

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



**IN THE HIGH COURT OF**

**SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO:**

**D3187/2022**

In the matter between:

**AMBA CHETTY**

**APPLICANT**

**(Identity no: [...])**

and

**MINAXI TRUESHANE GIHWALA**

**FIRST RESPONDENT**

**(Identity no: [...])**

**MINAMB PROPERTIES CC**

**SECOND RESPONDENT**

**(Registration number: [...])**

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**ORDER**

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**The following order shall issue:**

1. The second respondent, Minamb Properties CC, with registration number: ([...]), is placed under a provisional order of winding-up in the hands of the Master of the KwaZulu-Natal Division of the High Court, Durban.

2. A rule nisi is issued calling upon the respondents and all interested parties to show cause, if any, to the high court within six weeks of the issuance of this order, as to why:
  - (a) the second respondent should not be placed under a final order of winding-up; and
  - (b) the costs of this application should not be costs in the winding-up.
3. Service of this order shall be effected:
  - (a) by the sheriff of the high court or his lawful deputy on the registered office of the second respondent;
  - (b) on the South African Revenue Services;
  - (c) by publication in the edition of the Mercury Newspaper and another newspaper circulating in the area where the second respondent carries on business and in the Government Gazette;
  - (d) by registered post on all known creditors of the second respondent;
  - (e) on all employees of the second respondent; and
  - (f) and any registered trade union that employees of the second respondent may belong to.
4. Costs to be costs in the winding-up.

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## JUDGMENT

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**Sipunzi AJ**

### **Introduction**

[1] This is an application for the final winding-up of a solvent close corporation, the second respondent, at the instance of one of its members.

[2] The application is founded on the ground that there was a deadlock which rendered the second respondent unable to operate properly, and is made on the provisions of s68(d) of the Close Corporations Act ('the Act'),<sup>1</sup> read with s 81(1)(d) of the Companies Act.<sup>2</sup>

[3] The application is opposed.

### **The parties**

[4] The applicant is an adult female, residing at[...]. She is one of the members of the second respondent, with 50 percent members' interest. The parties are siblings, the applicant being the elder sister of the first respondent.

[5] The first respondent resides at flat[...]. She is also a member of the second respondent, with 50 percent members' interest.

[6] The second respondent is Minamb Properties CC, a close corporation duly incorporated in accordance with the Close Corporations Act, and having its registered address at First Floor, Realty House, 99 Field Street, Durban, and conducts business at Flat 608, 163 Windermere Road, Morningside, Durban. The applicant and the first respondent hold equal member interest in the second respondent.

### **Summary of facts**

[7] The second respondent was registered for the purpose of a purchasing real estate/properties. It purchased the flat situated at 608 Windermere Centre, 163 Windemere Road, Morningside, Durban and is its sole asset.

[8] The property was acquired for the purchase price of R120 000. An amount of R24 000 was paid as the deposit and the bond of R96 000 was registered. Subsequent to the bond registration, the bond was settled and therefore the property is not subject to a bond.

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<sup>1</sup> Close Corporations Act 69 of 1984.

<sup>2</sup> Companies Act 71 of 2008.

[9] There was a tenant, Moscon Optics which remained on the property until March 1994. When the tenant vacated in 1994, the first respondent moved to reside on the property. The first respondent has since been responsible for the payment of the utility bills; levies and the upkeep of the property on behalf of the second respondent. However, she had not been paying rent, despite various attempts to recover same on behalf of the applicant and the second respondent.

[10] The relationship between the applicant and the first respondent became negatively affected by their competing interests over the benefits or use of the sole asset of the second respondent, in which the first respondent resided. Their relationship as siblings and as members of the second respondent has deteriorated over time. There were interventions by family members; some legal representatives and accountants of the second respondent but none have managed to resolve their dispute.

[11] Some of the attempts to resolve the impasse between the members of the second respondent included holding of meetings and some discussions. For instance, during May 2011, their brother Dines also intervened. He offered to pay the applicant an amount of R250 000 in lieu of her interest in the second respondent. This was facilitated by Zubeda Seedat Attorneys. It also failed. Invitation to a meeting was facilitated by Shepstone and Wylie Attorneys, to be held on 25 July 2014. This invitation included two resolutions that were to be proposed during the meeting. Due to contestations of the first respondent on the composition of that meeting, nothing materialized.

