IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
Date: 20 February 2024
DATE: 11 August 2022

In the matter between:

DREYER: JIENIE-MICHELLE **APPLICANT**

And

AFRISTAT INVESTMENT HOLDINGS **RESPONDENT**

JUDGEMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application for the winding up of the Respondent. The Applicant was represen

Berdou and the Respondent by Adv. J. Klopper.

[2] At the outset the Court had to deal with certain preliminary issues: Firstly, documents had been up CaseLines without the leave of the Court. Secondly, there were various applications to strike out and thir of whether this matter had been determined to be urgent or not.

[3] On the first issue, it was resolved that documents uploaded without the leave of the Court will not the documents before Court. These documents included all confirmatory affidavits, the so-called improve 35(12) and any supplementary affidavits filed by the Applicant. The Applicant was of the view as stated b that the disregarding of the said documents was not fatal to the Applicant's case and did want a postpon Respondent to engage with the said documents.

[4] In respect of the second issue, it was agreed between the parties that the applications to strike ou be proceeded with.

[5] The third issue which related to whether the matter before Court had already been determined as required argument from Counsel for the Respondent. Counsel for the Respondent submitted that his inte the Order,[1] by Mokose J was that the issue of whether the matter was urgent was not decided and that th would make submissions on same during the hearing. The Court pointed out to Mr Klopper that the orde and that the matter had already been determined as urgent and as such my ruling was that the matter wa this Court did not need to make such determination.

[6] The Applicant has launched these proceedings relying on Section 81(1)(c) (ii) and Section 81(1)(e Companies Act, as amended, hereinafter referred to as 'the Act'[2].

ANAYLSIS AND FACTUAL BACKGROUND

[1] Section 01-13

[2] Act 71 of 2008

[7] It is common cause that the Respondent Company was established in 1988 as ED Holdings Limit converted into a public company on 9 July 1988. The Company was then listed on the venture capital ma Johannesburg Stock Exchange, hereinafter referred to as 'the JSE' on 6 August 1988.

[8] It is further common cause that the Respondent company entered into an underwriting agreement Exponent Capital (RF) Limited, a major shareholder in the said company.

[9] In a nutshell, the Respondent company was incorporated with the primary objective of eliciting fun public.

[10] It is common cause also that the Respondent company was suspended on 5 August 2022 becaus annual financial statements of the company had not been filed with 'the JSE' in terms of the rules of the '

[11] It is common cause that the Applicant is a minority shareholder. Much was made on the papers w Applicant was a preferent or ordinary shareholder. I do not deem it necessary to determine this issue.

[12] Now it is apt at this point to set out the provisions of Section 81 relevant to this matter:

"***Winding-up of solvent companies by court order***.

81. *(1) A court may order a solvent company to be wound up if—*

(a) the company has—

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in term 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the g

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c)

appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

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

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind

company on the grounds that—

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the

—

(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 d

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consec

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;

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that—

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraud

otherwise illegal; or

(ii) the company's assets are being misapplied or wasted; or

(f) …..

(2) A shareholder may not apply to a court as contemplated in subsection (1)(d) or (e) unless the shareholder—

(a) has been a shareholder continuously for at least six months immediately before the date of the application; or

(b) became a shareholder as a result of—

(i) acquiring another shareholder; or

(ii) the distribution of the estate of a former shareholder, and the present shareholder, and other or former shareho

aggregate, satisfied the requirements of paragraph (a).

(3) ….

(4) ….”

[13] The reason for setting out the provisions of Section 81 of ‘the Act’ is that a Court in a civil matter is the pleadings of the parties and cannot go beyond same – the object thereof being to delineate the issue the other party to know the case to be met[3]. It is impermissible to plead one issue and pursue another at

[14] In this matter the Notice of Motion filed of record does not set out which section of ‘the Act’ is bein upon.

[15] The Applicant does, however, set out in her founding affidavit, firstly, that the application is being l the basis of urgency and that a rule *nisi* be issued winding up the Respondent[5].

