IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA) CASE NO 08/21764

In the matter between:

NLA INTERNATIONAL HOLDINGS (PTY) (LTD) Applicant

And

THORPE PROPERTIES (PTY) LTD	**First Respondent**
THORPE, BRIAN EDWARD NO	**Second Respondent**
THORPE, SHARAN NO	**Third Respondent**
DICKSON, A E R NO	**Fourth Respondent**

JUDGEMENT

GILDENHUYS J.:

[1] This is an application for a final order to wind up the first respondent ("Thorpe Properties") in terms of section 344 (h) of the Companies Act no 61 of 1973, on the basis that the winding-up would be just and equitable.

[2] The applicant ("NLA") and the Brian Edward Thorpe Trust ('the Trust") each hold 50% of the shares in the first respondent. Brian Thorpe and Sean Lourens are the sole directors of NLA. The second, third and fourth respondents are the trustees of the Trust, and have been cited in their capacities as such.

[3] Thorpe Properties ("Properties") is the registered owner of certain immovable property ("the premises") situated on Forsdick Road, Roodekop. The premises are 50675 sq m in extent**.** At present, a portion of the premises is leased to Thorpe Timbers (Pty) Ltd ("Timbers"), and another portion to NLA. Both Timbers and NLA operate within the Timber trade. Brian Thorpe is a director of Timbers and Sean Lourens is a director of NLA.

[4] According to NLA, the premises comprises land leased to Timbers, land leased to NLA, and common terrain. At the time when the leases were concluded, Brian Thorpe represented Timbers and Nicolas Lourens (the farther of Sean Lourens) represented a close corporation which originally leased a portion of the premises and whose rights and obligations under its lease were subsequently made over NLA. NLA says it takes up 37, 5% of the total-leased out land (which does not include the common terrain) and Timbers takes up the balance of 62, 5%. Both tenants are entitled to use the common terrain.

[5] It is common cause that the rental payable to Properties by NLA comes to R24000 per month, and the rental payable by the trust to R40000 per month. This, so NLA contends, correlates with the extent of the areas leased by each of them. According to NLA, neither rental are market related. The rentals were determined to provide income to cover the costs of servicing the mortgage bond

over the premises and other imposts. The mortgage bond has now been repaid, leaving excess income available for distribution amongst the shareholders.

[6] On NLA's version of the circumstances, there is a considerable extent of common terrain on the premises, being land let to neither NLA nor Timbers. It was agreed that such land (including a railway siding thereon) would be kept as common terrain for use by both parties.

[7] According to NLA, both oral lease agreements contain *inter alia* the following provisions:

- The lease agreements are personal to the parties, neither tenant being capable of ceding or assigning any right or obligation under its lease agreement without the consent of Properties;
- Neither tenant is entitled to enter into any sub-lease in respect of any part of the leased premises without the consent of Properties; and
- Neither tenant is entitled to appropriate any common terrain for its exclusive use without the consent of Properties.

[8] Timbers has, since at least 2007, been effecting certain alterations and erecting certain structures for its own use on land which NLA considers to be common terrain. All of this was done so NLA contend without the consent of Properties or of NLA, and without paying any additional rental.

[9] During 2007 or thereafter Timbers concluded a sub-lease with a company styled Iliad Limited ("Iliad") relating to the part of the premises which Timbers avers it leased from Properties. The area under the sub-lease includes the disputed common terrain. The rental payable by Iliad to Timbers under the sub-

lease is considerably more that the rental payable by Timbers to Properties under its head-lease.

[10] The Trust denies that there is any common terrain on the premises. It says that the areas let to each of NLA and Timbers add up to 100% of the area of the premises. It also denies that the lease between Properties and Timbers contains a term that it could not enter into a sub-lease.

[11] After some dither, the Trust now takes the position that, under its lease from Properties, NLA is entitled to occupy on the premises -

- a double story office block;
- a covered shed;
- a loading bay adjacent to the shed; and
- a yard adjacent to (behind) the shed.

The area to which NLA is entitled under its lease (according to the Trust) comes to 6,318 sq metres. Timbers (in terms of its lease) is entitled to the remainder 44,356 sq metres. Although NLA occupies only 12, 5% of the total area of the premises, it pays 37, 5% of the rent because its area was, at the commencement of the lease, better improved.

[12] NLA contends that Brian Thorpe, who is a director of both Properties and Timbers, breached his fiduciary duties toward Properties by -

- failing to disclose to Properties the nature and extent of the sub-lease between Timbers and Iliad;
- failing to obtain the consent of Properties to such sub-lease;

- causing Timbers to sublet a portion of the premises, in extent 44356 sq metres, at an alleged rental of R160 000 per month to Iliad, whilst Timbers pays rental of only R40000 per month for the same portion to Properties.

[13] Sean Lourens, director of Properties and of NLA, also has other complaints against Brian Thorpe. I will briefly set them out.

- Brian Thorpe, without the authority or knowledge of the board of directors of Properties, entered into a lease agreement on behalf of Properties with Cell C in respect of a portion of the alleged common terrain, for the purpose of erecting a cellular telephone tower on it.
- Brian Thorpe caused Timbers to erect unauthorized buildings on the common terrain for the exclusive use of Timbers.
- Brian Thorpe does not regularly attend board meetings of Properties.
- In 2007 Brian Thorpe, without consulting with Sean Lourens, summarily caused the rejection of an offer made by Madison Property Fund Managers LTD for the purchase of Properties.
- In April 2008 Brian Thorpe, again without consulting Sean Lourens, caused a Momentum endowment policy taken out by Properties not to be paid out on its maturity, but to remain invested for "tax reasons".

