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

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 707/2022

In the matter between:

CAROLINA JOHANNA LOMBARD Applicant
(Identity number: […])

and

EUREKA LIMITED Respondent

(Registration Number: 2016/348067/06)

Bench: P.A.L. Gamble, J

Heard: 13 February 2023

Delivered: Wednesday 22 March 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on Wednesday 22 March 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. There are people in South Africa for whom the advent of constitutional democracy in 1994 was anathema. Some of those people, under the guise of the freedom of association provisions guaranteed in s18 of the Constitution, 1996, seek to live in splendid isolation, rooted in the past while speaking the language of their choice, to the exclusion of all others. In this instance, they are all White and Afrikaans speaking, and they vilify those who do not share their common interests as their enemy who is intent on driving them into the sea.[1]

2. Sensing an economic opportunity to be made out of this mindset of fear and loathing, one Adriaan Alettus Nieuwoudt[2] went about creating a White enclave in the arid landscape of South Africa's West Coast. On a farm colloquially known as "Dikdoorn" in the district of Garies in the Northern Cape, Nieuwoudt founded a settlement he called "Eureka"[3]. The proscription of the subdivision of agricultural land

[1] "Ons vyand" is the language used in some of the documents annexed to this application

[2] Wikipedia Online Encyclopaedia s.v *Adriaan Nieuwoudt*, refers to Mr Nieuwoudt as the mastermind of a Ponzi scheme conducted throughout South Africa in the 1980's known as "Kubus." "*The **Kubus scheme** was a scheme that originated in South Africa in the 1980s and was subsequently exported to the United States. It involved the cultivation of milk yeast cultures, which was sold to the originator, and the recultivating of the next batch. The producers had to canvass new members to the organisation to ensure sustainability. The whole scheme crashed when the government decided to implement a law in retrospect, thereby declaring the scheme illegal. The originator had to pay back all the money to claimants, likewise all who benefited had to return their earnings."*

[3] The papers reveal that the name is to be associated with the ancient Greek mathematician

and the statutory proclamation of townships upon which settlements may be built may have initially presented problems for Nieuwoudt and his cohorts.

3. The solution to the potential problems presented by the law were evidently circumvented by Nieuwoudt through the establishment of a public company called Eureka Beperk Ltd, with registration number 2016/348067/06, ("Eureka")[4] on 11 August 2016. This company is the respondent herein which the applicant, a resident on Dikdoorn, seeks to liquidate in this opposed application. The original directors of Eureka were Messers Nieuwoudt, Andries Engelbrechct Le Roux, Carlo Johann Viljoen and Carel Johannes Lodewicus Warnich. Presently the directors are Messers Deon Harmse, Daniel Jacob Benjamin Bezuidenhout and Flores Johannes van der Colff and Ms. Johanna Helena Albertha van Nieuwholtz.

4. The overall scheme of the company was to make shares available to the public who would then be entitled to erect dwellings on Dikdoorn and live in harmony with their chosen kith and kin.[5] Shares in the company were subsequently traded through an internal stock exchange colloquially referred to by Nieuwoudt as a "verhandelkamer". As it later appears, the purpose behind this mechanism was to strictly control the disposal and trade of the shares.

Archimedes' famous remark which reflects the joy of resolving a conundrum, as in "Eureka! I have found it!" In this case Nieuwoudt claimed that he had found a unique solution to the problems confronting the White people of South Africa.

[4] Notwithstanding the registered name of the company, it has been cited in the heading to this application as "Eureka Limited". The same registration number confirms that it is one and the same entity.

[5] Documents before the Court suggest that the intention was to create a residential township at the mouth of the Groen Rivier, dubbed "Groenriviersmond Akkomodasie".

5. According to a deeds search dated 20 January 2022, and annexed to the answering affidavit filed herein, a property registered in the Deeds Office, Kimberley in the name of Eureka is described as Portion 10 of Farm 547 Klipkuil under Title Deed T1084/2019. This property measures 160ha in extent and was acquired by the company on 5 July 2018 for R160 500 from an entity described as the Groenriviersmond Trust. The latter acquired the land in 2008 from one Johannes Gerhardus Auret for R2 178 540. No deeds search was placed before the Court in relation to any farm known as "Dikdoorn" and its ownership is thus unknown. However, both Lombard and the deponent to the answering affidavit, Mr Harmse, say that they reside on Farm 535 Dikdoorn, Garies, Northern Cape.

6. The applicant, Carolina Johanna Lombard, is a 59 year old pensioner who says she purchased shares in Eureka during the period 11 June 2018 to 15 August 2019 for the total sum of R529 235,10.[6] This shareholding, says Lombard, entitled her to erect separate structures for herself and her daughter on Dikdoorn. The papers further suggest that Lombard is involved in the commercial cultivation of marijuana in a hydroponic laboratory located on her premises. Later, she says, she purchased a further two "properties" on Dikdoorn from other shareholders.

