



Republic of South Africa

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

Before: Acting Justice HJ De Waal
Date of hearing: 1 December 2023
Date of judgment: 21 February 2024

Case No: 16845/2022

CHARLES JOHANNES SIERTSEMA

Applicant

and

STONE MEADOWS INVESTMENTS 27 (PTY) LTD

First Respondent

MEADOWRIDGE INVESTMENTS 10 (PTY) LTD

Second Respondent

SPALDING INVESTMENTS 9 (PTY) LTD

Third Respondent

ROSELLA INVESTMENTS (PTY) LTD

Fourth Respondent

PETRUS PRINSLOO

Fifth Respondent

DORPSIG (PTY) LTD

Sixth Respondent

NUTILITE (PTY) LTD

Seventh Respondent

THE TRUSTEES FOR THE

TIME BEING OF THE ZANDER ARMIN TRUST

Eight Respondent

THE TRUSTEES FOR THE TIME BEING

OF THE ZARMIN TRUST

Ninth Respondent

ERF 31477 WELGEDACHT (PTY) LTD

Tenth Respondent

JUDGMENT

Introduction

- [1] This matter is about the sale of a hotel, situated at 107 Dorp Street, Stellenbosch.
- [2] The sellers were companies and trusts under the control of the Fifth Respondent, Petrus Prinsloo. The sellers will be referred to as such and as “**the Prinsloo entities**”. They are the Sixth, Seventh and Ninth Respondents. When referring to his individual actions, Fifth Respondent will be referred to as “**Prinsloo**”. As explained below, the sellers fell out of the picture after selling the Hotel to the buyers.
- [3] The buyers were companies under the control of the Applicant, Charles Johannes Siertsema. The buyers will be referred to as such and as “**the Siertsema entities**”. They are the First to Fourth Respondents. When referring to his individual actions, the Applicant will be referred to as “**Siertsema**”.
- [4] The sale dates back to 3 March 2020, when the Siertsema entities first entered into an agreement to buy the real estate and the business operating the Hotel. I shall refer to the assets which were bought as “**the Hotel**”.
- [5] A number of disputes arose from the sale of the Hotel. I summarise them briefly with reference to the relief sought by Siertsema in the notice of motion.
- [6] The first and main dispute is about who owns the Hotel. According to the share registers, Siertsema owns only 50% of the shareholding of the buyers which now own and operate the Hotel. This is not in dispute. The dispute is about the other 50%

shareholding in the buyers, which, according to the share registers, vests in Prinsloo. The first and main relief sought by Siertsema is that Prinsloo's 50% shareholding be transferred to him and formally registered in his name. In other words, Siertsema claims that through his entities he is in fact the 100% owner of the Hotel.

[7] As a first alternative to the main relief, Siertsema seeks an order in terms of s163 of the Companies Act 71 of 2008 ("**the Companies Act**") declaring that the conduct of the buyers have been oppressive and unfairly prejudicial to Siertsema and that Prinsloo be directed to purchase his loan accounts and 50% in the buyers, for an aggregate amount of R10 140 726.00. Siertsema is further seeking release from any liability which he may have under any guarantee or surety given to any creditor of the buyers, including Nedbank Limited ("**Nedbank**"). In effect Siertsema is saying that if all the shares in the buyers are not transferred to him (in terms of the main relief sought) then Prinsloo must buy him out.

[8] In the second alternative to the main relief, Siertsema is seeking an order that the buyers be placed under provisional, and thereafter final, winding-up by the Court in terms of s181(1)(d) of the Companies Act. In terms of this alternative, Siertsema is claiming that, if the other claims fall, it is just and equitable to liquidate the buyers.

[9] I should say at the outset that Siertsema himself only operated the Hotel for a relatively short period of time and that Prinsloo is now back in charge. This is in circumstances where Prinsloo officially holds 50% of the shareholding in the buyers and Siertsema holds 50%.