[12] A proposed resolution in a letter from Webber Wentzel Attorneys dated 31 October 2014 related to the meeting of 25 July 2014. This letter sought to give notice by the applicant in terms of s 50 of the Act;<sup>3</sup> that there was a breach of duty arising

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<sup>3</sup> Section 50 of the Close Corporations Act provides: '**Proceedings against fellow-members on behalf of corporation.** — (1) Where a member or a former member of a corporation is liable to the corporation—

- (a) to make an initial contribution or any additional contribution contemplated in subsection (1) and (2) (a), respectively, of section 24; or
- (b) on account of—
  - (i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or
  - (ii) negligence in terms of section 43,

from the first respondent's relationship to the second respondent and alleged negligence in terms of s 43 of the Act. This initiative failed to yield any positive results in improving the relationship between the members of the second respondent.

[13] The last interaction between the applicant and the first respondent was in 2014 when Weber Wentzel Attorneys attempted to facilitate a meeting between them as members of the corporation. There had also been proposed resolutions at the said meeting, however this did not yield any tangible results and the members did not interact in person.

[14] During 2022, after the application at hand was instituted, the attorneys of the first respondent, attempted to facilitate a settlement, at the instance of the first respondent. The applicant was invited to propose a figure or amount that she wanted in lieu of her interest in the second respondent. The applicant communicated that she wanted R900 000 in settlement, however, this too was not successful.

[15] The second respondent had appointed Select Financial Consultants, as its accounting officers and such appointment was in compliance with the statutory provisions of the Act. However, there were no records to suggest that their services had been utilized, as the applicant contended that she was not involved in the operations or affairs of the second respondent.

### **The issue**

[16] The issues that this court is called to determine firstly relate to the alleged dispute of fact, and the specific factors raised by the first respondent in that regard which include:

- (a) the purpose for which the second respondent was incorporated; and
- (b) the nature of the interests of the applicant in the second respondent.

[17] On the merits of the application, the court must decide whether the winding-up of the second respondent would be justified. The two questions to be answered are,

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any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so.

...

whether there is a deadlock, if the answer is in the affirmative, whether such deadlock has made it impossible for the second respondent to function or operate.

### **Submissions of the parties**

[18] The applicant denied that she had no financial interest in the second respondent. According to her, the only property of the second respondent was acquired with the intention to start an investment property portfolio. When the property was rented out initially, the second respondent received income that was utilized to service the bond, until the first respondent occupied the premises and utilized it for her own purposes.

[19] The applicant argued that the conduct of the first respondent towards the affairs of the second respondent deprived her of the benefit of her financial interest and was detrimental to their family relations. She emphasised it had since become impossible for the second respondent to conduct its business or purpose; hence it should be wound up on the application of the deadlock principle. The applicant also contended that all possible means to resolve the impasse have failed and she was not on speaking terms with the first respondent. The winding-up of the second respondent was the only remedy available to the applicant.

[20] To make good the argument that the deadlock principle should be applied in this instance, the applicant referred to the case of *Yenidje Tobacco Company Limited*.<sup>4</sup> According to the applicant's argument, the court defined the situation of a deadlock in small domestic companies to a situation where there is an arrangement, express or tacit, or implied regarding the affairs of a company. The relationship is a particular personal relationship of confidence and trust, similar to that of a partnership.

[21] With further reference to *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc*,<sup>5</sup> the applicant's argument went further to state that:<sup>6</sup>

'21. In assessing the just and equitable provision for winding up, the Supreme Court of Appeal states the following

<sup>4</sup> *Yenidje Tobacco Company Limited* [1916] 2 Ch 426 (CA).

<sup>5</sup> *Apco Africa (Pty) Limited and Another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA).

<sup>6</sup> Applicant's heads of argument.

“[18] the just and equitable provision is not limited to cases where the substratum of the company has disappeared, or where there is a complete 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 the just and equitable provision.”

