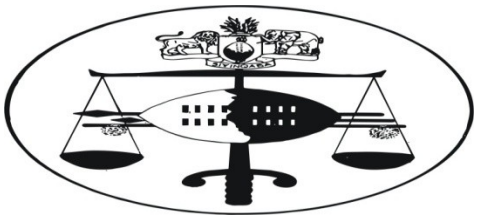

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 1757/2015

In the matter between:

GUY RICHARD MORE APPLICANT

AND

SWAZI DRUM MANUFACTURES (PTY) LIMITED 1ST RESPONDENT

GORDON DONALD BREWS 2ND RESPONDENT

Neutral Citation: *Guy Richard More, Swazi Drum Manufactures (PTY) LTD. & Gordon Donald Brews (Case No. 1757/15) [2016] SZHC (36) (February 2016)*

Coram: MLANGENI J.

Heard: 05 February 2016

Delivered: 01 MARCH 2016

Summary: *Company Law – liquidation based on the just and equitable cause.*

A company had two shareholders who held equal shares in the company; there was one director. One shareholder resided outside the country and had nothing to do with the day-to-day management of the company.

The non-resident director operated a "sister" company in South Africa. In the height of mutual distrust, each accused the other of financial mismanagement. Distrust degenerated into mutual acrimony and threats of legal action.

In the end there was disagreement on major administrative issues, such as appointment of Second Respondent as director in the Swaziland Company.

Company is a quasi-partnership, so that the failure of a cordial interpersonal relationship between the two shareholders is a sound basis for liquidation.

Although the company was a profitable entity, the extent of disagreement between the directors completely overshadowed the aspect of profitability.

Final liquidation order granted; costs to be in the liquidation.

JUDGMENT

[1] This is an application for the winding up of a company in terms of Section 289 of The Companies Act 2009. The ground upon which the company is sought to be wound up is at Section 287 (e) of The Act, which states that a company may be wound up by the court **"if it appears to the court that it is just and equitable that the company should be wound up."**

[2] Membership of the company comprises two shareholders, each of whom holds fifty (50) per cent shares in the company. Experience shows that such ratio of shareholding has an enormous potential for disaster, especially in the small companies that are regarded as quasi-parterships. There is one director, the Applicant, whose sole responsibility it was to manage the day-to-day operations of the company. As a matter of fact, the other shareholder resides in the Republic of South Africa.

[3] Applicant's approach to court is the culmination of deep-seated mistrust between the two shareholders, which developed to threats of

litigation, acrimony and insult. I will come to this aspect later when I assess the evidence.

[4] It is apparent that the Applicant is in charge of the business premises and the staff. Practically speaking, by serving the application at the place of business he may have been serving it upon himself. The company's registered office is said to be at King Mswati II Highway, Piggs Peak. For purposes of service of court process this address is hardly useful. These practical hurdles could well explain why the application was served on an entity known as **'Xpedia Consulting (Pty) Ltd'** which was entrusted with providing Secretarial Services to the company. It is common cause that this entity did bring the application to the attention of the Second Respondent. The notice of motion is dated 16th November 2015. On the 17th November, 2015 one Debbie Veloso of '**Expedia'** wrote an e-mail to **"Guy More, Nico de Villiers"** as appears below:-

> ***"Please find attached extract notice of motion in the High Court of Swaziland which was served at our offices today. I will e-mail the same document to Gordon Brews."***

[5] On the 18th November 2015 the First Respondent was, by order of court, placed under provisional liquidation through a rule nisi which was to be advertised in the usual way. Confirmation of the rule nisi is

vehemently opposed, with the Second Respondent filing his papers and the Applicant replying thereto.

SECOND RESPONDENT'S POINTS OF LAW IN LIMINE.

[6] The Second Respondent canvassed several points of law on the basis of which, he argues, the rule nisi is to be discharged. Some of them are quite prolix. I presently interrogate each of the points raised and their legal effect on the matter.