Factual background

- [10] During the beginning of 2020, Prinsloo indicated to Siertsema that he was willing to sell the Hotel for R20 million, which was acceptable to Siertsema. Siertsema established his entities, the buyers, for this purpose.
- [11] On 3 March 2020, the Siertsema entities concluded purchase agreements to acquire the Hotel from the Prinsloo entities. However, as certain suspensive conditions (which are irrelevant for present purposes) were not met by the due date (9 April 2020), the agreements lapsed. They were, however, reinstated on 20 August 2020. Prinsloo became a 50% shareholder in the buyers, three days earlier, on 17 August 2020.
- [12] The purchase price was R20 million. The Siertsema entities could initially only obtain funding from Nedbank for R10 million. Prinsloo and Siertsema accordingly agreed that the remaining R10 million would be paid in tranches of R2 million over time.
- [13] Nedbank later increased the finance to R11.25 million, leaving R8.75 million to be paid off by the buyers to Prinsloo over time (or more accurately and presumably, to his entities who were the sellers). A loan account in favour of Prinsloo was created in the accounts of the buyers for the R8.75 million outstanding.
- [14] Nedbank indicated in an email of 29 June 2020 that it would require that bonds [of R11.25 million] be registered over the properties of the buyers in its favour and that Siertsema had to sign surety for the debt. Nedbank further insisted that the loan account [of R8.75 million] created in favour of Prinsloo be subordinated to it.

[15] I should point out at that this stage that in terms of the sub-ordination agreements, Prinsloo warranted in favour of Nedbank that his loan accounts had not been ceded or subordinated to any third party and that no third party had an interest in the claims. This is one of the reasons why Prinsloo contended that Nedbank should have been joined to the proceedings, an aspect which I deal with below.

[16] Transfer of the Hotel to the buyers took place on 13 November 2020. By then Prinsloo held a 50% interest in the buyers. The reasons for this are in dispute but it is common cause that that Nedbank insisted that Prinsloo remains involved, at least while the R11.25 million loan owed to the bank by the buyers was still outstanding.

[17] What is disputed are Siertsema's allegations to the effect that:

17.1. The allocation of 50% of the shareholding in the buyers to Prinsloo was essentially a sham transaction in order to obtain funding from Nedbank.

17.2. It was agreed that once the funding had been obtained and the Hotel properties had been registered in the names of the buyers, Prinsloo would retransfer the 50% shareholding to Siertsema.

[18] On 13 February 2021, Siertsema attempted to enforce his version of the arrangement by demanding that Prinsloo retransfer the 50% shareholding in the buyers back to him. Prinsloo made clear, albeit somewhat later, that he was not prepared to transfer the 50% shareholding back to Siertsema.

[19] This is the origin of the first dispute. The question is whether the 50% shareholding registered in Prinsloo's name actually belongs to Siertsema.

- [20] The story does not end with the first dispute. After Prinsloo refused to transfer the 50% shareholding to the Siertsema entities, Siertsema decided to extract himself from the Hotel. He wanted to recuperate the money invested by him in the Hotel and be released from the liability (suretyship) to Nedbank.
- [21] Prinsloo agreed.
- [22] As a consequence, on 9 June 2021, Prinsloo and Siertsema concluded a second sale agreement in terms of which Siertsema agreed to sell to Prinsloo his 50% shareholding in the buyers against the payment of R4.25 million as well as any other money (such as operational expenses while Siertsema was in control of the Hotel) that Siertsema lent to the buyers. If the two are added together, Siertsema was happy to “walk away” from the Hotel if Prinsloo paid him R6 350 427.00.
- [23] This was agreed. It was agreed, further, that Prinsloo would be appointed as director of the buyers on 10 August 2021 and that Siertsema would resign as director.
- [24] When Prinsloo defaulted on payment in terms of the second sale agreement, Siertsema cancelled it on 28 February 2022.
- [25] It does not appear to be in dispute that Prinsloo did not comply with the terms of the second sale agreement. Prinsloo, however, disputes that Siertsema was entitled to cancel the agreement (as opposed to claim specific performance).
- [26] The second sale agreement is relevant to the alternative forms of relief claimed by Siertsema.

