SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 847/2012

Reportable

In the matter between:

THUNDER CATS INVESTMENTS 92 (PTY) LTD	**FIRST APPELLANT**
TURQUOISE MOON TRADING 8 (PTY) LTD	**SECOND APPELLANT**

and

NKONJANE ECONOMIC PROSPECTING AND INVESTMENT (PTY) LTD	**FIRST RESPONDENT**
BOSASA OPERATIONS (PTY) LTD	**SECOND RESPONDENT**
BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd* (847/12) [2013] ZASCA 164 (26 November 2013).

Coram: Navsa ADP, Malan, Shongwe, Wallis JJA et Meyer AJA

Heard: **11 November 2013**

Delivered: **26 November 2013**

Summary: **Section 81(*d*)(iii) of Companies Act 71 of 2008 – winding-up on ground that it is 'just and equitable' – failure of relationship between shareholders having equal shareholding and representation on board – clean hands – winding-up ordered.**

ORDER

On appeal from: South Gauteng High Court, Cape Town (Vermeulen AJ sitting as court of first instance):

1 The appeal is dismissed with costs including the costs of two counsel.
2 The order of the court below is confirmed save to the extent that the words ‘on the scale as between attorney and client' are deleted.

JUDGMENT

Malan JA (Navsa ADP, Shongwe JA, Wallis JA et Meyer AJA concurring):

[1] This is an appeal against the order of Vermeulen AJ in the South Gauteng High Court winding up the first respondent, Nkonjane Economic Prospecting and Investment (Pty) Ltd (the company). The two appellants, Thunder Cats Investments 92 (Pty) Ltd and Turquoise Moon Trading 8 (Pty) Ltd and the second and third respondents, Bosasa Operations (Pty) Ltd and Bosasa Youth Development Centres (Pty) Ltd (the respondents), are shareholders of the company each holding 25 per cent of the issued shares. The shareholders appointed directors who vote in blocks in proportion to their shareholding. The respondents’ nominees and the appellants’ nominees each have 50 per cent of the vote at both board and shareholder level. Mr Sabelo Macingwane, the managing director of the first appellant, is the chairperson of the company but has no casting vote. The company is solvent and its main asset is an 11 per cent shareholding in Ntsimbintle Mining (Pty) Ltd which is worth some R132 million.

The high court decision

[2] Vermeulen AJ made the order liquidating the company on the basis that it was just and equitable to do so as provided for by s 81(1)(*d*)(iii) of the Companies Act 71 of 2008. He founded his judgment on the general breakdown of the relationship between the shareholders and in exercising his discretion whether to liquidate, said that the company was of the kind envisaged in *In re Yenidje Tobacco Company Limited* [1916] 2 Ch 426 (CA), that is, in substance a partnership in the guise of a company. He took into account that the company had only four members, each having the right to appoint a director, and that there was accordingly no body of shareholders distinct from the board. Each of the shareholders had the right to participate in the management of the company. The shareholders' rights to dispose of their shares were restricted so that a shareholder could not, without the consent of the other shareholders, simply sell its shares and go elsewhere. Given the irretrievable breakdown in the relationship between the parties, which went further than the inability to meet or pass resolutions, and irrespective of whether it also resulted in a deadlock at board level, he found that the liquidation of the company was, in the absence of any other remedy, the only route to follow. In addition, he considered events that occurred after the filing of the answering affidavits and which were recorded in the respondents' replying affidavit, but found that they strengthened his conclusion that the relationship between the parties had irretrievably broken down. These events concern the agreement concluded after the liquidation application had been launched for the sale of the respondents' shares to the appellants for some R51 million and the negotiations before and after agreement in principle had been reached. This is an aspect to which I will return.