[7] **ABUSE OF PROCESS**

7.1 Second Respondent argues that the manner in which the process was instituted and served, and the manner in which the rule nisi was obtained, amount to abuse of process in one or more of the following respects:-

(a) It was not lodged with the Master prior to being issued and served, contrary to the requirements of Section 289 (3) of The Company's Act 2009;

(b) No service on First or Second Respondent;

(c) No prayer for condonation of non-compliance with requirements as to service and notice;

(d) No allegations concerning ex parte nature of application;

(e) No demonstrable urgency.

(f) Failure to make full disclosure.

7.2 Applicant's reply revealed abundantly clearly that the requirement to lodge the papers with the Master prior to issue and service was complied with. At the hearing Ms v.d. Walt graciously informed the court that this aspect was no longer pursued, but not without pointing out that if appropriate averments in this regard had been made in the founding affidavits, then the need to raise this would have been obviated. I cannot agree more. After-all, the onus is upon Applicant to demonstrate to the court that he has complied with what needs to be complied with.

7.3 The issue of service of the Application upon the Respondents generated an extremely lively debate. It is common cause that the Act does not expressly require that the Application should be served. It is also common cause that the 1912 Act also did not expressly require service upon the Respondents. Coupled with this is the long-standing practice in this jurisdiction, of moving

liquidation application (petitions under the old Act) ex parte. This is what the present applicant did.

7.4 Second Respondent, relying principally on South African case law, makes the argument that the ex parte process is appropriate in matters of insolvency, where there is need to safeguard the available assets and there is also tangible evidence of insolvency, e.g. where a deputy sheriff has returned a 'Nulla bona'. In any other situation, goes the argument, the respondent company and any other interested parties should be served in terms of the rules of court, in compliance with the audi alteram partem rule; Second Respondent is emphatic that this should be done even before the rule nisi is sought and obtained.

7.5 In advancing the argument the Second Respondent relies on South African case law and concedes that no local case in point could be found. One such case cited on behalf of the Second Respondent is **BHYAT vs. KHURISHI 1929 TPD 896**. I am satisfied that the position in South African law is as articulated by the Second Respondent, *viz* that unless the petitioner (Applicant) relies upon a nulla bona return, balance sheet or some other firm documentary proof of insolvency, notice in terms of the rules must be given. It is urged on behalf of the Second Respondent that the same should apply in Swaziland.

7.6 It is my view, however, that for purposes of this case I do not have to make the call. It is my view that in the exigencies of the situation before me effective service upon the Respondents was done. Any other way, short of edictal citation, would have raised similar objections by the Respondents. For instance, service at the principal place of business or at the registered office is challengeable on the basis that, applicant being the sole manager of all the business operations of the company, he would have effectively served upon himself. In view of the ready availability and effectiveness of Expedia Consulting (Pty) Ltd, insistence on edictal citation would be unreasonable. At page 174 of the book of pleadings, we see that the Second Respondent had instructed **'Expedia'** to prepare documentation to appoint him as director of the company. It is apparent that if this was not overtaken by the liquidation process such documentation would have been done by **'Expedia'**. And we know for a fact that on the same day **'Expedia'** was served, the process was instantly brought to the attention of the Second Respondent.

7.7 It is also my view that the issue of improper or ineffective service cannot be divorced from the occurrence of prejudice to the other side. Where the other side gets notice of the process in time to advance their defence, and they do advance their defence such

as in this case, it is futile to pursue an argument of bad service, to the extent of suggesting the expensive and cumbersome edictal citation.

7.8 It is on the basis of the aforegoing that I respectfully think that the decision of this court in **M.P.D. MARKETING SUPPLIERS (PTY) LTD VS. ROOTS CONSTRUCTION (PTY) LTD AND ANO, (2709/09) [2012] SZHC** does not apply to the present facts. The ratio *decidendi* of MPD Marketing Suppliers comes from Nigerian jurisprudence, and it is my view that our jurisprudence favours an approach that is not like a straight jacket, it is an approach that takes into account all relevant considerations. In any event I have stated above that in my view there was effective service upon the Second Respondent and he has done everything he wished to do to advance his defence.

7.9 I therefore dismiss the point about bad service or non-service.

[8] No Prayer for Condonation of non-wcompliance with Rules of Court.