[22] According to the first respondent, the applicant has no financial interest in the second respondent. The applicant's members interest was registered in *loco parentis* to the first respondent, and such membership served as a 'check' against the first respondent failing to comply with the financial obligations and disposing of the apartment. The first respondent further claimed that the applicant was purely to ensure that the first respondent practiced financial discipline and not to act irresponsibly. She contended that in November 1992, she took up their brother's interest in the second respondent. The applicant remained to ensure that there was enough supervision to ensure that the first respondent was financially disciplined in relation to the affairs of the second respondent. The first respondent further contends that she beneficially owned 100 percent members interest in the second respondent, even though 50 percent was registered in the applicant's name, the applicant's membership was as a nominee of the first respondent.

[23] According to first respondent, the corporation was sustainable, since its incorporation 30 years ago. She argued that if the second respondent were to be liquidated, such would not be in its best interests. She highlighted that the liquidation process would be costly and time consuming. She proposed obtaining the best price possible for the flat that is owned by the second respondent and that proceeds be proportionally distributed.

[24] Further argument for the first respondent was that *Apco Africa* as relied on by the applicant found no application to the case at hand. It was pointed out that, the second respondent is not a company, but a close corporation (*Apco Africa* dealt with a company); there would be no loss of confidence on any one since the applicant had little to no say in respect to the management of the second respondent; further that the second respondent was founded for the exclusive benefit of one member, in

this case being the first respondent; and lastly that there could be no loss of trust as the applicant's involvement was not contemplated by the original arrangement (that of a *loco parentis* role). It was also argued for the first respondent that the second respondent required no management.

[25] The argument on behalf of the first respondent that the principles in *Apco Africa* could not be applied in the current matter by virtue of *Apco Africa* dealing with a company cannot be sustained. It should be common knowledge that since 1 May 2011, the effective repeal of certain sections of the Act meant that all close corporations assumed the stature of private companies and therefore the Companies Act became the applicable legislation on matters that related to close corporations.

[26] The first respondent also contended that there were disputed facts that required resolution with the application of the *Plascon-Evans* rule. I propose to deal with such in detail hereunder.

### **Applicable law**

[27] The applicable provision of the Companies Act in the given circumstances is s 81(1)(d). It provides that a company may 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-

- (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
- (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 It is otherwise just and equitable for the company to be wound up;
- (iii) it is otherwise just and equitable for the company to be wound up;'



[28] The trite principle in the case of a winding-up of a domestic company can be found in *Apco Africa*,<sup>7</sup> where the Supreme Court of Appeal laid the principles as follows:<sup>8</sup>

‘There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Loch v John Blackwood Ltd* [1924] AC 783 (PC) at 788, is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company’s affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company’s business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director’s conduct of those affairs. The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It 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 personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up.’

[29] In *Malgas v Omega Investment CC and Others*<sup>9</sup> one of the issues for determination was whether the winding-up of a company was justified on the basis of a deadlock that allegedly arose between family members or whether it would be just and equitable to do so. The court acknowledged that:<sup>10</sup>

‘Although it could be impossible to define circumstances under which equitable considerations could arise, some of the categories that have been identified are “the disappearance of a company’s substratum; illegality of the objects of the company and fraud connected in relation to it; a deadlock; oppression; and grounds similar to the dissolution of a partnership. A “deadlock “which because of a divided voting power at both the board and

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<sup>7</sup> *Apco Africa (Pty) Limited and Another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA).

<sup>8</sup> *Ibid* para 19.

<sup>9</sup> *Malgas v Omega Investment CC and Others* [2021] ZAECGHC 15.

<sup>10</sup> *Ibid* para 30.

general meetings, affected the management of the company could also found a liquidation order on this ground.’

## **Application and evaluation**

### ***The dispute of fact***

[30] The first respondent’s argument is that the second respondent was “incorporated for the purpose of taking ownership of the apartment, which was to be acquired for the purpose of accommodating the first respondent. The apartment was to be the first respondent’s and the second respondent was to be the ownership vehicle. The second respondent was created solely for the benefit of the respondent.”<sup>11</sup>

[31] In regard to the nature of the applicant’s interest, the first respondent submitted that:<sup>12</sup>

- (a) the applicant was registered in *loco parentis* to the first respondent;
- (b) the applicant’s member interest served as a “check” against the first respondent failing to comply with the financial obligations and disposing of the apartment; and
- (c) the applicant was a mere nominee of the first respondent, with no economic interest and the first respondent as the beneficial owner of 100 percent member’s interest in the second respondent.

