THE HIGH COURT OF SWAZILAND

J & E CONSTRUCTION (PTY) LTD 1st Petitioner

JOAO FIGUREDO LOPES 2nd Petitioner

And

MABALABALA INVESTMENTS (PTY) LTD 1st Respondent

DAVID MAMBA 2nd Respondent

Civil Case No. 756/2004

Coram S.B. MAPHALALA – J

For the Petitioners MR. M. MAGAGULA

For the Respondents In absentia

JUDGMENT

(16/04/2004)

2 The relief sought

Before court is a petition for a winding up of a company in terms of Section 112 of the Company's Act No. 7 of 1912. The Petitioners pray for an order, inter alia winding up the 1st Respondent provisionally; appointing Sibusiso Motsa as provisional liquidator of the 1st Respondent and granting him full powers as listed in Section 127 of the Companies Act, alternatively, directing that the 1st and 2nd Respondents show cause on a certain day why; there should not be an order for a final winding up of the 1st Respondent under the supervision of the Master of the High Court; and further that the costs of this petition should not be costs in the winding up of the 1st Respondent. I granted a final order for the winding up of the 1st Respondent on the 6th April 2004 in open court and I intimated that I will furnish full reasons for the order in due course. Following are my reasons for the order I granted on the 6th April 2004.

Introduction.

The matter first came before me as a matter of urgency on the 17th March 2004, whereupon the parties agreed that it be postponed to the 31st March 2004. In the meantime the Respondents were to file their answering affidavits on or before the 29th March 2004. The matter was to be argued on the merits on the 31st March 2004.

However, on the return date the matter did not proceed as agreed but was further postponed by consent of the parties to the 6th April 2004. The Respondents had not filed any answering affidavits as agreed on the 17th March 2004. Again the Respondents were afforded another opportunity to file their opposing affidavits on or before the 2nd April 2004, and the Petitioners were to file their replying affidavits, if any, on or before the 5th April 2004. The Respondents were further ordered to pay the wasted costs of the 31st March 2004.

When the matter was called on the return date being the 6th April 2004, the Respondents had not filed their opposing papers still. Mr. Magagula appeared for the Petitioners and there was no appearance for the Respondents.

Mr. Magagula submitted from the bar that he had had contact with Mr. Mamba for the Respondent who conceded that in the circumstances the Petitioners could obtain a final order in this matter. It appeared from what Mr. Magagula told the court that the Respondents were no longer opposing the matter. It was in this vein, therefore that I allowed Mr. Magagula to move the petition. He duly took the court through the various averments and made submissions of law. I granted the order and intimated that I will furnish full reasons in due course in view of the complex nature of the principles involved in the matter.

The parties.

The 1st Petitioner is J & E Construction (Pty) Limited a company duly registered and incorporated with limited liability in accordance with the company laws of the Kingdom of Swaziland, with its principal place of business at 4th Street, Plot No. 301 and 302, Nhlangano, district of Shiselweni, Swaziland,

The 2nd Petitioner is an adult male businessman, Director of the 1st Petitioner.

The 1st Respondent is also a company duly registered and incorporated with limited liability in accordance with the company laws of the Kingdom of Swaziland and carrying on business at 5th Street, Nhlangano, Shiselweni district.

The 2nd Respondent is an adult male businessman, Director of the lst Respondent of SNPF Flat No. 25, 6th Street, Nhlangano, Shiselweni district.

The facts of the matter.

The background of the matter is that the 1st Respondent a private limited company was incorporated on or about July 2003. The 2nd Petitioner and the 2nd Respondent are both members and directors of the 1st Respondent, The 2nd Petitioner and the 2nd Respondent hold 50% each of the shares in the 1st Respondent and they have one vote for each share they hold. The 1st Respondent was incorporated for purposes of running a hardware business in Nhlangano as well as another hardware business at New Haven and a tyre business in Nhlangano. The 2nd Petitioner and the 2nd

Respondent did not invest any funds in the 1st Respondent. The initial capital to start the business was by way of loans provided by 1st and 2nd Petitioners.

The said loans were to be repaid yearly on a percentage of the profits of the 1st Respondent. The loans were to be utilized to purchase the hardware business from Mr Peter Cooper a liquidator of Skonkwane Franchise Ltd and Asibemunye Builders Suppliers Ltd, to pay arrear rentals for Nhlangano Tyres and to purchase stock and provide working capital.

The 1st Petitioner provided a loan in the sum of E600, 000-00 which was put up as a guarantee at the Standard Bank of Swaziland in favour of Mica Plus Limited for Mica Stock Purchases made through Mica Plus Limited and associated companies. The 2nd Petitioner on the other hand provided a loan totalling the sum of E330, 000-00 which amount was used to purchase stock, to pay the liquidator, to settle outstanding arrear rentals for Nhlangano Tyres and generally as working capital for the business.

The Petitioners aver that during the time when 2nd Petitioner and 2nd Respondent were working out the financing details of the business, it was agreed that a shareholders' agreement would be signed wherein all the terms upon which the 2nd Petitioner and the 2nd Respondent, respectively agree to structure their interests in the 1st Respondent are recorded. No finality was reached on some of the issues that were to form part of the shareholders' agreement. What was conclusively agreed upon was that the 2nd Respondent was to be responsible for the day-to-day management of the business, which included the New Haven branch and Nhlangano Tyres.