[27] Then there is a third dispute. This relates to an amount of R4.25 million paid in tranches by Siertsema to Prinsloo or entities under his control during the latter half of 2020. Siertsema contends that these payments were made pursuant to an agreement in terms of which Prinsloo ceded his loan accounts of R8.75 million against the buyers to Siertsema for R4.25 million. The deal was in effect, according to Siertsema, a reduction of the purchase price from R20 million to R15.5 million. There is no written document recording the deal in these terms. Siertsema contends that deal was brokered by intermediaries, including an attorney, who now refuse to provide the signed agreements to him.

[28] Prinsloo denies that there was such a transaction. He claims he could not have entered into such a transaction given the terms of the subordination agreement, referred to above. According to Prinsloo, what actually happened is that Siertsema agreed to make a loan of R4.25 million to another entity owned by him, Erf 31477 Welgedacht (Pty) Ltd (“**Welgedacht**”). This was done because it was unclear how long Prinsloo’s loan accounts of R8.75 million would be tied up. There is support for Prinsloo’s version in the second sale agreement (dealt with above), which explicitly records that Siertsema made a loan to Welgedacht and that the latter would provide a schedule to Siertsema on how and when said loan would be paid off.

[29] The above is the third aspect which is in dispute. It is peripherally relevant to the main and alternative claims.

[30] As already stated above, from about 10 August 2021 Siertsema has been in charge of the Hotel and running it without involving Siertsema.

[31] Nedbank subsequently agreed to make Prinsloo a surety and to release Siertsema as such. This was recorded in a letter dated 25 October 2023.

[32] Accordingly, as things stand:

32.1. Prinsloo is the sole director of the buyers and is running the Hotel, albeit with only a 50% share in the buyers.

32.2. The buyers are paying off the R11.25 million bond to Nedbank. Prinsloo is the surety.

32.3. There is a dispute regarding Prinsloo's loan account. Prinsloo claims he is owed R8.75 million, which loan has been subordinated to Nedbank. Siertsema claims he bought that loan account of R8.75 million for R4.25 million paid to Welgedacht.

[33] I now turn to deal with the three alternative forms of relief sought by Siertsema in the notice of motion. Before doing so, I briefly deal with the procedural history and the non-joinder complaint raised by Prinsloo.

Procedural history and non-joinder

[34] After I was allocated the matter, I called a meeting with the parties on 20 November 2024. I felt that there was a need for a meeting as the matter was not ripe for hearing for two reasons.

34.1. Firstly, Prinsloo applied for leave to file a rejoining affidavit in order to deal with what he alleged to be new matter raised by Siertsema in his replying affidavit.

34.2. Secondly, Prinsloo raised a special plea of non-joinder on the basis that Nedbank had a direct and substantial legal interest in the relief sought by Siertsema in the matter.

[35] At the meeting it was agreed:

35.1 regarding the first issue, that the rejoinder affidavit of Prinsloo be admitted on condition that Siertsema was afforded an opportunity to reply thereto and agreed; and

35.2 regarding the second issue, that Nedbank would be contacted and provided with the opportunity to join the proceedings should it so wish.

[36] Nedbank later indicated that it abided the decision of the Court. This disposes, in my view, of the non-joinder point.

The three alternative forms of relief sought by Siertsema

[37] It will be recalled that the three forms of relief (all in the alternative) sought by Siertsema are the following:

37.1. That the 50% shareholding in the buyers registered in Prinsloo's name be transferred to Siertsema.

37.2. In the alternative, that the conduct of the buyers as represented by Prinsloo be declared to be oppressive and unfairly prejudicial to Siertsema and/or that such conduct unfairly disregarded Siertsema's interests and that, pursuant to s163 of the Companies Act, Prinsloo be directed to purchase Siertsema's shares in the buyers for an amount of R10 140 726.00.