Companies Act 71 of 2008

[3] The law regulating the winding-up of a company is contained in *Part G* of Chapter 2 of the 2008 Act and Chapter XIV of the Companies Act 61 of 1973, read with the applicable laws relating to insolvency. The latter statute continues to apply by virtue of the provisions of item 9 of Schedule 5 notwithstanding its repeal with effect from 1 May 2011. In terms of the 2008 Act, the provisions of Chapter XIV continue to apply until the Minister, by

notice in the *Government Gazette*, determines a date on which it shall cease to have effect, that is, once the Minister is satisfied that 'alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies' (Item 9(4)*(a)* of Schedule 5). However, in terms of item 9(2) of Schedule 5, ss 343, 344, 346 and 348 to 353 of the 1973 Act do not apply to the winding-up of a 'solvent company' except to the extent necessary to give effect to the provisions of *Part G* of Chapter 2 of the new Act. Item 9(3) of Schedule 5 provides that in the event of a conflict between a provision of the previous Act that continues to apply and a provision of *Part G* of Chapter 2 of the new Act with respect to a solvent company, the provisions of the new Act with respect to a solvent company prevails. The winding-up of solvent companies is dealt with in ss 79 to 81 of the new Act and their deregistration in ss 82 and 83. The company concerned in this matter is a 'solvent company'.

[4] Section 81(1) provides that a court may order the winding-up of a solvent company where the company has resolved by a special resolution that it be wound up by the court (sub-s (*a*)(i)); or has applied to have its voluntary winding-up continued by the court (sub sec (*a*)(ii)). The court may further order the winding-up of a solvent company where the practitioner appointed during business rescue proceedings applies for liquidation in terms of s 141(2)(*a*) on the ground that there is no reasonable prospect of the company being rescued (s 81(1)(*b*)). Two further grounds are relevant and they are set out in s 81(1)(*c*) and (*d*):

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

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2) *(b)* or *(c)* (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

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

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

(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…'.

[5] The 2008 Act contains numerous innovations. They include the institution of business rescue in Chapter 6; the provisions of *Part A* of Chapter 7 providing for alternative dispute resolution and of *Part B* of Chapter 7 providing for a number of specific remedies. They require a reconsideration of the grounds for the winding-up of companies. Hence the references to business rescue and deadlock in s 81(1). This application is based on s 81(1)(*d*)(iii), an alternative ground for winding-up, where 'it is otherwise just and equitable for the company to be wound up'.

Appellants' contentions

[6] The appellants contended that the application for winding-up is based on a deadlock between the parties at both shareholder and director level but that deadlock, as a ground for liquidation, is excluded by clause 8.2 of the shareholders agreement. The respondents had stated at various places in the founding affidavit that the directors were not able to operate and make decisions commercially because of a deadlock at both levels. They also alleged that the directors were deadlocked concerning the management of the company and that the shareholders were unable to break the deadlock, given the terms of the shareholders agreement. The result of the deadlock at both levels was that the business of the company could not be conducted and its assets managed to the advantage of the shareholders generally. The

appellants also submitted that there was no evidence that the relationship between the parties had irretrievably broken down and that the court below erred in coming to that conclusion. The further submission was made that a winding-up order may not be made on the application of a party responsible for the situation giving rise to the application. The respondents were, in other words, not approaching the court with ‘clean hands’.

Respondents’ desire to dispose of their shares company

[7] The winding-up application was motivated by the desire of the second and third respondents to dispose of their shares. The shareholders agreement provides a mechanism for this but requires that all the other shareholders consent thereto in writing. The appellants, it was argued, were and remain unwilling to consent to the respondents disposing of their shares or to meet in order to discuss a reasonable basis for their leaving the company. The result of the impasse and the consequent lack of trust between the parties have rendered the management of the company dysfunctional and the company moribund, justifying its winding-up.

[8] The company holds shares in Ntsimbintle and it is therefore merely a vehicle for the parties’ investment in that company. The respondents wish to leave the company and to do so they must sell their shares. The appellants refused to consent to a sale and submitted that liquidation would be to their prejudice. The second appellant considers Ntsimbintle as a long-term investment and has no intention of disinvesting. Any such disinvestment, it suggested, would result in the loss of the full value of the investment, which will only be realised once Ntsimbintle starts mining and disposing of its minerals.

[9] This argument is flawed. The respondents wish to leave the company and to do so have to dispose of their shares, not of the company’s shares in Ntsimbintle. The company’s 11 per cent holding in Ntsimbintle will not be affected by the respondents’ disposing of their shareholding in the company. Sale of their shares will only mean that 50 per cent of the shares will no longer be held by the respondents but by the purchaser.

