. In that regard, Glen submitted that Dodds’ complaints of unlawful conduct and offensive behaviour allegedly suffered by VSG or VSCT were factually at the hands of other entities, such as Vital Engineering (Pty) Ltd, Broad Market Trading 242 (Pty) Ltd, Amagratings (Pty) Ltd and Veam International (Pty) – not by Glen. I am in agreement with these submissions.

[24]. That, in my view, spells the end of the counter-application. None of these juristic entities are a ‘related party’ to VSG or VSCT as envisaged in s 2 of the 2008 Companies Act. (*Kudumane Investment Holdings Ltd v Northern Cape Manganese Co (Pty) Ltd and Others*¹⁰; *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*¹¹; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*¹²). And the fact that Glen is a director or shareholder in these ‘unrelated’ companies does now mean that Glen’s involvement in those entities makes him ‘related party’ for purposes of s 163.

[25]. For all of these reasons, the counter-application falls to be dismissed.

[26]. Consequently, and because the counter-application should fail, the application to intervene by VSCT, should suffer the same fate.

Conclusion and Costs of Appeal

[27]. For all of these reasons the liquidation application must succeed and the counter-application should be dismissed.

[28]. As for costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*¹³. There are, in my judgment, no grounds in this case to depart from the ordinary rule that costs should follow the result. I therefore intend granting costs in favour of the applicant against the second respondent. The complexity of the matter does, in

¹⁰ *Kudumane Investment Holdings Ltd v Northern Cape Manganese Co (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) at par 49 – 50;

¹¹ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) paras 6 & 56;

¹² *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC);

¹³ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

my view, warrant costs to include the costs of two counsel, with one being Senior Counsel (where so employed).

[29]. I am however not persuaded that the costs should be on a punitive scale.

Order

[30]. Accordingly, I make the following order: -

- (1) The first respondent, Vital Sales Group (Pty) Limited, with registration number 1999/005997/07, be and is hereby finally wound-up and placed under final liquidation in the hands of the Master of the High Court, Johannesburg.
- (2) The second respondent shall pay the applicant's costs of the liquidation application, such costs to include the costs of two Counsel, one being Senior Counsel (where so employed).
- (3) The second respondent's counter-application is dismissed with costs, such costs to include the costs of two Counsel, one being Senior Counsel (where so employed).
- (4) The application to intervene in these proceedings by the Intended Intervening Party (Vital Signs Cape Town (Pty) Limited) is dismissed with costs, such costs to be paid by the second respondent and are to include the costs of two Counsel, one being Senior Counsel (where so employed).

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	27 th February 2023
JUDGMENT DATE:	7 th June 2023 – judgment handed down electronically
FOR THE APPLICANT:	Adv L M Malan SC, together with Adv L Van Rhyn van Tonder
INSTRUCTED BY:	Cilliers Attorneys,
FOR THE FIRST AND SECOND RESPONDENTS:	Advocate Andries Van Wyk
INSTRUCTED BY:	Phosa Loots Attorneys Inc,