[32] The essence of the arguments advanced by the applicant to the aforementioned dispute of fact was that it could be resolved by reference to the founding documents of the second respondent. The applicant’s argument pointed to the contents of the CK2 document of the second respondent, specifically where the purpose of the registration reflected “Property Investment” under part A, as opposed to the ‘*loco parentis*’ and or ‘ownership of the apartment’. Reference was also made to the correspondence from Realty Management (Pty) Ltd, dated 4 March 1992 which included well wishes to the members of the second respondent on adding more property investments into their corporation.

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<sup>11</sup> The first respondent’s heads of argument para 6.

<sup>12</sup> *Ibid* para 7.

[33] According to the applicant, these details in the CK1 and CK2 documents were conclusive in resolving the alleged dispute of fact. These documents would be equally applicable to the description of the interest of the applicant, where each member contributed to the registration of the second respondent and that they each held 50 percent interest. Further to that, the applicant's argument highlighted the two instances where the applicant was offered money, in lieu of her claim of financial interest in the second respondent. According to the applicant's contention, these offers found consistency in her claim that her interests were not *loco parentis* but financial. Such offers being an amount of R250 000 that was offered by their brother Dines in 2011, in order to 'buy her out of the second respondent. The most recent being in 2022, an offer by the first respondent who invited her to state how much she would accept in lieu of her claim or a sale of the apartment wherein they would share the proceeds.

[34] On these matters, one is inclined to accept the applicant's argument in regard to her interest in the second respondent. The CK1 document contains sufficient and credible information that demystify beyond any shadow of doubt, the purpose of the incorporation and the members' interest in the second respondent. The document contains no detail about the applicant being a *loco parentis* or member nominee of the first respondent. There are no factors to indicate that the applicant may have amended her interests in the founding documents of the second respondent. In the absence of any factors that casts doubt on the veracity of the stated contents of the CK1 and CK2 documents or negatively impact on the integrity of the such documents, they remain conclusive proof of the allegations by the applicant, both of her interest and the purpose of the second respondent.

[35] By application of the *Plascon-Evans* rule, the dispute of fact is resolved. It remains incontestable that the purpose of the second respondent was property investment and that the members had equal members' interests and contrary to the alleged *loco parentis* and or member nominee.

***Are the members in a deadlock situation?***

[36] In determination of the issue at hand, the starting point will be a close examination of the state of the relationship of the members of the second

respondent. This will include a glimpse of how they related shortly before the incorporation and at the time it was registered.

[37] It remained common cause that the first respondent became the resident of the sole asset of the second respondent. According to the applicant, such was a unilateral decision of the first respondent, without a resolution of the second defendant. Apparently, from the perspective of the applicant, that conduct also occasioned tensions within their family. Both the first applicant and the first respondent expressed their reluctance and uneasiness in getting involved in litigation against each other. They had however, equally reconciled with the fact that litigation was unavoidable since various attempts to resolve the impasse failed.

[38] It is common cause that as far back as 2011, there was consensus among those involved in attempts to resolve the dispute, including their brother Dines, that the corporation was not capable of operating with both members being involved. This was evident in his attempts, when he offered to pay the applicant R250 000 in lieu of her interest in the corporation.

[39] Various attorneys also attempted to facilitate discussions between the members, but failed. These included Zubeda K Seedat & Company Attorneys in 2011 and 2022, at the instance of the first respondent; Shepstone and Wylie in July 2014 and Weber Wentzel in October- November 2014, at the instance of the applicant. From the details given by the first respondent, it could be gathered that the last meeting in 2014 and the last discussion in 2022 were not in-person engagements, but that they were communicating through Weber Wentzel and Zubeda Seedat Attorneys, respectively.