37.3. In the further alternative, that the buyers be placed under provisional and thereafter final winding-up pursuant to s81(1)(d) of the Companies Act.

[38] I deal with each of these claims in turn.

(i) Siertsema's claim to Prinsloo's 50% shareholding

[39] This claim is based on an arrangement which Siertsema claims existed alongside the first agreement of sale in terms of which the 50% shareholding that Prinsloo had in the buyers would be transferred back to Siertsema once the R11.25 million loan had been obtained from Nedbank.

[40] At the hearing I raised with both Mr HN De Wet, who appeared for Siertsema, and Mr J Van Dorsten, who appeared for Prinsloo, that, as a matter of law, the first purchase agreement and whatever arrangements made around it were replaced by the second sale agreement of June 2021 in terms of which Siertsema was to exit in exchange for a release from his suretyship obligations and the cash amount of R6 350 427.00. In other words, I suggested that the second sale agreement was in effect a compromise¹ which extinguished the pre-existing rights and obligations of the

¹ See the following succinct description of the nature of a compromise in **Contract: General Principles** by Lubbe, Van Huyssteen, Reinecke & Du Plessis (6 ed, 2020):

"14.47 Compromise (settlement, *transactio*) is an agreement whereby a dispute – which may or may not involve litigation – characterised by uncertainty as to the existence or terms of a legal relationship is settled by the parties, who agree to regulate their relations in a particular way, often by creating a

parties and replaced them with a fresh contractual regime in terms of which Siertsema was to be paid R6 350 427.00 and was to be released from the suretyship. The latter happened but the former not. Even though there is a dispute as to whether Siertsema could cancel due to non-payment, Siertsema could certainly enforce the second sale agreement and claim payment of the outstanding amount to him. On the face of it, that claim has not prescribed and even if it did that would not revive the original claims that were compromised.

[41] Both counsel seemed to agree with my analysis but they also agreed that as the point was not raised by either of the parties they represent, it was no open for me to decide the matter on this basis. I accept this, but for reasons set out below, the fact that Siertsema has a simple and straightforward contractual exit claim for an agreed sum of R6 350 427.00 is not irrelevant to the matter, and particularly not to the alternative claims. I deal with this aspect below, but given the second sale agreement, it can hardly be said that Siertsema is trapped in an abusive arrangement from which he cannot escape.

[42] I now revert to Siertsema's claim for 50% of the shareholding in the buyers registered in Prinsloo's name.

[43] The main point made by Siertsema's counsel, both in his heads of argument and in oral argument, is that:

new set of obligations between them.

14.48 The purpose of a compromise is to terminate uncertainty and to avoid the inconvenience, costs and risk inherent in resorting to other methods of resolving disputes. It follows that, unlike novation, a compromise does not depend on the existence of a valid original obligation between the parties. In fact, even if nothing is due, a settlement may still fulfil a purpose by avoiding litigation.

14.51 Substantively, a compromise extinguishes any legal relationship that may previously have existed between the parties. A compromise brings legal proceedings already instituted to an end and bars further legal proceedings in respect of the original, disputed cause of action. On this basis, and because a compromise does not depend on the original cause of action, a party sued on a compromise is not entitled to 'go behind the agreement' and raise defences to the original cause of action."

- 43.1. The parties agreed that the Hotel was worth R20 million.
- 43.2. That is the amount that Prinsloo received.
- 43.3. More particularly, Prinsloo and/or his entities received the R11.25 million from Nedbank pursuant to a mortgage loan and a loan claim of R8.75 million against the buyers, totalling R20 million.
- 43.4. There could be no conceivable basis for Prinsloo holding on to 50% of the shareholding when he received the full purchase price of R20 million.
- 43.5. If Prinsloo could hang on to the 50% shareholding in the buyers it would mean that the purchase price was actually not R20 million, but R40 million.