7. Lombard says she became concerned about the legality of the erection of her dwelling when it came to her attention in June 2021 that the local authority, the Kamiesberg Municipality ("the Municipality"), was in the process of obtaining demolition orders from the local magistrate in respect of structures erected on the farm. She further complains that she and other shareholders in Eureka were duped

[6] According to a share certificate issued by the company on 5 November 2020, Lombard then held 486 000 shares in Eureka Ltd.

into buying their shares by virtue of Mr. Nieuwoudt's assurances that the scheme was legal.

8. In that regard, documents annexed to the founding affidavit demonstrate that in 2018 the Municipality made application under case no 19/2018 against some 24 respondents, including Lombard, Nieuwoudt and Harmse, for an order declaring that the structures they had erected on "Farm 535, Dikdoorn, Garies" since 2017 were in breach of s4(1) of the National Building Regulations and Standards Act, 103 of 1977.

9. On 1 April 2021 the Magistrate for the District of Namaqualand sitting at Garies delivered a written judgment in which he noted that Nieuwoudt had earlier confirmed erection of the structures to municipal officials. The Municipality's application was however dismissed on the procedural basis that its founding affidavit had not been properly commissioned. In the answering affidavit herein it was noted that the Municipality had lodged an appeal against that order, which appeal was set down for hearing in the High Court, Kimberley on 21 February 2022. This Court was not informed (by way of a supplementary *status quo* affidavit) of the outcome of the appeal or the further progress, if any, of proceedings before the Magistrate.

LIQUIDATION PROCEEDINGS

10. Lombard approached the Western Cape High Court as a matter of extreme urgency on Wednesday 12 January 2022 (during Court recess) for a final

order of liquidation[7] to be made on Tuesday 25 January 2022 – the second week of the first term. She thus placed the legal representatives for Eureka under the most unreasonable time constraints to file opposing papers in an application which was out of the ordinary: in this Division orders for provisional winding-up are customarily sought first whereafter final orders are made on the return day, usually some six to eight weeks later. If a matter is opposed it will usually be referred to the semi-urgent roll before a provisional order is made.

11. In the result, answering papers were filed by Eureka on Thursday 20 January 2022 whereafter the matter was postponed for hearing on the semi-urgent roll on 30 August 2022, with replying papers filed in the interim. Due to alleged administrative bungling in the Registrar's Office, the matter was not placed on the roll on 30 August 2022 and it was consequently postponed again for hearing on the semi-urgent roll on 13 February 2023. At that stage any semblance of the urgency that was alleged to have existed 13 months previously had dissipated like the West Coast's notorious early morning mists but Lombard persisted nonetheless.

12. At the commencement of proceedings on that day, counsel for Lombard, Mr. H.P.van Staden from the Pretoria Bar, informed the Court that he would only be moving for a provisional winding-up order, notwithstanding that his heads of argument were drawn on the basis of seeking final relief as per the notice of motion. This was in accordance with local practice, unlike Gauteng where parties often only approach the

---

[7] It is not in dispute that this court has the requisite jurisdiction to hear the application as the company's registered office is in Welgemoed, Bellville.

court once, and then for a final order. No doubt counsel had been informed of the practice in this Division by his local correspondent attorneys, hence the change of tack.

13. Ms. Wharton, of the Cape Bar, who appeared for Eureka, was taken by surprise by this last-minute change of tack, her heads of argument also having been drawn on the basis of final relief with the concomitant onus cast on an applicant. The matter was, nevertheless, argued on the basis that Lombard seeks only a provisional winding-up order and that is the order which this Court must now consider.

WINDING-UP SOUGHT QUA CREDITOR

14. The indebtedness of Eureka to Lombard alleged in the founding affidavit appears to be based on two grounds. Firstly, there is an amount that Lombard says she paid to the company for her shares, and secondly, it is said that there are other amounts that Lombard paid to Eureka for the purposes of the construction of the two dwellings which she and her daughter occupy.

15. To the extent that the poorly drafted founding affidavit might be read to suggest that Lombard was a creditor of Eureka on the basis of the shares that she bought in the company, Mr. van Staden accepted in argument, without more, that there was no *vinculum juris* between a purchaser of shares and the company and that Lombard could not claim to have *locus standi* as a creditor in such circumstances.

16. Rather, submitted counsel, Lombard was a prospective or contingent creditor of Eureka under s346(1)(b) of the Companies Act, 1973 (“the Old Act”).

However, this is not what the papers say. In the founding affidavit Lombard firstly makes the bald allegation that she is "*an unpaid creditor*" without describing herself as either a contingent or prospective creditor. She does not allege in any detail how she claims the company's indebtedness to her is calculated nor when she made demand on the company for payment thereof.

"2.1.2 I bring this application as one of the Respondent's shareholders and an unpaid creditor in accordance with section 346(1)(b) of [the Old Act]…I have the requisite *locus standi* to apply for an order for the Respondent's liquidation…"

17. Lombard then goes on to allege that -

"4… (T)he Respondent is indebted to me in the amount of R1 015 235.10… which is the value of the funds for property, shares and 'speculation shares' that were entrusted by me to the Respondent and the Respondent is unable to pay such amount due to the fact that the known assets owned by the Respondent does (sic) not exceed the value of my claim and the respondent is indebted to various other creditors as well.