[40] The visits mentioned by the first respondent to the applicant's home do not indicate the time period, it also did not appear that any affairs of the second respondent were subject of their alleged interaction. With respect, the alleged visits; provision of financial assistance and the health condition of the applicant did not add value to the issues that required determination herein.

[41] At least, from the perspective of the first respondent, as the youngest of the siblings, they were collectively playing a *loco parentis* role to her. As the first respondent put it, the said role was motivated by the manner in which she carried herself. With the same breath, the first respondent claimed that she would provide financial and social support to the applicant. Although the period during which she would have done so was not apparent in the papers, one gets the impression that it was the first respondent who was playing the role of *loco parentis* to the applicant.

[42] On the other hand, it seems that although the applicant was always cognisant of their age difference, she did not assume the *loco parentis* responsibility in the life and affairs of the first respondent. Instead, when Dines resigned from the second respondent, the applicant and the first respondent were equal business partners, with equal interests in the corporation. Further, the alleged *loco parentis* responsibilities of the applicant were not recorded in the founding documents of the corporation.

[43] The founding and amended founding documents of the second respondent showed consistency with the claims of the applicant that the purpose of the second respondent was property investment and that she, together with the first respondent, held equal interests. Further, the first respondent's claim that the applicant was a nominee at her instance and *loco parentis* do not find support in the founding documents.

[44] With the characteristics of the relationship described above, and on a reflection to the circumstances in *Malgas*<sup>13</sup>, there were some striking similarities. It appeared that in both entities the dispute involved family members; their purpose was to pursue property investments (albeit, in *Malgas* the focus was on farming). When there was a fallout between the members, there were attempts made to resolve the disputes, in the interests of the corporation, but all attempts failed. The apparent cause of the breakdown was a lack of cooperation between the members and the relationship deteriorated over time. In both instances the poor communication and or lack thereof, kept one of the members in the dark with the affairs of the corporation. In both cases, attorneys were engaged to facilitate

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<sup>13</sup> *Malgas v Omega Investment CC and Others* [2021] ZACGHC 15.

meetings of members; there were offers or attempts to buy out one of the members, but all failed. In the case of the applicant and the first respondent, they last interacted in 2014, and seemingly, the tensions continued to persist. In *Malgas*, when the court was confronted with factors that are highlighted above, it concluded that there was a deadlock between the partners and that such made it impossible for the company to operate. Undoubtedly, with the same approach in the matter at hand, it is inescapable to conclude that a clear deadlock persisted over time to the detriment of the relationship of parties as siblings and as the business partners of the second respondent.

***Is there a lack of probity in the conduct of the affairs of the second respondent?***

[45] In regard to this element in the examination of the state of the second respondent, regard has to be to the state of the business and whether the entity is run in accordance with the statutory requirements of the applicable legislation. On this point, it is imperative to note that the second respondent is a creature of statute and this can also be seen from its founding documents. By design, close corporations were required to comply with requirements set out in the Act, and by extension the current Companies Act, where applicable.

[46] In order to ascertain if the conduct of the affairs of the second respondent complied with the provisions of the governing legislation, it would be beneficial to refer to a few examples. In compliance with s 59 of the Act, the second respondent appointed Select Financial Consultants, as its accounting officer. A further statutory requirement in terms of s56 of the Act was that the second respondent was required to keep accounting records to present the state of affairs and business of the corporation. However, there was no evidence to suggest, in the least that this important statutory requirement was observed. Instead, the first respondent argued that the second respondent required no management. This was without any evidence to contend that the second respondent was exempt from such compliance.

[47] The second respondent was further required to hold members' meetings and keep records of the resolutions of meetings held. This requirement too, as outlined in

s 48 of the Act was not observed in the running of the affairs of the second respondent. What could be gathered from the attempts of Shepstone Wylie and Weber Wentzel firms of attorneys was that, even when these meetings were facilitated, due to the tensions between the members, such was not possible.