[44] Prinsloo disagrees and claims that he and Siertsema are equal shareholders and that they each own 50% of the shareholding in the buyers. Prinsloo contends that:

- 44.1. Nedbank's requirement that 50% of the shareholding remains with him was a reasonable requirement imposed by Nedbank before it would approve the parties' application for finance. Prinsloo had the experience of running the Hotel, which gave comfort to Nedbank.
- 44.2. It must be borne in mind that the full purchase price for the Hotel was not paid by the buyers. The balance of the purchase price (ultimately R8.75 million) was funded by a vendor loan from Prinsloo. It made sense for him to continue to hold the 50% shareholding in the buyers until that vendor loan was repaid.

44.3. It is therefore not correct that Prinsloo received the full R20 million for the Hotel. Prinsloo received R11.25 million free of obligations (at least for the period until he replaced Siertsema as the surety) but the balance of R8.75 million he lent to the buyers and his loan accounts were subordinated to Nedbank. From a practical perspective this meant that Prinsloo would only receive the R8.75 million after Nedbank had been repaid its R11.25 million bond.

44.4. Prinsloo is clearly going to wait a long time for the R8.75 million. Prinsloo is also now the surety for the R11.25 million bond with Nedbank. All that Siertsema paid is the R4.25 million which was paid to Welgedacht.

44.5. Siertsema's version would constitute a fraud on Nedbank and a breach of Prinsloo's obligations to Nedbank in respect of the loan insubordination.

[45] I am inclined to agree with Prinsloo's version. The matter can be approached from another angle: What did Siertsema actually *pay* for the Hotel? Subject to him becoming surety, Siertsema obtained the R11.25 million from Nedbank and the rest from Prinsloo through vendor financing. Why would Prinsloo agree to sell 100% of the shareholding without payment, at least not payment in the immediate future, of 43.75% of the purchase price? A large chunk of the purchase price came in the form of a vendor loan, to be paid off only after the bond was paid. It made commercial sense for Prinsloo to retain 50% of the shareholding until the amount of R8.75 million was repaid to him. That would be long into the future, which is why Siertsema paid the R4.25 million to Welgedacht. That is actually the only amount that Siertsema *paid* for his 50% of the Hotel.

[46] Of course, the test is not whether I regard Prinsloo's version as more plausible than Siertsema's version. The question is whether Prinsloo's version is palpably implausible, far-fetched or so clearly untenable that it can safely be rejected on the papers.² This is clearly not the case here. It made commercial sense for Prinsloo to retain 50% of the buyers until his loan was repaid. Furthermore, Siertsema's version would amount to a fraud on Nedbank. Fraud is not easily inferred.³

[47] For these reasons, the first claim by Siertsema for the transfer of the 50% shareholding in the buyers from Prinsloo to him is dismissed.

(ii) The claim in terms of s163 of the Companies Act

[48] Section 163(1) and (2) of the Companies Act provides as follows:

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

- (1) A shareholder or a director of a company may apply to a court for relief if-
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 – 635.

³ See Gilbey Distillers & Vintners (Pty) Ltd v Morris NO and Another 1990 (2) SA 217 (SE) at 225J – 226A with reference to Gates v Gates 1939 AD 150 at 155.

- (a) an order restraining the conduct complained of;
- (b) an order appointing a liquidator, if the company appears to be insolvent;
- (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;
- (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
- (e) an order directing an issue or exchange of shares;
- (f) an order—
 - (i) appointing directors in place of or in addition to all or any of the directors then in office; or
 - (ii) declaring any person delinquent or under probation, as contemplated in section 162;
- (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- (k) an order directing rectification of the registers or other records of a company; or
- (l) an order for the trial of any issue as determined by the court.”

[49] Counsel for Siertsema relies on the interpretation of the predecessor to s163 (s252 of the Companies Act) in **De Sousa v Technology Corporate Management (Pty) Ltd**

2017 (5) SA 577 (GJ). Siertsema's counsel contends that certain legal principles can be distilled from this case. They are that a shareholder or a director of a company may apply to Court for relief if:

- 49.1. acts or omissions from a company or a related person has had a result that is oppressive or unfairly prejudicial or unfairly disregards the interests of the applicant;
- 49.2. the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfair prejudicial to, or that unfairly disregards the interests of the applicant; or
- 49.3. the powers of a director or prescribed officer of the company, or a related person, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.