A bank account was opened with Standard Bank, Nhlangano branch, which account was to operate as a business account for all the Respondents businesses, being in Nhlangano branch of the hardware business, the New Haven branch and Nhlangano Tyres. The said bank account was only opened in August 2003, and by this time the businesses were already operational and the loans from 1st and 2nd Petitioners had already been paid to the 1st Respondent. Prior to the opening of the accounts, all receipts were to be deposited in a safe.

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A shareholders' agreement was prepared on 2nd Petitioner's instruction and was given to the 2nd Respondent to consider and sign if he was in agreement.

From paragraph 16 to paragraph 25 the Petitioners outline the sequence of events leading to the breakdown in their confidence in the 2nd Respondent and that the cordial relationship which existed between the parties was destroyed with the result that the parties barely talk to each other and this caused the business to suffer irreparably.

In paragraphs 26, 27, 28, 29 to 30 the Petitioners relate what efforts they have made to resolve the difficulties.

In paragraph 32 the Petitioner deposes that the 1st Respondent is truly indebted to the Petitioners in the sum of E930, 000-00 being in respect of the loan advances.

In paragraph 33 the Petitioner avers that the 1st Respondent is commercially insolvent in that it clearly can no longer and will in future be unable to pay the Petitioners and/or the other creditors' claim. The 1st Respondent is barely carrying on business and generates very little income, which is insufficient to sustain it as a usable commercial entity. That the 1st Respondent is now unable to pay its debts. In paragraph 33.1.3 the Petitioners aver that it is just and equitable that the 1st Respondent be wound up in terms of Section 112 (6) of the Company's Act No. 7 of 1912, to enable the liquidator to take charge of the 1st Respondent and to administer and reduce the assets of the 1st Respondent under the machinery of winding up and to reach compromises with all the 1st Respondent's creditors for purposes of settling their debts.

In paragraph 34, 34.1, 34.1.1, 34.1.2, 34.1.3 averments are made relating to immediate consequence of liquidation, which include inter alia, that the winding up of the 1st Respondent will enable the liquidator to properly and immediately investigate the affairs of the 1st Respondent, realize and dispose off, the movable assets of the 1st Respondent at a market related price, with a view to setting the creditor's indebtedness as well as reaching compromises with the creditors under the machinery of winding up.

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In paragraph 37 averments are made on the question of urgency.

The above therefore are the facts of this matter. What the court has to decide is whether the provisions of Section 112 of the Act have been satisfied in casu.

The applicable law.

This matter is governed by Section 112 (g) of the Companies Act No. 7 of 1912. The Section, in part reads as follows:

Winding up by court

Circumstances in which company may be wound up by court.

A company may be wound up by the court if:

a) .....
b) .....
c) .....
d) .....
e) .....
f) .....
g) The court is of the opinion that it is just and equitable that the company should be wound up.

Trollip J in the case of Moosa vs Mavjee Bhawan (Pty) Ltd 1967 (3) S.A. 131 (T) in dealing with a similar section in South Africa had this to say, and I quote:

"The ground relied upon for a final winding up order is that in paragraphs (g) of Section 111 of the Companies Act, namely, that it is "just and equitable" that the company should be wound up. That paragraph, unlike the preceding paragraphs of Section 111, postulates not facts but only a broad conclusion of law, justice, and equity, as a ground for winding up... In its terms and effect, therefore, Section 111 (g) confers upon the court a wide discretionary power, the only limitation originally being that it has to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned".

The learned Judge in his judgment proceeded to cite with approval the principle enunciated by Lord Shaw in the English case of Loch vs John Blachvood Ltd (1924) AC 78 where His Lordship propounded that it may be just and equitable for a company to be wound up where there is:

"Justifiable lack of confidence in the conduct and management of the company's affairs ... grounded on conduct of the directors not in regard to their private life or affairs, but in regard to the company's business; that lack of confidence is not justifiable if it springs merely from dissatisfaction at being out voted on the business affairs or on what is called the domestic policy of the company".

In another English case of In Re: Yenidje Tobacco Co. Ltd (1916) 2 CH 426 (CA) the "deadlock" principle was enuanciated 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.

Leon J in the case of Emphy & another vs Pacer Properties (Pty) Ltd 1979 (3) S.A. 363 (D) whilst agreeing that the ejusdem generis does not apply, held that the "just and equitable" rule must not be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock. The learned Judge, expressed himself as follows:

"Where ...there is in substance a partnership in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding up of the company under the just and equitable clause".

The above therefore are the legal principles which govern in the circumstances of the instant case.

The law as applied to the facts.

On the facts, it is my considered view that the 2nd Respondent's lack of probity in managing the company's affairs as outlined in the uncontroverted averments of the 2nd

Petitioner in paragraphs 16 up to 25 of the petition justifies the winding up of the company in terms of Section 112 of the Companies Act under the "just and equitable" principle. There has been an irretrievable breakdown of the relationship between the members of the 1st Respondent. The deadlock in the management of the 1st Respondent caused solely by the 2nd Respondent is another reason which justified the winding up of the company under the Section. Further, the 1st Respondent is presently insolvent.

In the totality of the averments in the petition and on principles of law I have outlined above, I have come to a considered view that the requirements of Section 112 (g) have been satisfied in the present case that the 1st Respondent be wound up under the said Section.

The above therefore are the reasons for the order I issued on the 6th April 2004, directing that the 1st Respondent be wound up under the supervision of the Master of the High Court.

S,B.MAPHALALA

JUDGE