Deadlock

[10] The appellants relied on clause 8 of the shareholders agreement which, they submitted, excludes, as a ground for liquidation, a deadlock. The ordinary meaning of 'deadlock' is a 'condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement or equal opposing forces'.[1] However, clause 8.2 must be construed in its context.[2] The clause is headed 'Deadlock' and provides as follows:

'8.1 If the required majority for the passing of a Directors' resolution cannot be obtained, such resolution shall cease to be within the Directors' domain and shall be put to the Shareholders in a General Meeting.

8.2 A deadlock shall not constitute grounds for the winding-up of the Company.'

The clause immediately preceding it, clause 7, deals with resolutions of the board or shareholders pertaining to certain prescribed matters which require the consent of directors or shareholders holding or representing 75 per cent of the issued shares. Clause 8.1 then follows by providing that where the required majority cannot be obtained at board level, the matter shall be put to the shareholders at a general meeting. Clause 8.2 deals with a deadlock at *board level* and excludes the inability to obtain the required vote at that level as a ground for winding-up. It does not affect what has been referred to as the 'deadlock principle' or other forms of 'deadlock'. It follows that the respondents were not precluded by clause 8.2 from launching the winding-up application.

[11] Moreover, the power to consent to the respondents' proposed exit is not a power that falls within the powers of the board of directors. Nor is the non-selling shareholders' consent to the respondents' sale of their shares a matter that has to be resolved necessarily by the shareholders in general meeting. Clause 11.1 is clear:

'Save as is provided for in this Agreement, no Shareholders shall sell or transfer any Equity in the Company or any interest in such Equity, without the prior written consent of all other Shareholders who may, without assigning any reasons therefore,

[1] *The Shorter Oxford English Dictionary* 6 ed (2007) vol 1 at 611.

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 17.

decline such consent.'

Consent could have been sought and granted by the other shareholders in any manner, save that it must be in writing. There was no need for a general meeting to be convened to obtain the consent of the other shareholders. Clause 11.3.6 of the shareholders agreement has the effect of creating an automatic 'option' or right of first refusal in favour of the remaining shareholders. This option, however, only comes into effect when the remaining shareholders, in terms of clause 11.1, have all consented to the proposed sale. No consent to the proposed sale has been given.

Construction of s 81(1)(*d*)

[12] The words 'just and equitable' appear in both the 1973 and the 2008 Acts. The question that arises here is whether s 81(1)(*d*)(i) and (ii) affects the construction of the words 'just and equitable' in s 81(1)(*d*)(iii) so as to preclude all other grounds of deadlock. Mr van Niewenhuizen, on behalf of the respondents, submitted that the word 'deadlock' as used in s 81(1)(*d*)(i) and (ii) should not be interpreted so as to restrict its meaning to a rigid category excluding other forms of deadlock from forming the basis for liquidation under s 81(1)(*d*)(iii).

[13] There are conflicting decisions in the high court. In *Muller v Lilly Valley (Pty) Ltd*[3] Weiner J accepted that the legal basis for a liquidation order under s 344(h) of the old Act is the same as under s 81(1)*(d)*(iii) of the new Act. The provisions of the new provision 'mirror the "just and equitable" ground provided for in terms of section 344(*h*) of the old Act'. On this basis she seems to have accepted that the 'same legal principles which held sway in relation to such section of the old Act are applicable to the present inquiry under the new Act'. In a subsequent case, *Budge & others NNO v Midnight Storm Investments 256 (Pty) Ltd & another*[4] in the same division Meyer J qualified the judgment of Weiner J and said:

'The 'just and equitable' basis for the winding-up of a solvent company in terms of s 81(1)*(d)*(iii) of the new Companies Act should for the reasons that follow not be

[3]*Muller v Lilly Valley (Pty) Ltd* [2012] 1 All SA 187 (GSJ) paras 1 and 2.
[4]*Budge NO v Midnight Storm Investments 256 (Pty) Ltd* 2012 (2) SA 28 (GSJ) paras 9-10.

interpreted so as to only include matters *eiusdem generis* the other grounds enumerated in s 81. The *eiusdem generis* rule, in my view, is inapplicable to s 81(1)*(d)*(iii) of the new Companies Act.