[50] Siertsema contends that he is entitled to the relief in the notice of motion, which is that his 50% shareholding should be bought by Prinsloo for R10 140 726.00 because:

- 50.1. Prinsloo refuses to retransfer the shares to Sietsema despite the fact that he is not entitled to such shares;
- 50.2. Prinsloo is not a surety, only Siertsema [it is common cause that this changed and that Prinsloo is now a surety and Siertsema not];
- 50.3. Prinsloo is not supposed to be sole director or a director at all;

50.4. Prinsloo has failed to properly attend to the tax and corporate affairs of the buyers; and

50.5. Prinsloo excludes Siertsema from the management of the buyers.

[51] Based on the above, Siertsema contends that he has established that Prinsloo's conduct is oppressive, unfairly prejudicial to, and unfairly disregards his interests as a shareholder. Siertsema further contends that there is no reason why he, as a 50% shareholder, should not be involved in all the major decisions of the buyers. Siertsema claims that Prinsloo is just doing "*what he wants*".

[52] Prinsloo's counsel, on the other hand, contends that Siertsema is also not entitled to relief in terms of s163 of the Companies Act as he has not been excluded from the management of the companies but agreed to resign as director pursuant to the second sale agreement. It is accordingly by agreement that Prinsloo is now the sole director of the buyers. Reference is made, in this regard, to an email from Siertsema, stating that his attorney requested him not be involved with the administration and finances of the Hotel for the duration of the litigation.

[53] Prinsloo's counsel further points out that exclusion from management is only regarded as oppressive or unfairly prejudicial if the (usually minority) shareholder is not being offered a reasonable opportunity to withdraw his or her capital. This makes it unfair.⁴ That is not the case here, as Siertsema can withdraw by enforcing the second sale agreement.

⁴ **Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others** 2014 (5) SA 179 (WCC) at para 55.

"What is important to emphasise, however, is that it is not enough for an applicant to show that the conduct of which he complains is 'prejudicial' to him or that it 'disregards' his interests. The applicant must show that the prejudice or disregard has occurred 'unfairly'. 'Oppression' likewise connotes an element at least of unfairness if not something worse."

[54] I agree with the submissions of Prinsloo's counsel. The complaint by Siertsema is in effect that Prinsloo took the advantage of the settlement contained in the second sale agreement by becoming a director without paying the agreed amount for Siertsema to exit. For that breach Siertsema has a clear contractual remedy and I cannot see how, in these circumstances, reliance can be placed on s163 of the Companies Act. If that was the case, then any contractual dispute between shareholders would fall under s163 of the Companies Act. I should add that the failure to timeously attend to the buyers' tax affairs can hardly on its own justify an order under s163 of the Companies Act. A full explanation for the delay was in any event given by Prinsloo. The delay with the tax affairs has to do with the hand over from Siertsema to Prinsloo after the former resigned as director. It is understandable that the hand over caused delay.

[55] Reliance was also placed on s161 of the Companies Act by Siertsema in the founding affidavit. The section provides as follows:

“161 Application to protect rights of securities holders

- (1) A holder of issued securities of a company may apply to a court for–
 - (a) an order determining any rights of that securities holder in terms of this Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument; or
 - (b) any appropriate order necessary to–
 - (i) protect any right contemplated in paragraph (a); or
 - (ii) rectify any harm done to the securities holder by–
 - (aa) the company as a consequence of an act or omission that contravened this Act or the company's Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph (a); or

(bb) any of its directors to the extent that they are or may be held liable in terms of section 77.

(2) The right to apply to a court in terms of this section is in addition to any other remedy available to a holder of a company's securities–

(a) in terms of this Act; or

(b) in terms of the common law, subject to this Act.”