18. After these rather vague allegations, Lombard concludes by claiming that -

5.1 The Respondent is both commercially and factually insolvent, and an order for its liquidation therefor (sic) be granted in terms of section 344 of the old Companies Act."

19. Later in the founding affidavit Lombard explains how she parted with her money. She says that on 11 June 2018 she

"…registered with…[Eureka], represented by Abri Louw[8], to purchase a share allowing [her] to erect a structure on the property known as Farm 535, Dikdoorn, Garies."

Lombard does not say whether she paid anything for this "registration".

20. Thereafter, says Lombard, she made various payments to Eureka during the period 11 June 2018 to 15 August 2019 to enable her to erect structures for herself and her daughter, Candice Lombard, on the property.

"I made these payments based on the representation by [Eureka] and its officer that the erection of a structure on the property was at all times lawful."

As already pointed out, the aggregate of these payments was R529 235,10. Lombard says that she thereafter purchased another two further properties from other shareholders as investments.

21. Lombard concludes with the bald allegation that she has

"suffered damages in the amount of **R6 494 367.00** due to the intentional misrepresentation by [Eureka], which is the fair replacement value of the properties."

The misrepresentation is not clarified but it is likely to be the allegation alluded to above that the erection of her structure was lawful. There is no evidence to substantiate the calculation of Lombard's alleged damages.

---

[8] Louw was not a director of Eureka. He is referred to later by Nieuwoudt in company minutes as the person who played the key role in admitting members to the company, a task he is said to have discharged with "distinction".

22. Finally, Lombard claims that there is no evidence that Eureka owns sufficient movable or immovable assets to satisfy its liabilities, that it has no cash flow generating activities and that the company "*relies solely on investment from its shareholders for capital*." Based on these scraps of information, Lombard asks the court to conclude that Eureka is unable to pay its creditors and moves for a final order of winding-up.

23. In his heads of argument, Mr. van Staden submitted that Lombard was a prospective or contingent creditor as contemplated in s346(1)(b) of the Old Act.[9] However, when this submission was interrogated during oral argument, in light of the paucity of facts detailed in the founding affidavit and the strident attack thereon in the answering affidavit, Mr. van Staden, wisely in my view, did not press the point too strenuously. Rather, counsel fell back on the submission that, as a shareholder, Lombard had the necessary *locus standi* to move for the winding-up of Eureka on the basis that it was just and equitable to grant such an order. That submission was made on the basis that the company was insolvent and fell to be wound up under the Old Act.

24. In the result, I am unable to find at this stage that Lombard has established that she is a creditor of Eureka and that she consequently has the *locus*

---

[9] **346. Application for winding-up of company**

(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made –

(a)…

(b) by one or more of its creditors (including contingent or prospective creditors);

(c) by one or more of its members, or any person referred to in section 103 (3), irrespective of whether his name has been entered in the register of members or not.

standi as such to apply for the company to be wound up. Further, I am not persuaded that it has been established at this stage that the company is either commercially or factually insolvent. It is however possible that this allegation may be sustained later.

25. That having been said, it is not in dispute that as a member of the company, Lombard does have the *locus standi* under s346(1)(c) to move for the winding-up of Eureka on the basis that it is just and equitable to do so under s344(1)(h) of the Old Act[10] in the event that it is insolvent.

26. Ms. Wharton submitted, however, that, in the event that it was found that the company was not insolvent (as is contended in the answering affidavit), a winding-up order on a just and equitable basis would have to considered under s81(1)(d)(iii) of the Companies Act, 71 of 2008 ("the New Act"). That submission is sound in respect of a solvent company provided that an applicant for such relief meets the definition of a "shareholder" as defined in s1 read with s81(2)(a) of the New Act[11]. Lombard is such a shareholder.

27. Since the approach to a just and equitable winding up is the same, whether under the Old Act or the New Act[12], I shall consider this matter in the context

---

[10] **344. Circumstances in which the company may be wound up by Court.**

A company may be wound up by the Court if –

(h) it appears to the Court that it is just and equitable that the company should be wound up.

[11] S81(2) – A shareholder may not apply to a court as contemplated in subsection (1)(d) …unless the shareholder –

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

[12] Muller v Lilly Valley (Pty) Ltd [2012] 1 All SA 187 (GSJ) at [1]; Budge and others NNO v Midnight Storm Investments 256 (Pty) Ltd and another 2012 (2) SA 28 (GSJ) at [12]

of the extensive body of jurisprudence which has developed in respect of s344(h) of the Old Act. Indeed, both counsel referred in argument to authorities which deal with this section. I shall revert to a discussion of the just and equitable approach in this matter hereunder. Before doing so, however, I there are further facts which need to be addressed.