8.1 Closely tied to the so-called abuse of court process is Second Respondent's argument that Applicant ought to have sought condonation for non-compliance, e.g. for not serving, or for short service.

8.2 I have already made a finding that the Applicant did serve, effectively. So this argument must go like a flash in the pan, because there was nothing to be condoned. At the back of the Second Respondent's mind there might be the notion that because the application was moved about two days after it was issued, then it proceeded as an urgent application. No, it did not; it proceeded as an ex parte application. I have already noted that in this jurisdiction this is the normal way to proceed in such matters.

8.3 Again the issue about failure to justify urgency has no substance because the application hardly purports urgency and it was not moved as such. In terms of the rules an ex parte application can be filed before noon on the court day preceding motion court day, and this is what was done in this case.

[9] **APPLICANT'S FAILURE TO MAKE FULL DISCLOSURE**

9.1 It is trite law that an ex parte applicant has a duty to disclose in his application all facts that are relevant to the relief that he seeks. In particular he must disclose facts which, if they are brought to the attention of the court, may bring about a different decision than what he seeks. All relevant facts, adverse or favourable, ought to be alleged.

9.2 In casu the Applicant did not disclose in his founding affidavit a number of e-mails that transpired between him and the Second Respondent during the period leading to the inception of court process, as well as a meeting that was held on the 15th September 2015, just before inception of litigation.

93. I will examine the contents of these e-mails later, in the context of the merits of the Application. For present purposes I am persuaded by the Applicant's response to the effect that the non-disclosure is inconsequential because these e-mails all point in one direction, that the relationship between the shareholders had broken down irretrievably, to such an extent that **"the only way forward is for us to part ways." -** page 141 paragraph 16. These e-mails are generally a mirror image of profound and persistent distrust, demands for forensic audits, threats of legal suits and even plain insults. If these were disclosed it is extremely unlikely that the rule nisi would not have been granted on the 18th November 2015.

9.4 I therefore find that this non-disclosure is of no consequence, on the facts, and I accordingly dismiss the point.

[10] There is significant overlap regarding some of the points of law that have been raised by the Second Respondent. It is my view that all the

points are of the character that is discouraged by the case of **SHELL OIL SWAZILAND LTD VS. MOTOR WORLD t/a SIR MOTORS.** As a matter of fact, so much energy has been applied to dealing with points of law which do not take the matter any further.

THE FACTS

[11] **INTERACTION BETWEEN THE SHAREHOLDDERS**

11.1 The company has only two shareholders, the Applicant and the Second Respondent. They hold an equal number of shares. This arrangement is a typical example of a quasi-partnership. I stated above that this arrangement is a recipe for trouble.

11.2 From inception of the company Applicant was the sole director, right up to when these proceedings were instituted. The Second Respondent always resided in the Republic of South Africa. For all intents and purposes the Second Respondent could, in a partnership, be described as a **'sleeping partner'** who has no relevance to the day-to-day operations of the company. The company is a profitable entity.

11.3 The company is about fifteen (15) years old, having been incorporated in 2001. From the pleadings it is apparent that the shareholders largely communicated electronically, with very little

in the form of conventional meetings. One possible explanation is that since about 2005 the Second Respondent became directly involved in a 'sister company' in the Republic of South Africa, whose intended role was to market the products of the Swaziland Company – the First Respondent. In the result the Applicant had exclusive control of the Swaziland Company and the Second Respondent had effective control of the South African Company.

[12] **ADVENT OF DISTRUST BETWEEN THE APPLICANT AND SECOND RESPONDENT.**

12.1 On or about 2013 the Applicant had reason to believe that the business affairs of the South African Company were not run with sufficient probity. He became aware that no audits were done since 2006. In the Applicant's words, **"It was following this that the relationship between myself and Brews started to deteriorate."**

12.2 As a result of the looming tension, the shareholders pondered the possibility of selling the Swaziland operation, but progress was not made in this regard. On the 12th November 2014 Second Respondent sent electronic mail to the Applicant in these terms:

> ***"Hi Guy. As we seem to be getting nowhere in our negotiation regarding the sale of the Swazi Drum I am forced to consider the ongoing operation of the entity.***

In this regard I invite you to comment on the appointment of Robert Barkhuisen as the executive director of Swazi Drum ----------Robert is more than able to investigate every aspect of the company" (my emphasis).