[16] The Applicant then goes further and sets out the sections of ‘the Act’ she is relying on to launch th She specifically states that:

“Such application is made in terms of Section 81 (1) (c) (ii) that it is “Just and Equitable” read with Section 81 (e) (i Act, that with the leave of the above Honourable Court, on the basis that the Directors have acted in a manner tha fraudulent or otherwise illegal, alternatively the assets are or have been misapplied or wasted justifying an Order t Respondent.[6]”

[3] Gusha v Road Accident Fund 2012 (2) SA 371 (SCA) para 7

[4] Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107G-H

[5] Founding Affidavit at para 4.1

[6] Founding Affidavit at para 4.2

[17] It is important to state that an applicant must make out its case in its founding affidavit[7]. The Appli case is not permitted to rely on Section 81 (1) (d) (iii) as no mention of this subsection appears from the f affidavit. What is mentioned specifically is as set out hereunder.

Firstly, the reference to Section 81 (1) (c) (ii) in paragraph 4.2. of the Applicant's Founding Affidavit cann the Applicant as a basis to secure the winding up of the Respondent. The Applicant has not made out a c is a creditor of the Respondent. Section 81 (1) (c) (ii) is prefixed by "one or more of the company's credit applied to the court". Counsel for the Respondent made this point clear in his submissions to the Court a that the Applicant is bound by the case made out in the founding affidavit. Accordingly, the said section c does not assist the Applicant and reliance thereupon for the winding of the Respondent on this ground m includes reliance on "just and equitable" in the context of this subsection. In my view, the just and equitab requirement in Section 81 of 'the Act' must not be taken out of context to fit the circumstances of a given does not stand alone as a requirement and the subsection relied upon must be proven as a whole and n a particular aspect.

[18] The Applicant in relying on Section 81 (1) (c) (ii) states that the said section must be read with Se (e) (i) and (ii). However, the two subsections in the circumstances of this case cannot be placed together together because of the specific mention of 'creditors' in the former section.

[19] This, however, is not the end of the matter. The Applicant has also relied on Section 81 (1) (e) (i) a am of the view that although the Applicant has placed the two subsections together for the purpose of ma case for winding up of the Respondent, which I have already held is impermissible, Section 81(1) (e) on i be of assistance to the Applicant.

[7] Mari Haywood & Others v Foresta Timber and Board (unreported) 2023 GPJHC @ para 21 and the authorities cited therein

[20] Before analysing the requirements of Section 81(1) (e), it should be noted that Section 81 of 'the A itself to 'solvent' companies. An Applicant relying on this section therefore is bound by such limitation. Th be dealt with further in this judgement.

[21] Now Section 81(1) (e) requires of an applicant to prove either subsection (i) or subsection (ii). In m Applicant has failed to prove the requirements of subsection (i). In other words, the Applicant has failed t the directors, prescribed officers or a person in control of the company acted in a manner that is fraudule otherwise illegal.

[22] With regards to Section 81(1) (e) (ii), however, demands further investigation.

[23] It is appropriate, at this time, to also interrogate whether the Applicant has complied with the requi Section 81 of 'the Act' itself, namely, the that the Respondent is a 'solvent' company. Respondent's Cour submitted during the hearing that the trend of the Applicant's submissions was that the company was ins a result reliance cannot be placed on Section 81 of 'the Act' for a winding up Order.

[24] The Supreme Court of Appeal[8] had the opportunity of dealing with the question of 'solvency' as se Sections 80 and 81:

"Consequently, in order for a solvent company to be wound up in terms of either s 80 or 81 of the new Act, it must commercially solvent…."

[25] The Respondent submits, as I understand the submission, that the Applicant has tried to show to insolvent circumstances of the Respondent, and accordingly is barred from relying on Section 81 for the the Respondent. However, in my view, the two issues are not mutually exclusive. The conduct of the com conducting its business and not paying certain creditors can be relied on to prove insolvency but may als on to prove, *prima facie*, the misapplication of assets or wastage thereof. The Applicant has submitted th Respondent itself has made out to the public that it is solvent. The Applicant references in this regard the

[8] Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd 2014 (2) SA 518 at para 22

Financial Statements of the Respondent dated 21 March 2021[9]. On this basis, in my view, the Applicant to rely on Section 81 for the winding up of the Respondent.