SALE OF INTELLECTUAL PROPERTY

28. As alluded to earlier, the original directors relinquished stewardship of Eureka during the period September 2019 to June 2021. Nieuwoudt was the first to resign – on 28 September 2019. Before that, and on the "*3th day of Ocktober 2018*", Nieuwoudt concluded a written agreement with the company (then represented by his fellow director Andries Engelbrecht Le Roux) for the sale by him (Nieuwoudt) to the company of his alleged intellectual property. For the sake of convenience, I shall refer to this as "the IP agreement."

29. The IP agreement commences with the following recordal which provides context.

"A. In light of the fact that the Purchaser [Eureka] wishes to create a safe haven for the white population of South Africa in the district of Garies in the Northern Cape province and the Seller [Nieuwoudt] is familiar and well acquainted with the region and possesses the necessary knowledge and know-how to bring this vision to fruition and successful execution, the Seller undertakes to and hereby sells his specific knowledge herein to the Purchaser as listed below:

A1) His knowledge on available underground water sources,

A2) Building of sewerage systems,

A3) Manufacturing of bricks from locally sourced materials,

A4) Building of houses,

A5) Building of roads,

A6) Desalinating underground water,

A7) Putting up and maintaining sustainable wind- and solar units and installations,

A8) General knowledge and know-how of the environmental and local factors as well as the managerial skills the Purchaser requires to execute his intended project.

B. The intention of the Parties is that the Purchaser shall purchase the intellectual property, as defined herein, from the Seller, as set out in this Agreement."

30. The IP agreement further provides that –

(i) it was to be effective from 11 September 2016, notwithstanding the (indecipherable) date thereof;

(ii) the purchase price for the intellectual property was to be -

"60% of the authorized share capital of the Company, currently as well as amended from time to time in future (the Purchase Price Shares)";

(iii) the method of payment of the purchase price was described as follows:

"4.1 The Purchaser shall issue or transfer the Purchase Price Shares (whichever is applicable from time to time) to the Seller or any trust or entity (anywhere in the world) it may nominate for this purpose from time to time.

4.2 The Parties further agree that the Seller shall be entitled to sell his Purchase Price Shares to existing shareholders of EUREKA BEPERK Ltd at a price he may determine in his own discretion, without the permission of the Company, its shareholders or board of directors.

4.3 The Seller is thus authorized to sell his Purchase Price Shares in private transactions, without any pre-emptive rights being applicable on such sales."

31. Now is not the time to comment on the question whether that which Nieuwoudt sold to Eureka is properly to be classified as intellectual property. Rather, it is the complaint of Lombard that this sale was an unlawful mechanism whereby Nieuwoudt effectively stripped the company of a substantial portion of its assets that falls to be considered. In that regard, Lombard points out that the IP agreement was concluded after the "First Ordinary General Meeting of Shareholders" of Eureka held on 15 June 2018 ("the June 2018 meeting"), the minutes whereof are attached to the founding affidavit.

32. As the agreement makes plain, Nieuwoudt then a director of Eureka (also described in the minutes of the June 2018 meeting as its Executive Director and

Chairman) had devised a scheme together with le Roux[13] to allocate to himself (or any entity nominated by him anywhere in the world) at least 60% of the shareholding in the company (dubbed “Purchase Price Shares”) and, in addition, the unilateral right to increase this percentage in the future. Nieuwoudt was further authorized to dispose of those shares to whomsoever he chose and was not obliged to offer them to any of the other shareholders of Eureka.

DEALING WITH THE SHAREHOLDING IN EUREKA

33. A mere 5 days after the registration of Eureka, and on 16 August 2016, the erstwhile shareholders[14] passed certain resolutions after it was recorded that they had waived the requisite 15 business day notice period stipulated for a meeting in s62(2)(a) of the New Act. The first was described as “Special Resolution Number 1” and provided that the existing authorised share capital of the company comprising 10 000 shares with no par value be increased to 700 000 000 (seven hundred million) shares with no par value. In terms of the second resolution (“Ordinary Resolution 1”), Nieuwoudt was authorized to take all steps necessary to give effect to the special resolution and all steps already taken by him in that regard were ratified.

34. The papers also show that Nieuwoudt had set up a company in 2015 of which he was the sole director, NFC (Pty) Ltd – an acronym for “Namakwa Free Chickens” – which he employed as a vehicle to house and later dispose of the “Purchase Price Shares” procured under the IP agreement. In the founding affidavit Lombard says that in 2018 she was offered shares in Eureka by NFC through an offer

[13] Described in the said minutes as the “Second Director and Accounting Officer” of Eureka.

[14] Then only Nieuwoudt, le Roux and van Nieuwholtz.

by Nieuwoudt (which he described as "Development Shares"[15]) at 10c per share in blocks of 1000 shares, hence her accumulation of the 486 000 shares referred to above.