In enacting s 81(1)*(d)*(i), which applies to a situation where the directors are deadlocked in the management of a company, and s 81(1)*(d)*(ii), which applies to a situation where the shareholders are deadlocked in voting power, the legislature modified the judicially developed deadlock category that forms part of the just and equitable ground for winding-up of a company and made its application subject to certain new requirements. The application of s 81(1)*(d)*(iii) to deadlock categories and to the circumstances referred to in s 81(1)*(c)* would render the provisions of s 81(1)*(d)*(i) and of s 81(1)*(d)*(ii) nugatory since an applicant who is unable to meet the requirements of those sections would nevertheless be able to invoke the judicially developed deadlock category that forms part of the just and equitable ground for winding-up in terms of s 81(1)*(d)*(iii). I am further of the view that the *eiusdem generis* rule is excluded, because the specific words of s 81(1)*(d)*(i) and of s 81(1)*(d)*(ii) exhaust the genus, in this instance deadlock.'

[14] Meyer J's conclusion that the just and equitable ground in s 81(1)(*d*)(iii) should not be interpreted so as to include only matters similar to the other grounds stated in s 81(1) is clearly correct. However, his conclusion that s 81(1)(*d*)(iii) modified the 'judicially developed deadlock category' is doubtful. Meyer J was dealing with what has been (inappropriately) termed the 'complete deadlock' category and not with the 'deadlock principle'.[5] Indeed he made the winding-up order on what has been referred to as the 'deadlock principle'. This case is also concerned with the 'deadlock principle' or, preferably, the failure of the relationship between the parties. The examples of 'deadlock' given in s 81(1)(*d*) (i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, and, it seems to me, are not exhaustive and do not limit s 81(1)(*d*)(iii). The use of the word 'otherwise' in the subsection does not limit what is meant by 'just and equitable'. On the contrary, it extends the grounds of winding-up to include other cases of deadlock. It is conceivable that it may be just and equitable to liquidate even if the shareholders have been unable to elect successors to directors for less than the stipulated period that includes two consecutive annual general

[5]See *Cilliers NO v Duin & See (Pty) Ltd* 2012 (4) SA 203 (WCC) paras 5 and 6.

meeting dates, as s 81(1)(*d*)(ii) requires.

'Otherwise just and equitable'

[15] Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A winding-up on this basis 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up'.[6] The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section.[7] Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase.[8] There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground. In *Sweet v Finbain*[9] it was said:

'The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not eiusdem generis with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable".'

Section 344(*h*) gave the court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account.[10]

[16] 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.[11] A 'deadlock' which, because of a divided voting power at both the board and general meeting, affected the management of the company could also found a liquidation order

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[6] *Moosa, NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) at 136H-I.
[7] *Apco Africa (Pty) Ltd v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) para 16; *Loch v John Blackwood, Limited* [1924] AC 783 (HL).
[8] *Apco* para 16.
[9] *Sweet v Finbain* 1984 (3) SA 441 (W) and see *Sunny South Canners (Pty) Ltd v Mbangxa NO* [2001] 1 All SA 474 (SCA) at 481.
[10] *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181C-H.
[11] See *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350C-H.

on this ground.[12] No doubt these categories remain under the new Act and may be extended.[13]

[17] The word 'deadlock' is not always given the same meaning.[14] The reference to deadlock in the previous paragraph and also in s 81(1)(*d*)(i) and (ii) was described as a case of 'complete deadlock',[15] but there is no particular advantage in the introduction of this term. The 'deadlock principle', on the other hand, 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.'[16]

The 'superimposition of equitable considerations' in such a case may justify the dissolution of such a company under the just and equitable provision.[17]

[18] The company under consideration, the first respondent in the court below, is not a partnership and there is no evidence that it is the continuation of a partnership. It is a relationship based on the shareholders agreement which is the 'entire agreement between the parties' (clause 2.27). The shareholders agreement is stated to be personal to the parties and they may not without the consent of the other 'transfer, encumber, subcontract or otherwise deal or dispose with any or all of their obligations (clause 18). Clause 19 obliges the parties in their dealings with each other in the implementation of the agreement 'to observe the utmost good faith and to give full effect to the intent and purpose of this agreement'. In addition, the parties

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[12] *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350E-G.