[26] I indicated hereinabove that it necessary to interrogate whether this application can be regarded a within the realm of Section 81(1) (e) (ii). This subsection requires an applicant to show that the Respond 'misapplying or wasting assets'.

[27] Can it be thus be said that the Respondent has been 'misapplying or wasting assets'? It should be remembered that the onus is on the Applicant to prove this requirement. The Applicant makes mention o Respondent's investment in 'MyBucks' as an example of the misapplication or wasting. The question righ by the Respondent is whether the misapplication is judged at the beginning of such investment or *ex pos*

[28] In my view, an investment of the kind made in 'MyBucks' must be judged at the time such investm because it is at that time that one must consider whether it was a good investment or not. Applying that t the view that the Applicant has failed to discharge her onus of proving a misapplication or wastage of ass

[29] It bears repeating what I stated hereinabove. An Applicant is bound by the pleadings and cannot c case pleaded at the hearing of the matter unless an amendment of the pleadings has been sought. In thi such amendment was sought.

[30] The Applicant cannot, in my view, at the hearing indicate that it is clear from the evidence before C something is amiss in the Respondent and thus this Court should use its discretion on a just and equitab wind up the Respondent.

[31] A Respondent must know what case it has to meet in any given case and to at a hearing to want t basis on which ones seeks a winding is impermissible, in my view. I have already dealt with the 'just and requirement above. This requirement needs to be placed in context and cannot be extracted and used as additional requirement.

[9] See Annexure FA21: Caselines: Section 04A-170

[32] The case made out by the Applicant is also relevant to the suspension of the Respondent from tra Johannesburg Stock Exchange as well as the resignation of the auditors of the Respondent. These facto view, are not relevant to the misapplication and wastage of assets in Section 81(1)(e)(ii).

[33] Even if I am wrong in holding that this Court cannot have regard to the provisions of Section 81(1) reason that the Applicant has not mentioned same in her founding affidavit, the Applicant has not convin Court that it should exercise its discretion in her favour to wind up the Respondent on the basis that it is ' equitable'.

[34] Respondent's Counsel made much of the fact that the Applicant is a single shareholder and, on th should not be permitted to apply for the winding up of the Respondent. I mentioned to Counsel during the the authorities do not bar such an application and have not barred a single or minority shareholder from l application to wind up a company. The test in any given circumstance is whether an applicant can prove and not the status of such applicant. Insofar as is necessary, the Applicant qualified to launch these proc having been a shareholder of the Respondent for at least six months before the launching of the applicat

CONCLUSION

[35] For the reasons outlined above, the application for the winding up of the Respondent must fail.

COSTS

[36] Applicant's Counsel submitted that this Court must make a determination as to the relevance of so documentation filed by the Respondent when considering the question of costs. At the outset of the hear raised the preliminary issues and indicated my *prima facie* view and Applicant's Counsel having consulte Applicant, I ruled as in paragraphs 4 and 5 above.

[37] In my view, accordingly, the applications for striking out not having been adjudicated, and the com matter, the Applicant cannot now want to resuscitate the issue of the Respondent's documentation filed o

[38] It is trite that a Court is vested with a discretion when considering the questions of costs. This disc however, must be exercised judicially. The norm is that costs follow the result unless exceptional circums shown to order otherwise.

[39] The are no exceptional circumstances in this case to deviate from the norm. Accordingly, the Appl pay the costs of this application.

Accordingly, the following Order shall issue:

a). The application is dismissed;

b). The Applicant is to pay the costs of the Respondent in this application.

ACTING JUDGE OF THE H

GAUTENG DIVISION OF THE HIGH COURT

Electronically submitted therefo

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is han electronically by circulation to the Parties/their legal representatives by email and by uploading it to the e of this matter on CaseLines. The date for hand-down is deemed to be **20 February 2024.**

Date of virtual hearing: 8 and 9 June 2023

Date of judgment: 20 February 2024

Appearances:

Attorneys for the Applicant: **FRANCOIS BURGER ATTORNEYS**

francois@franlaw.co.za

Counsel for the Applicant: **Adv. J.T.H. Berdou**

Attorney for the Respondents: **CAVANAGH & RICHARDS ATTORNEYS**

stella@crlawchambers.co.za

Counsel for the Respondent: **Adv. J Klopper**