35. Lombard explains in the founding affidavit that when she bought what she terms the "speculation shares"[16], she established that Eureka conducted an unlawful, internal stock exchange set up for the exclusive benefit of Nieuwoudt and to the detriment of the company's other shareholders. Lombard claims that this was "*nothing more than a self-enrichment scheme*" for Nieuwoudt. Moreover, says Lombard, when she queried the legality of this exchange with the officers of the company in September 2019, she discovered that her shares on "*the stock exchange had mysteriously stopped being sold to other parties."*

36. Lombard consequently asserts that trade in the so-called "*speculation shares*" was unlawful and that Eureka

"…is actively perpetrating fraud against its shareholder (sic) in an attempt to enrich its erstwhile director, Nieuwoudt*."*

For that reason, she says, it is just and equitable to wind up the company in terms of s346 of the Old Act.

37. In the answering affidavit deposed to by Harmse, a current director of Eureka and resident on Dikdoorn, it is disputed that the company's winding-up is warranted on a just and equitable basis. The averments regarding the running of an

[15] "Ontwikkeling Aandele"

[16] This appears to be a misnomer for the "development shares".

internal stock exchange are disputed and Lombard is taken to task for not adequately setting out the specific provisions in the New Act upon which she relied for her allegations in that regard. It is further denied that Nieuwoudt is running a self-help scheme and it is pointed out that, in any event, as of January 2022 when the affidavit was deposed to, he had had no involvement with the company for more than 2 years. Any complaints about the shenanigans of Nieuwoudt were said by Harmse to be no longer relevant to Eureka and Lombard was encouraged to pursue steps against Nieuwoudt separately.

38. In the replying affidavit Lombard addresses the criticism levelled at her in the answering affidavit and sets out the statutory basis for the broad allegations made in the founding affidavit. Lombard correctly points out that that issuing of shares in a public company such as Eureka is governed by Chapter 4 of the New Act, and in particular s95 – 111 thereof.

39. In her heads of argument and in oral submissions to the Court, Ms. Wharton chose not to deal with the substance of these allegations made in reply by Lombard on the basis that they should have been made in the founding affidavit. In the absence of an opportunity to reply to those allegations by the company in the answering affidavit, said counsel, it was not fair to do so. Counsel buttressed these submissions with an application to strike out the relevant parts of the replying affidavit.

40. Subject to what is said hereunder, I am of the view that I should have regard to these allegations in the reply which are really no more than a restatement of the relevant statutory provisions. As matters of law, I consider that it would have been open to Mr. van Staden to address the provisions of the New Act in argument, without

more. There was in any event, more than sufficient opportunity for the company to have requested the filing of a fourth set of affidavits to address these points of law in the event that they were incorrectly stated.

IS THE METHOD OF THE SALE OF EUREKA'S SHARES PROSCRIBED?

41. There are two discrete aspects to be considered when one looks at the way that shares in Eureka were traded. Firstly, there is the manner in which shares were sold (i) initially by way of an "initial public offering" and (ii) by way of a "secondary offering", both offerings as defined in s95 of the New Act. Secondly, there is the question whether Eureka conducted an internal stock exchange dealing with its shares in contravention of the Financial Markets Act, 19 of 2012 ("the FMA").

42. In relation to the first offer for the purchase of shares in Eureka, it appears on the available evidence that such offer fell within the definition of an "initial public offering" as defined in s95(1)(e) of the New Act.[17] Accordingly, in terms of s99(2) of the New Act, such sale was required to be preceded by a registered prospectus[18] as defined in s95(1)[19]. In s100, the New Act sets out in some detail the requirements for such a prospectus. There is no evidence to suggest that any such prospectus was either issued or filed with the Companies and Intellectual Property

---

[17] S95(1)(e) reads "**initial public offering**" means an offer to the public of any securities of a company, if –

(i) no securities of that company have previously been the subject of an offer to the public…"

[18] S99(2) provides that "a person must not make an initial public offering unless that offer is accompanied by a registered prospectus."

[19] S95(1)(k) – "**registered prospectus**' means a prospectus that complies with this Act and –

(i) in the case of listed securities, has been approved by the relevant exchange; or

(ii) otherwise, has been filed.

Commission and it is thus not necessary at this stage to assess whether there was compliance with the s100 criteria. It is thus fair to conclude that the initial sale of shares in Eureka to Lombard was not in compliance with the necessary statutory provisions and was thus unlawful and illegal.

43. I am further of the view that the sale to Lombard by NFC in 2018 of the so-called "Development Shares" constituted a "secondary offering" as defined in s95(1)(m) of the New Act.[20] Such an offering must comply with the myriad conditions stipulated in s101 of the New Act, which, for the avoidance of prolixity, will not be repeated herein. There is no evidence that such offer complied with the provisions of s101 and accordingly the sale to Lombard of the "Development Shares" is similarly unlawful and illegal.