[13] *Herman v Set-Mak Civils CC* 2013 (1) SA 386 (FB) para 15; *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC* 2013 (2) SA 439 (FB) para 22.

[14] See P H McPherson 'Winding Up on the "Just and Equitable" Ground' (1964) *Modern Law Review* 282 at 293-297.

[15] *Cilliers v Duin & See* 2012 (4) SA 203 (WCC) para 5.

[16] *Apco Africa (Pty) Ltd v Apco Worldwide Inc* 2008 (5) 615 (SCA) para 19; *Emphy v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) para 2; *Cilliers v Duin & See* 2012 (4) SA 203 (WCC) para 5.

[17] *Apco* para 17 with reference to Lord Wiberforce's speech in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) at 379*b*-380*b*; [1972] 2 All ER 492 at 500*a*-*h.*

undertake to keep confidential the agreement and details of the transaction (clause 20.2). The shareholders each have an equal say in the management of the company. Indeed, it can only function consensually. Transfer of the shares of members is restricted. For those reasons, the company can function only when the relationship of confidence and trust between the parties is maintained.

[19] The appellants, however, invoked the maxim *pacta sunt servanda*. They rely on the words of the constitutional court stating that,[18] -

'. . . public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken.'

They argue that the winding-up application was motivated solely by the respondents' desire to exit the company and that clause 11 of the shareholders agreement governs the disposal of shares by members to third parties. They contended that there was nothing inequitable or unjust regarding the appellant's insistence that the respondents pursue the agreed course concerning the disposal of their shares.

[20] However, the oft-cited passage from the speech of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd & others*[19] is particularly apposite:

'The "just and equitable" provision does not … entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'

Failure of the relationship

[21] The court below found that the application for the company's liquidation was founded on the general failure of the relationship between the parties. Although there are references to deadlock in the founding papers, one should

[18] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

[19] [1973] AC 360 (HL) at 379C-G. See also *Muller v Lilly Valley (Pty) Ltd* [2012] 1 All SA 187 (GSJ) para 18.

be careful, as the court below emphasised, not to confuse the symptom, that is deadlock, with the malaise. This is made clear in the founding affidavit where the deponent in so many words stated that the relationship had broken down irretrievably to the extent that attempts by the respondents to meet in order to discuss their exit from the company had failed. As a result, the company lost its ability to function and the board became unable to take decisions.

[22] Indeed, the board of directors has not met since 11 March 2011. The meetings of the board and shareholders set down for 8 June 2011 had four items on its agenda for the shareholders' meeting. The first was a presentation by Questco (Pty) Ltd relating to the proposed disposal of 5,5 per cent of the company's shareholding in Ntsimbintle. The second was a discussion and the approval of the proposed disposal. The third entailed the disposal of the respondents' holdings to the remaining shareholders, alternatively, to the company. The fourth concerned the ratification of the board's decision to approve the annual financial statements for the year ending 28 February 2010. The meetings of 8 June 2013 were cancelled by the respondents because their representatives were not available on that day.

[23] Meetings by directors and shareholders were called for on 13 July 2011 and the same agenda circulated. The meetings did not go ahead and the reason for their cancellation is not clear. A meeting of 'elders' was then called for 17 August 2011 by Mr Macingwane. The attorneys for the appellants wrote to the attorneys for the respondents on 1 July 2011:

'Our instructions are that at the meeting of the 16th October 2008 held at 1 Windsor Road, Luipaardsvlei, Mogale City, it was decided that the "elders" would convene a meeting for the purposes of discussing the correction of the share register of the company. This meeting has not taken place and our client requests the said meeting be held as a matter of urgency. Our client is available at any time that suits your client.'

The respondents' attorneys replied on 4 July that the share register required no correction and that the proposed meeting need for that reason not be held. They referred to the 'impasse' existing between the shareholders and

requested a meeting with them, together with their respective attorneys, to 'resolve issues once and for all'.