12.3 So, the Second Respondent wanted to bring in someone not only to watch over the Applicant but to investigate every aspect -----". Unavoidably, this had the effect of driving the wedge in. The move to have Robert appointed director did not win the support of the Applicant.

12.4 Then suddenly the Second Respondent wanted to be appointed director of the Swaziland Company. Applicant's response to this idea is in these words:-

"I have given substantial thought to your request -----. I agree that in theory and as a shareholder you have the right to be appointed as a director ---- but I think that there are more pressing issues to deal with ----

You cannot deny that our business relationship has significantly deteriorated in the last few years and that attempts to reach some amicable solution for the dissolution or sale of Swazi Drum during this time have been unsuccessful."

12.5 So these distrusting shareholders do not agree on the appointment of a second director who was to have authority over the Applicant. They also fail to agree on an amicable way to dispose off the business. They also fail to agree on the

appointment of Second Respondent as a second director. It is my view that in a quasi-partnership this is bad enough. The disagreements enumerated above are not insignificant; they relate to major administrative issues. Mediation between the shareholders was mooted but it never took off.

[13] A meeting took place between the shareholders on the 15th September 2015. Second Respondent says in his affidavit that the meeting was conducted **"in a professional and business-like manner….and we discussed me selling my shares in the company----- That meeting concluded amicably."** In his reply the Applicant describes the same meeting in the following terms:-

> ***"The meeting was not conducted in a professional and business-like manner and in fact was very acrimonious and full of tension. I stated in that meeting that I had no wish to continue in a relationship with the 2nd Respondent and re-iterated my request that he either purchase my shares or I purchase his so that we may part ways."***

[14] **COUNTER-ALLEGATIONS OF MISMANAGEMENT AGAINST THE APPLICANT BY THE SECOND RESPONDENT.**

14.1 For his part, the Second Respondent raised numerous issues against the Applicant in the nature of mismanagement and abuse of funds. Applicant states that **"pursuant to these allegations a deadlock arose between myself and Brews**

and it was agreed that an exit strategy be determined between the shareholders."

14.2 Applicant avers that in a meeting of the 20th February 2014, in the presence of a third party, the Second Respondent accused the Applicant of theft. Responding to this at paragraph 43 (page 102 of the Book) the Second Respondent does not deny the description of '**theft'** and confirms that the meeting was **"acrimonious"**.

14.3 There were repeated references by the Second Respondent to need for forensic audit of the Swaziland operation and that he (Second Respondent) was willing **"to make this into a big nasty fight if need be."** (See page 29, last sentence.

14.4 There were also threats of legal action (See page 26) and a four months deadline given to the Applicant **"to defend yourself ----"** An e-mail from Second Respondent to Applicant dated 21st October 2014 states that he might need an Attorney **"to sort this shit out"**, referring to the accounts that he wanted reconciled.

[15] **LITERAL INSULTS**

15.1 Applicant avers that in one meeting in 2013 the Second Respondent referred to him as either **"fucking stupid or a**

crook." The Second Respondent does not deny this in his response. What he does state at page 99 paragraph 39.2.4 is this:-

> ***"Meaningless and insignificant insults, in the heat of the moment, may have been traded in the process between me and the Applicant ----".***

15.2 In my opinion the above, between 'partners', is not meaningless or insignificant. Even between strangers it is not insignificant. Once insults are exchanged between business partners the end, mostly likely, becomes unavoidable.

THE LAW

[16] The company sought to be wound up has only two shareholders and one director. Such companies are described as quasi-partnerships. In partnerships a codial relationship of confidence and trust is of utmost importance. Not least because the members are often very few and likely to interact during the normal operations of the business.