THE "VERHANDELKAMER"

44. Lastly, there is the establishment of the "*verhandelkamer*". In the minutes of the June 2018 meeting, to which reference has already been made, Nieuwoudt informed the gathering of shareholders of the establishment of a mechanism through which members might trade their shares. This he termed a "*verhandelkamer*" (loosely translated as "a trading room"), the existence whereof is not disputed on the papers. It is thus common cause that there is such a "*verhandelkamer*" being conducted by Eureka.

---

[20] S95(1)(m) – "**secondary offering"** means an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary."

45. There is also reference in those minutes to three classes of shares which could be traded through the "*verhandelkamer".*

(a) Class A shares – so-called "*ontwikkelingaandele*" ("development shares") which the company would sell to strengthen its asset base, acquire land and finance general capital expenditure;

(b) Class B shares which members can purchase to cover the building costs of their dwellings. These shares do not earn dividends and will be linked to the dwelling erected on the member's "property";

(c) Class C shares which remain attached to the shareholder's "property" in circumstances where the company elects to sell a transferable life right of use of the ground. The "properties" at the new "Groenriviersmond Dorp" fall into this category. A member holding Class C shares would have the option to erect a structure on the "property" and such structure would not accrue to the company.

46. In my view the "*verhandelkamer"* falls foul of the provisions of the FMA for the following reasons. Firstly, in s1 of the FMA, "*securities*" are defined to include "*listed and unlisted…shares...in public companies*". Then in the same section "*exchange*" is said to include "*a person who constitutes, maintains and provides an infrastructure…for bringing together buyers and sellers of securities*." Further, s7 of the FMA requires an exchange to be licensed under s9 of that Act, which in turn establishes the procedure to be followed to procure such licensing. None of these provisions has been complied with by Eureka. In the circumstances the

"verhandelkamer" operates unlawfully as an unlicensed securities exchange and the trade in Eureka's shares through it is similarly unlawful and illegal.

CONCLUSIONS REGARDING THE PURPOSE AND MANAGEMENT OF EUREKA

47. When the aforegoing findings are considered holistically, the following picture emerges. Nieuwoudt, whose criminal convictions in relation to illicit diamond dealings and subsequent sentence of 11 years imprisonment in this Division were confirmed on appeal in 1990[21], answered the call of some to unify the Whites in South Africa who did not wish to be part of the new order and to accommodate them in their chosen Xanadu through the vehicle of a public company.[22] The papers do not reflect whether, in light of his criminal record, Nieuwoudt was qualified to assume directorship of Eureka under s69 of the New Act.

48. In the minutes of the June 2018 meeting it is recorded that Nieuwoudt railed against what he claimed to be the plight of White South Africans stating, inter alia, that -

(i) they were facing total extermination as a race;

"*Met nou reeds meer as 400 000 Blankes in plakkerskampe en miljoene jong Blankes oorsee wie se kinders daar gebore word staar die blanke ras in Suid Afrika totale uitwissing in die*

---

[21] See S v Nieuwoudt 1990 (4) SA 217 (A)

[22] The minutes of the meeting record Nieuwoudt's words - "Op 28 Julie 2016 [het ek] die Maatskappy EUREKA BEPERK Ltd. gestig met die doel om die blankes van Suid Afrika in een wettige entiteit saam te voeg."

gesig…Daar bestaan geen teenargument dat die blankes in Suid Afrika uiteindelik total as ras kan verdwyn"

(ii) they were systematically being excluded from the economy of the country;

"*Ons is die mense wat nou gedurende die afgelope meer as twintig jaar slegs weens die kleur van ons vel uit die ekonomie van die land gedwing word"*

(iii) they were being subjected to vicious criminal attacks;

"*Ons is die mense wie se kinders nou oor die wereld verstrooi is, wie se gesinne opgebreek is, op plase aangeval, vermoor en gemartel word."*

49. The solution to this plight, said Nieuwoudt, was the founding of an exclusively White enclave on Dikdoorn.

"*Ons moet vir ons grond koop waar ons die voortbestaan van die blanke ras kan beskerm… Om seker te maak dat daar geen rassehaat op daardie grond ooit kan bestaan nie moet daar nooit enige ander ras as uitsluitlik blankes woon nie..*

Op 10 Augustus 2016 het ek die Plaas Dikdoorn 3246 Hektaar groot, gekoop met die doel om vir die Blankes van Suid Afrika 'n veilige hawe daar te skep."

50. In motivating the founding of Eureka, Nieuwoudt explained to the gathering of shareholders that he had decided to register a public company so as to ensure that any restrictions that applied to the number of shareholders in a private company was avoided. By opting for such a company, he said, a multitude of shareholders could be scattered across the world and did not need to have a direct interest in the control of the company (as might be the case with a small private company), rather leaving management and day-to-day control to a board of directors.

51. Nieuwoudt also told the meeting of shareholders that through the creation of a public company it might be possible to manipulate the tax exposure of Eureka.