[24] An exchange of e-mails and faxes followed on 16 August 2011, the day before the meeting of 'elders' was to take place. The respondents requested an agenda but none was forthcoming because, the appellants replied, the agenda had to be prepared by the 'elders'. The respondents answered as follows:

'The "impasse" in the company is the fact that it is moribund and unable to function given the terms of the shareholders agreement.

Our clients, who hold 50% of the shares in Nkonjane, wish to exit the company. A satisfactory mechanism enabling our clients to do so was proposed by Questco the advisors to Safika Resources, which would enable our client to realise value utilising its 50% portion of Nkonjane's holding in Ntsimbintle Mining.

Questco have been and remain amenable to make a presentation to all of the Nkonjane shareholders to explain to them the basis for our client exiting and realising value, and to the extent that your client wished to realise value, he would be entitled to do so. However, your client has cancelled a number of board and shareholders meetings convened for this purpose. Your client suggested a meeting of "elders" (whatever that may mean), we said yes, provided that such meeting was together with their attorneys.

It is our client's exit from Nkonjane and the realisation of its value in Ntsimbintle that our client is amenable to discuss tomorrow.'

However, the appellants were 'not at this stage interested in any presentation by Questco'. They made their conditions for the respondents' exit clear:

'1. the correction of the share register before such an exit; and

2. the payment of outstanding/withheld dividend due to our client. The amount that has been withheld is R 100 000.00'

The respondents were not prepared to meet on those terms and the meeting of 'elders' never took place.

[25] While the cancellation of some of the meetings cannot be explained, the fact remains that the last time the board met was on 11 March 2011. The appellants simply denied that the relationship had broken down and that no such inference could be drawn from the failure to meet. To my mind, however,

the failure to meet has one cause only, that is, the breakdown in the relationship. Why were the appellants not interested in discussing the Questco proposal? Why would the chairman, Mr Macingwane, instead call for a meeting of 'elders', and not of shareholders, to resolve the impasse? The very tone of the letters exchanged between the parties' representatives suggests a strained relationship. No agenda was set by Mr Macingwane. When the respondents' attorney stated that the appellants' exit from the company had to be discussed, the response was that one of the conditions of any consent to the respondents' disposing of their shareholdings was the correction of the share register. Several references to the rectification of the share register are made, but Mr Macingwane did not disclose why the register was supposedly incorrect. Indeed, he stated that this issue was of no relevance. If it is the contention that the respondents own less than half of the shares in the company then, of course, the appellants will not consent to the disposal by the respondents of 50 per cent of the shares nor pay for them.

[26] In addition, during 2008 the company instituted action against Mr Macingwane for the recovery of moneys lent and advanced. The first respondent thereafter joined the action as a plaintiff. The action was then consolidated with an action instituted by Mr Watson in which recovery of moneys lent by Mr Watson to Mr Macingwane was sought. The matters went to trial in 2010 and Mr Macingwane succesfully defended the claim of the company and the first respondent. Watson's claim is currently on appeal. Mr Macingwane laid criminal charges against Mr Watson and made allegations against the first respondent of theft of dividends the company was said to owe the second appellant. One can hardly conceive of better evidence of the breakdown of the relationship than the chronicle of the litigation between the parties. The business atmosphere between the parties was replaced by one of litigation and confrontation.

Clean hands

[27] The appellants contended that the respondents and Watson were to blame for the breakdown in the parties' relationship and that, for this reason, they were precluded from seeking the liquidation of the company. The

appellants, in other words, invoke the principle that a person who applies for winding-up on the just and equitable ground must come to court with 'clean hands'. If the breakdown in the relationship is due to an applicant's misconduct, it cannot insist on the company being wound up.[20] However, lack of clean hands is not an absolute bar.

[28] As Santow J stated in *Ruut v Head*:[21]

'As a matter of logic, lack of clean hands could not be an absolute bar, else otherwise for example, where both Partners are equally at fault, neither could obtain a winding-up order. Nonetheless it must be an important factor in the exercise of the court's discretion along with other factors, such as whether the partnership is truly deadlocked.'