[56] Counsel for Prinsloo contends that Siertsema's claim falls outside the provisions of s161(1) of the Companies Act in that it concerns a contractual dispute between shareholders and not the determination of Siertsema's rights as a security holder in terms of the Companies Act; the memorandum or rules of the companies; or any debt instrument.

[57] I agree with this submission.

[58] For these reasons, there is no merit in the second (alternative) claim and it should be dismissed.

(iii) Should the buyers be liquidated?

[59] It is common cause that the buyers are factually and commercially solvent. For this reason, Siertsema is applying in terms of s81 of the Companies Act for the winding-up of the buyers on the ground that it is just and equitable to make such an order.⁵ In

⁵ The relevant section provides as follows:

81 Winding-up of solvent companies by court order

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

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

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

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

this regard, reference is made by Siertsema to five categories of cases where a court may liquidate a company on just and equitable grounds. These were enunciated in the matter of **Rand Air v Ray Bester Investments (Pty) Ltd** 1985 (2) SA 345 (W) at 349G.

[60] I need not dwell on these categories. In the founding affidavit Siertsema devotes little more than one page to this leg of his case. Siertsema essentially contends that the manner in which Prinsloo became the sole director and his refusal to retransfer his shares to Siertsema constitute grounds for liquidation on just and equitable grounds.

[61] Prinsloo's counsel, on the other hand, emphasizes again that Siertsema voluntarily withdrew from the business. For this reason, there is no deadlock in the management of the buyers as Prinsloo is the sole director and responsible for the management. Also, that the dispute between Siertsema and Prinsloo has not had a negative effect on the business operations of the buyers. Furthermore, Prinsloo recognises Siertsema's rights. On 21 January 2022, Siertsema wrote an email to Prinsloo in which he reminded the latter that of every R1 profit, 50% belongs to Siertsema. Prinsloo accepts that this is true.

[62] Prinsloo's counsel further referred to the matter of **Apco Africa (Pty) Ltd v Apco Worldwide Inc.** 2008 (5) SA 615 (SCA) at para [17], which basically holds that equitable considerations may make it just and equitable to wind up a group of companies in circumstances where the shareholders operate as a partnership with both participating in the business and there is a breakdown in confidence between them. This kind of situation may make it just and equitable to wind up the company,

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- (ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or
 - (iii) it is otherwise just and equitable for the company to be wound up;"

especially when it is not possible for one of the partners to remove his stake and go elsewhere.

[63] As already stated, there is a perfectly acceptable second sale agreement in place which provided for Siertsema to exit at a specified price. Rather than enforcing that agreement, Siertsema is now trying to invoke s81 of the Companies Act quite unnecessarily. That section cannot possibly find application in these circumstances.

[64] For these reasons, the third (alternative) claim falls to be dismissed.

Order

[65] Siertsema contends that he is entitled to the wasted costs of a chamberbook application which was launched when Prinsloo's answering affidavit was not filed in time. I had regard to the papers and I believe that the reason for the delay was properly explained. Ultimately it was agreed that Prinsloo could file his answering papers by 6 February 2023. Siertsema's replying affidavit was then filed late. Prinsloo was thus not the only party that filed out of time. In the circumstances there is no justification for a separate order regarding costs for the late filing of the answering affidavit.

[66] I also do not believe that the further affidavit of Prinsloo relating to the non-joinder of Nedbank was unnecessary. Prima facie there was merit on the point and the filing of the affidavit then resulted in Nedbank confirming that it was not going to get involved.

[67] Ultimately I could see no reason why costs should not follow the result.

[68] In the circumstances the following order is made: “*The application is dismissed with costs.*”

H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
21 February 2024

APPEARANCES

Applicant's counsel: Naude De Wet

Applicant's attorneys: Werksmans Attorneys

Fifth Respondent's counsel: J Van Dorsten

Fifth Respondent's attorneys: Michalowsky Geldenhuys Attorneys