[48] Another aspect was the attempts by the members' brother, Dines to pay the applicant cash for her interests in the second respondent. The first respondent, also proposed, through Zubeda Seedat Attorneys for the applicant to indicate how much she would require in lieu of her interest in the second respondent. The first respondent also qualified these attempts in that they should not be regarded as an admission of the allegations by the applicant. In a case where partners in a business entity are unable to have a meaningful engagement since 2014, a period of almost ten years, due to a deadlock over the operation and or the affairs of the same entity, certainly, there would be no confidence or relationship of trust in such a situation.

[49] The contention that the second respondent did not require management cannot be sustained, particularly because, by design, and as a creature of statute, in the least, it could not operate without compliance with statutory requirements that would validate its continued existence. There is overwhelming evidence that the breakdown in the relationship of the applicant and the first respondent cannot be reversed. Consequently, the operations of the second respondent have no prospects of being restored. Overall, the first respondent could not raise any valid defence against the applicant's claim of deadlock that also occasioned the inability of the second respondent to continue to operate in terms of its intended purposes. Instead, the first respondent highlighted some options and difficulties that might be encountered by the second respondent if the relief sought were granted.

[53] In my view, the deadlock between the members and the state of affairs of the second respondent are in the extreme, hence it would be just and equitable for the second respondent to undertake due process, and in this instance, a winding-up.

### ***Applicability of the Act***

[54] At the commencement of oral arguments, it was submitted that in this application, the applicant relied on the repealed s 68(1)(d) of the Act, implying that the applicant's case was founded on a non-existent provision. It was also recorded that the applicant referred to s81 of the Companies Act for the first time in her heads of arguments.

[55] The specific averment referred to in the first respondent's submission is contained in paragraph 6 of the applicant's founding affidavit, which reads:

'This is an application for the winding up of the First Respondent (hereinafter referred to as "the Corporation"), in terms of section 68 of the Close Corporation Act 69 of 1984, read with Schedule 9 Item 5 of the Companies Act 71 of 2008.'

[56] Certain sections of the Act were repealed and, in some instances, amended by the Companies Act on 1 May 2011. There were significant amendments to close corporations, two of which are as follows:<sup>14</sup>

1. All close corporations that existed when the Companies Act, 2008 became effective can continue indefinitely, and do not have to be converted into companies. The Close Corporations Act will continue to govern existing close corporations indefinitely. However, no new close corporations can be formed and no companies can be converted into close corporations.
2. Schedule 2 of the Companies Act, 2008 provides for the steps to be taken when close corporations are converted to companies...'

[57] Section 68 of the Act was expressly repealed by s 224(2) of the Companies Act. While the answering affidavit dealt specifically with averments contained in the founding affidavit, there was no answer to the allegations made in paragraph 6 of the founding affidavit. Notably, when the first respondent answered to specific averments that made mention of a reliance on s 68 of the Act, she opted not to answer to paragraph 6

[58] A perusal of the first respondent's heads of argument shows that the repealed s 68 was expressly referred to in paragraph 2, with no mention that it was a repealed

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<sup>14</sup> Professor W Geach 'Guide to the Close Corporation Act and Regulations' Service No. 20 (June 2013).



provision. The complaint that the applicant relied of a repealed provision was raised for the first time from the bar and without prior notice.

[59] It is trite that a party in a dispute in civil proceedings has a duty to allege in his/her pleadings the material facts upon which it relied.<sup>15</sup> The “purpose of pleadings is to define the issues for the other party and the court...It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.”<sup>16</sup> Uniform rule 22(2) specifically requires that “the defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies”.

[60] In the given circumstances, it should not be permissible for the first respondent to only register the objection against reliance on s 68 of the Act, and subsequent reference to s81 of the Companies Act at the stage of oral arguments and from the bar. It is against this background that the first respondent’s complaint and or objection cannot be sustained. Determination of matters shall be on the basis that the first respondent admitted that the applicant correctly relied on the applicable provisions in its application.

### ***Final or provisional winding-up***

[61] The relief sought by the applicant is that the second respondent be placed under final winding-up in the hands of the Master of the High Court.

[62] The Master of the High Court reported that sufficient security had been given for the payment of all fees and charges necessary for the prosecution of all liquidation proceedings and of all costs of administering the corporation until trustee has been appointed.<sup>17</sup>

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<sup>15</sup> *Minister of safety and Security v Slabbert* [2010] 2 ALL SA 474 (SCA) para 11 .