A court should thus assess the respective contributions to the breakdown to determine whether it is just and equitable to liquidate. But a party's fault should not necessarily deter a court from winding-up –

'. . . so that the paralysis … may be eliminated, a competent functionary (in the person of a liquidator) may be placed in control of [the company] and that functionary may address the question of where the best interests of [the company] lie ….'[22]

[29] Vermeulen AJ found that the blame for the breakdown in the relationship could not be apportioned with precision. He nevertheless held that the respondents' blameworthiness was no greater than that of the appellants. An equal apportionment of blameworthiness, he thought might be somewhat charitable to the appellants but not an outright injustice to the respondents. I cannot fault his reasoning.

Subsequent events

[30] The appellants argued that the agreement reached at the meeting of shareholders on 4 November 2012, after the liquidation application was launched, was binding on the parties. This agreement provided for the

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[20] *Apco* para 19; *Emphy v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 368G-I; *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) at 387G-H.

[21] *Ruut v Head* (1996) 20 ACSR 160 at 162 cited with approval in *Pham Thai Duc v Pts Australian Distributor (Pty) Ltd* [2005] NSWSC 98 para 17.

[22] *Pham Thai Duc v Pts Australian Distributor (Pty) Ltd* [2005] NSWSC 98 para 18.

purchase by the appellants of the combined shareholding of the respondents for a consideration of R51.7 million. The agreement was, however, subject to the liquidation application being kept in abeyance pending finalisation of the sale agreement. Moreover, the parties had to obtain the consent of the Ntsimbintle shareholders prior to 25 November 2011. The closing date of the transaction was to be 25 November 2011 or such later date agreed upon in writing, on which date the purchase price had to be paid in cash. Furthermore, the parties agreed that should payment not be made by 25 November 2011 (or at a later agreed date) the respondents would be entitled to sell their 50 per cent *aliquot* stake in Ntsimbintle to Ntsimbintle or its nominee on its own terms. It was further agreed that the respondents' attorneys would provide a draft of the agreement to the other parties for comment. This was done on 18 November 2011.

[31] The appellants' response was to propose an amendment of the closing date from 25 November 2011 to 29 February 2012 and to remove the clause relating to the power of the respondents to conclude an agreement with Ntisimbintle if payment was not made on the agreed date. The respondents did not agree to the proposed amendments and made counter proposals. In the result no agreement was concluded.

[32] The court below correctly found that, because no agreement was reached, the events provided further evidence of the breakdown of the relationship. Moreover, after the matter was postponed on 8 February 2012 to give the parties a further opportunity to settle, the further negotiations led nowhere. This, the court below found, strengthened the conclusion that winding-up was the only feasible method of resolving the breakdown between the parties.

[33] The shareholders agreement and the equal holding of shares and voting power on the board require the shareholders to co-operate. Without such co-operation the company cannot function. It was not possible to meet and approve the financial statements for the year ending February 2010. In these circumstances their relationship has broken down irretrievably and the

court below correctly found that it was just and equitable that the company be wound up. Only a winding-up will break the paralysis that haunts the company.

Costs of the recusal application

[34] When this matter commenced before Vermeulen AJ, the appellants applied for his recusal on the basis that he was a member of the same group as senior counsel representing the respondents. It was contended that this presented grounds for a reasonable apprehension of bias. The application was dismissed with costs on the scale as between attorney and client.

[35] The appellants appeal against the costs order only. The court below correctly dismissed the application: it was obviously devoid of merit.[23] However, in making the punitive costs order the court said that 'it is difficult to resist the [inference] that it was actuated by an ulterior motive'. However, no proper application was before the court below. It was moved from the bar and there are no facts on record to justify the inference drawn and, hence, the punitive costs order made. For this reason the order made should be set aside and amended.

[36] In the result the appeal should be dismissed. The following order is made.

1 The appeal is dismissed with costs including the costs of two counsel.
2 The order of the court below is confirmed save to the extent that the words 'on the scale as between attorney and client' are deleted.

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[23] *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) para 29. See *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A) at 691F-G; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at 170I-171F.

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F R MALAN

JUDGE OF APPEAL

APPEARANCES:

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