[17] Applicant submits that because of the failure in the personal relationship between the shareholders it is just and equitable that the company should be wound up. This, despite the fact that it is a

profitable operation. The applicable provision in the Companies Act is Section 287 which provides as follows:-

> "287. A company may be wound up by the court if :-
>
> (a) **------**
>
> (b) **------**
>
> (c) **------**
>
> (d) **------**
>
> (e) it appears to the court that it is just and equitable that the company should be wound up"

[18] It is accepted that the sub-section confers a very wide discretion upon the court to determine in each particular case what is just and equitable.

See: **PHILDA FREDA OSWIN-GLOVER, CIVIL CASE NO. 1909/2013** per **M.C.B. MAPHALALA J**. as he then was.

ERASMUS VS. PENTAMED INVESTMENTS (PTY) LTD 1982 (1) SA.WLD 178

[19] **In MOOSA NO VS. MAVJEE BHAWAN (PTY) LTD AND ANOTHER, 1967 (3) SA 131** at **136** the discretion was described as **"a broad conclusion of law, justice and equity."**

[20] In **Philda Freda Oswin – Glover's case Honourable M.C.B. MAPHALALA J** makes mention of some applicable principles, viz –

(i) Whether there is some other remedy available to the applicant;

(ii) If there is an alternative remedy, whether the applicant is acting unreasonably in seeking to have the company wound up;

(iii) In respect of domestic private companies, conduct which destroys or seriously impairs the personal relationship of confidence, friendly co-operation or trust which exists between members regarding the running of the company's affairs.

See: Pages 13-14 of the judgment.

[21] It is not necessary that the business operations of the company must have become grounded or moribund. It is sufficient if the personal relationship between the shareholders has broken down.

See: **MOOSA N.O. VS. MAUJEE BHAWAN (PTY) LTD**, *supra* at page 137.

[22] During the hearing of legal arguments I asked Counsel, more than once, what would become of the company in the event that I did not confirm the rule nisi? This question was born of genuine concern because of the extreme polarization between the shareholders. All the ingredients of a breakdown in a working relationship are there – occasional interaction, distrust that degenerated into acrimony, disagreement on all important business matters, threats of litigation and trading of insults in the heat of passion. It appears to me that all that one can ask for in a breakdown is there. Never mind the fact that the shareholders also saw the point of no return quite clearly, as evidenced by their repeated reference to the need to go their separate ways.

[23] The extent of disagreement was such that they could not even agree on how to separate. In my view it cannot get worse.

[24] It was argued for the Second Respondent that this sad scenario has been occasioned by the Applicant, hence he cannot benefit from the unpleasant and unworkable scenario that he has created. From the evidence I am not persuaded that the Applicant is largely responsible

for this debacle. If anything, the Second Respondent comes through as the more aggressive of the two. But even if the Applicant was largely responsible for the fiasco, if the result was such a total breakdown in the relationship it would still make sense to order liquidation if, on the facts, it is just and equitable to do so. That is where the discretion comes in, taking the totality of the circumstances into account.

[25] It was also argued on behalf of the Second Respondent that –

25.1 the company is profitable, hence it should not be liquidated;

25.2 the company contributes significantly to the fiscus through taxes;

25.3 the interests of the workers must be taken into account.

[26] Regarding profitability, it is true that a profitable company should not lightly be liquidated. But where, due to deadlock or severe breakdown of the personal relationship between directors and/or shareholders, there is no point in allowing the company to continue. In the present case the disagreements were escalating in the direction of grounding the business operations.

[27] The issue in 25.2 is not a relevant consideration; neither is the one in 25.3. Interests of workers are provided for in the relevant laws.

CONCLUSION

[28] I have no shadow of doubt in my mind that the extent of polarization between the two shareholders leaves the company with no future in the hands of the present shareholders.

[29] I confirm the rule nisi which I granted on the 18th November 2015.

[30] Both Counsel agree that legal costs must include costs of Counsel. I therefore order that legal costs, including costs of Counsel, must be costs in the liquidation.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For Applicant:	**Adv. P.E. Flynn, instructed by Henwood & Company.**
For Respondent:	**Adv. M. v.d. Walt, instructed by J.M. Currie.**