<sup>16</sup> *Ibid.*

<sup>17</sup> Master’s Report dated 5 March 2024.

[63] The applicant argued that although the general practice was to grant a provisional order, in the first instance, she insisted that a final order was justified, in light of the state of affairs of the second respondent.

[64] It was pointed out on behalf of the first respondent that the prayer for a final order of winding-up was inconsistent with the practice in this Division. It however left it to the applicant, if she persisted to seek a final order of winding-up.

[65] It is trite that in winding-up proceedings, the granting of interim relief is necessary to protect the interests of litigants or third parties and the public interests.<sup>18</sup> In *Imobrite (Pty) Ltd v DTL Boedery CC*<sup>19</sup> it was held that:<sup>20</sup>

‘...Generally, it is a well-established practice that a provisional order of liquidation should issue. The purpose of the practice is to afford interested parties, especially creditors, an opportunity to support or oppose a final liquidation. There is no reason to depart from the general practice in this case. The respondent’s business is a farming enterprise. It may very well have other creditors than the appellant. Some new developments might have occurred since the refusal of the winding-up application. New employees oblivious of this litigation may have been employed in the intervening time between the handing down of the judgment of the high court and the finalisation of this appeal. It is therefore not inconceivable that further relevant facts might be forthcoming if a *rule nisi* is issued. Thus, a provisional order will best serve the interests of justice in this matter.’

[66] In the matter at hand, there could well be parties whose interests may be adversely affected if there is a departure from the general practice in relation to the nature of order granted. Firstly, it is worth noting that the applicant’s complaint was among others borne from the allegations that she had been kept in the dark in regard to the affairs of the second respondent. Secondly, on the contention of the first respondent that the corporation required no management, there is an uncontestably reality that the second respondent kept no accounting records, despite this being a statutory requirement. Thirdly, before the service of this application on the first respondent, the members had had no interaction since 2014, when the last attempts were made to convene a members meeting.

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<sup>18</sup> *Lyconet Austria GmbH v Weiglhofer and Others* [2023] JOL 61432 (GJ).

<sup>19</sup> *Imobrite (Pty) Ltd v DTL Boedery CC* [2022] ZASCA 67.

<sup>20</sup> *Ibid* para 24.

[67] As it was the case in *Imobrite* it may well be that due to the lapse of time between when the members last interacted; the service of the application to interested parties and the subsequent disposal of this application that there had been developments which necessitate the granting of an opportunity for interested parties to support or oppose the granting of the final order.

[68] The motivation on behalf of the applicant for a departure from the general practice in this regard has not been convincing. One is not persuaded that a departure from the practice in the given circumstances is justified. One is alive to the fact that the applicant did not seek an interim order in her notice of motion. However, a case of winding-up of the second respondent has been made and the parties made submissions on the consideration of the granting of the interim as opposed to the final order of winding-up sought. In light of the discussion above, the efficacy of the administration of justice will not be offended if an interim order is granted.

### **Order**

[69] The following order shall issue:

1. The second respondent, Minamb Properties CC, with registration number: ([...]), is placed under a provisional order of winding-up in the hands of the Master of the KwaZulu-Natal Division of the High Court, Durban.
2. A rule nisi is issued calling upon the respondents and all interested parties to show cause, if any, to the high court within six weeks of the issuance of this order, as to why:
  - (a) the second respondent should not be placed under a final order of winding-up; and
  - (b) the costs of this application should not be costs in the winding-up.
3. Service of this order shall be effected:
  - (a) by the sheriff of the high court or his lawful deputy on the registered office of the second respondent;

- (b) on the South African Revenue Services;
- (c) by publication in the edition of the Mercury Newspaper and another newspaper circulating in the area where the second respondent carries on business and in the Government Gazette;
- (d) by registered post on all known creditors of the second respondent;
- (e) on all employees of the second respondent; and
- (f) and any registered trade union that employees of the second respondent may belong to

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**SIPUNZI AJ**

#### APPEARANCES

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Date of hearing: 05 March 2024

Date of judgment: 18 March 2024