"*Gelukkig het die Wetgewer dit goed bedoel en word redelike tyd toegelaat om al die sake van 'n nuwe maatskappy in plek te kry. Dis waarom ons adviseer is om so lank as moontlik tyd te wen voordat ons die finansiele state deur die ouditeure laat afteken."*

52. Despite the unambiguous wording of the IP agreement, Nieuwoudt told the June 2018 meeting that when he established Eureka it had no assets. He said that he had concluded an employment contract with the company which entitled him receive 60% of the issued share capital of Eureka in exchange for services rendered in the management of the company. This was manifestly false: it was an IP agreement, with onerous provisions *vis-à-vis* the company.

53. Further, he did not inform the shareholders of his entitlement to increase the extent of his shareholding under that agreement. And, while he dealt at length with the "*verhandelkamer*" and the classes of shares contemplated in the company, Nieuwoudt did not explain to the shareholders that the exchange did not comply with the necessary statutory requirements.

54. Considering all of these factors together, I agree that a prima facie case has been established for the following conclusion drawn by Lombard in the founding affidavit, save for the conclusion that the company cannot pay its creditors.

"12.6 It appears that the Respondent was used by Nieuwoudt to conduct a selfenrichment (sic) scheme. The illegality of the Respondent's business model justifies the Respondent's

immediate liquidation so the liquidators can commence with an investigation into the affairs of the respondent to determine how the respondent dealt with the 'invested funds'.

12.7 It is clear from the facts as set out herein above that the Respondent is unable to pay its creditors and I submit that the actions of the directors of the Respondent indicated that it never intended to pay its creditors. I therefore submit that it would be just and equitable for the Respondent to be liquidated in order to allow a duly appointed liquidator to investigate the scheme perpetrated by the Respondent, take control of the assets and dissipated assets of the Respondent."

JUST AND EQUITABLE?

55. The relief available to a shareholder under s344(h) of the Old Act does not give the Court *carte blanche* to exercise of an unbounded discretion. However, at this stage, the Court need only be satisfied that the need for such an order has been established on a prima facie basis.[23]

56. In one of the leading cases on a just and equitable winding-up order, Rand Air, [24] the court observed that over the years five broad categories had evolved in which our courts have exercised that discretion. They are –

(i) disappearance of the company's *substratum*;

(ii) illegality of the objects of the company and fraud in connection therewith;

---

[23] Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA at [3]

[24] Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 350.

(iii) deadlock on the management of the company's affairs;

(iv) grounds analogous to those for the dissolution of partnerships; and

(v) oppression.

57. In Cunninghame[25], in which Rand Air was once again cited with approval, the Supreme Court of Appeal observed that the application of s344(h) "*postulates not facts but a broad conclusion of law, justice and equity."* In that case the Supreme Court of Appeal found that the business of a company (incorporated as a "not for profit" in terms of s21 of the Old Act) was being conducted unlawfully – for profit - and therefore fell to be wound up under the just and equitable rubric.

58. In this matter, I suppose there might be an argument that the aim and objects of Eureka and the philosophy underlying its establishment stand in stark contrast to the spirit and purport of our Constitution, which is, inter alia, to heal the divisions of the past, to promote tolerance and respect between all citizens and to reject racism in all its manifestations. In this regard, one is reminded of the words of Chaskalson P in Makwanyane[26]

"The Constitution

'… *Provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human*

---

[25] Cunninghame and another v First Ready Development 249 2010 (5) SA 325 (SCA) at [3]

[26] S v Makwanyane and another 1995 (3) SA 391 (CC) at [7]

rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.' "

59. But, as a subscriber to the principles of White supremacy and the racist agenda promoted by Nieuwoudt, her fellow shareholders and the company in general, Lombard can hardly have been expected to raise such a point in her papers. She has chosen to make common cause with the other occupants of Dikdoorn and she is tarred by the same brush. In the circumstances it would be incorrect for this Court to adjudicate the case on this basis.

60. However, what Lombard has demonstrated, at least at a prima facie level, is that immediately after establishing the company, Nieuwoudt set about diluting the shareholding significantly. Thereafter, the company was stripped of at least 65% of its shareholding by Nieuwoudt through a questionable agreement for the sale of his alleged intellectual property. And then, through the establishment of NFC, the very shares he had stripped out of the company with no *quid pro quo* were offered back to the members of the company at a price determined by him.

61. One cannot but be reminded in such circumstances of the analogy of a motorist who has to go the nearby second-hand motor spares shop to buy back the hubcaps which were stolen off her car the previous night. An order for winding-up would enable the liquidators to investigate and, if satisfied, seek to recover what was taken from Eureka unlawfully.

62. A further consideration is the fact that Nieuwoudt established an unlawful exchange for the sale of the company's shares and that, despite his apparent

departure from the company, the exchange continues to function. Prospective purchasers of such shares, whoever, and wherever in the world, they may be, are entitled to the full protection of the law.

63. Then there is the question of Nieuwoudt's criminal conviction. A liquidator would be entitled to examine whether Nieuwoudt was ever entitled to act as a director of Eureka and if not, what the consequences of his conduct were for the nascent company.

64. Lastly, I consider that the approach of the Kamiesberg Municipality for interdictory relief in the local magistrates' court cannot be ignored. If it is indeed so that structures have been unlawfully erected on land owned by the company (or procured by it) for occupation by shareholders who have paid for those rights, it might well be that the *raison d'etre* for the company has disappeared.

65. In argument Ms. Wharton pointed out that Lombard was but one of many shareholders of Eureka. Counsel observed that in the answering affidavit Harmse had stated that there were some 8200 members of the company but that only 18 families resided on Dikdoorn and another 18 on the Farm Klipkuil 547. Given that Lombard was the only member that had approached the Court to wind-up Eureka, it was suggested that this state of affairs was an indication that it might not be just and equitable to grant such an order.

66. While the minutes of the June 2018 meeting reflect that at stage there where some 173 members who held shares in Eureka, the volume of shares each member then held is not recorded. What the papers do however show is that by far

the majority of shareholders do not live on Dikdoorn or Klipkuil. Whether the other members of the company know about these proceedings is thus not clear. If they are unaware, their ignorance of the proceedings may account for the lack interest.

67. But neither the members' absence of interest in these proceedings or a show of support for the continued existence of the company are relevant considerations in circumstances where the company has been set up in contravention of the relevant statutes and where it continues to function in contravention of the law. Rather, on the approach adopted in Cunninghame, I am persuaded that this is a situation *par excellence* where it is just and equitable to provisionally wind-up the company in order that its affairs can be properly examined by a duly appointed liquidator.

STRIKING OUT APPLICATION.

68. Lastly there is the application by Eureka to strike out certain portions of the replying affidavit. Mr. van Staden accepted that para 3.5 fell to be struck out as it raised entirely new matter in reply. For the rest, Lombard opposed the application, the argument being that it constituted a fleshing out of broader allegations made in the founding papers. As I have said, the company chose not to address the legal issues which were expanded on in the replying affidavit. That was its right but it must bear the consequences of its choice.

69. The application to strike out is to be determined in accordance with Rule 6(15)[27]. Thus it is for Eureka to establish –

[27] Rule 6(15) The court may on application order to be struck out from any affidavit any matter which is

(i) that the matter which its seeks to strike out is scandalous, vexatious or irrelevant, and

(ii) that if the striking out is not granted, it will be prejudiced in advancing its case.[28]

70. No argument was advanced that the allegations were vexatious, scandalous or irrelevant and I am not persuaded that Eureka has established that it will suffer prejudice in the event that the Court refuses to strike out the allegedly offending material in the replying affidavit. I am thus satisfied that, save for para 3.5, the remainder of the reply should be permitted to stand. Any new issues that might have been introduced are essentially legal points and it can hardly be argued that they were frivolous or vexatious.

71. Moreover, if this Court has misconstrued the legal argument or misapplied them to the facts at hand, the company will have the opportunity to address any such short-comings on the return day. In any event, I consider that the case for a provisional winding-up order is adequately established in the founding papers.

72. In conclusion, the order which I intend making provides for the usual forms of service made in matters such as this. In a proposed draft order handed up, Mr. van Staden suggested publication in the Citizen newspaper. Just why that

---

scandalous, vexatious or irrelevant, with an appropriate order as to costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[28] Beinash v Wixley 1997 (3) SA 721 (SCA) at 733B.

broadsheet was selected is not clear but it is possible that counsel simply utilized his *pro forma* draft order for matters of this kind. Given the facts deposed to in the affidavits, and particularly because the shareholders are predominantly Afrikaans speaking and may be scattered throughout the country, I consider that there should be publication of this Court's order in one national newspaper published in the Afrikaans language (Rapport) and the two local newspapers customarily used for such publication. In the event that any party requires additional forms of service to be ordered, such party may approach this Court for an amplification of the order in that regard.

ORDER OF COURT

Accordingly, it is ordered that:

A. Paragraph 3.5 of the applicant's replying affidavit is struck out.

B. The respondent is provisionally wound up and it is to be placed in the hands of the Master of the High Court, Cape Town.

C. The provisional order of winding-up shall serve as a rule *nisi* returnable at 10h00 on Wednesday 17 May 2023, at which date the respondent or any other interested party may show cause why a Final Order for the winding-up of the respondent should not be granted.

D. A copy of this order shall forthwith be –

(i) published once in the Government Gazette, Rapport, Die Burger and Cape Times newspapers;

(ii) served on the respondent at its registered address;

(iii) served on the South African Revenue Service and the Master of the High Court, Cape Town

(iv) forwarded by electronic mail to each known creditor of the respondent with a claim in excess of R20 000 (Twenty Thousand Rand)

E. The costs of this application are to be costs in the winding-up.

_____

GAMBLE, J

APPEARANCES

For the applicant: Mr. HP van Staden
Instructed by Vezi De Beer Inc.
Cape Town.

For the respondent: Ms. B.C. Wharton
Instructed by WN Attorneys
c/o Assheton Smith Ginsberg Inc.
Cape Town.