[14] Brian Thorpe replied to all these complaints. It is not necessary for purpose of this judgement to deal with the replies in any detail. I need only say that should it appear that there exists no common terrain on the premises and that Timbers actually leases 87'5% of its total extent, the complaints insofar as they may be valid at all), have much less substance than would have been the case if

a portion of the land to which Timbers lays claim in terms of its lease, is in fact common terrain.

[15] As I have said, NLA seeks the winding-up of Properties on the ground that it is just and equitable. Coetzee J, in *Rand Air (Pty) Ltd Ray Bester Investments (Pty) Ltd,* 1985 (2) SA 345 (W), said that the circumstances under which the Court will order the winding-up of a company on the basis that it is just and equitable, fall into five board categories. These were set forth by the leaned judge as follows (at 350C-I):

> The first is the disappearance of the company's substratum. Where the company was formed for a particular purpose for instance, and that purpose can no longer be achieved at all, its *raison d'être*, its *substratum* has gone and it may be fair and equitable to the incorporators under those circumstances to wind it up. There are a variety of circumstances which can possibly lead to the disappearance of a company's *substratum*.
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> Secondly, illegality of the objects of the company and fraud committed in connection therewith. If a company is promoted in order to perpetrate a serious fraud or deception on the persons who are invited to subscribe for its shares, it is the kind of case in which the persons who are defrauded in that fashion can take the promoters to Court and, provided the circumstances demand that, ask that the company be wound up.
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> The third is that of deadlock which results in the management of companies' affairs, because the voting power at board and general meeting level is so divided between dissenting groups that there is no way of resolving the deadlock other than by making a winding up order. The kind of case which falls most frequently to be dealt with under this heading is the one where there are only two directors or only two shareholders, usually in a private company, who hold equal voting shares or rights and have irreconcilably fallen out.
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> Fourthly, grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held wholly or mainly by the directors and it is in substance a partnership in corporate form, the Court will order its winding up in the same

> kind of situation that it would order the dissolution of a partnership on the ground that it is just and equitable to do that.
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> Fifthly, there is oppression. Where the persons who control the company have been guilty of oppression towards the minority shareholders whether in their capacity as shareholders or in some other capacity, a winding up order in suitable cases may be made. This is in addition to other remedies in the Companies Act, which are available to oppressed minorities to obtain not only dissolution, but also a money judgement.

Ms Weiner, who appeared with Mr Berkowitz for NLA, informed me that NLA relies on the last three of these categories.

[16] The central issue in this case pertains to the conclusion of the sub-lease agreement between Timbers and Iliad. The other occurrences relied upon happened well before the present application was lodged. It is questionable whether, on their own, these grounds would justify the winding-up of Properties. It must also be kept in mind that Properties does not carry on business in the true sense: it simply holds and lets out immovable property to its two tenants. That has not been adversely affected by the alleged breakdown in the relationship between shareholders and directors.

[17] It would, however be an entirely different situation if it should be found that the areas let to NLA and to Timbers do not make up the entire premises, that there is common terrain, and that Thorpe, who is a director of both Properties and Timbers, has caused Timbers to appropriate the common terrain and to let it out to Iliad for the sole benefit of Timbers. I cannot however make such a finding on the papers. I am unable to reject the Trust's version as being implausible, palpably , far-fetched or clearly untenable. This case comes before me on notice of motion. Motion proceedings cannot be used to resolve factual

issues because they are not designed to determine probabilities. See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290E.

[18] Margo J pointed out in *Wackrill v Sandton International Removals (Pty) Ltd and Others*, 1984 (1) SA 282 (W) at 285A – 286A:

> "Ordinarily the consequences of a final winding-up order are drastic indeed, and it may not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of *viva voce* evidence, where that may be necessary, to resolve material disputes on the affidavits". ["My underlining']

[19] There is no request in the affidavits or in the heads of argument filed on behalf of the parties that any of the issues between the parties be referred to oral evidence. That raises the question whether the Court can do so *meru moto*. In *Du Plessis en 'n Ander v Tzerefos*, 1979 (4) SA 819 (O) , a case on sequestration, van Heerden J (giving judgement on behalf of a full bench) held as follows:

> Nie een van die partye het op enige stadium aansoek gedoen dat die aangeleentheid vir mondelinge getuienis verwys moes word of dat een van die deponente aan kruisverhoor onderwerp moes word nie. 'n Hof kan egter ook *meru motu* 'n bevel met sodanige strekking maak: *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) te 1165; Oertel NO v Pieterse and Others 1954 (3) SA 364 (O) te 368.* Waar daar in die onderhawige geval nie 'n bevinding gemaak kan word nie ten aansien van 'n aspek wat by die uitoefening van 'n diskresie in ag geneem behoort te word: waar daar wel aanduidings van moontlike bedrog is en die enigste persoon wat sy oogmerke kon verduidelik het dit nie gedoen het nie, en waar die getuienis wat ter sprake kom binne 'n klein bestek val, meen ek dat daar wel van die bepalings van Hofreel 6 (5) (g) (betreffende die aanhoor van mondelinge getuienis) gebruik gemaak moet word.

[20] I have taken cognizance of the following dictum by Myburgh J in *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428 H – 429 C,

> It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trail *meru moto*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6 (5) (g) to be invoked.
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> In my view it should not be left to presiding Judge to determine, in the light of what I said, whether the application should be decided on the affidavits of not. In proper circumstances the presiding Judge may, in his discretion, decide to do otherwise.

In my view I should, in the present case, do otherwise. The amounts involved are substantial. The parties do not appear to be impecunious. The ambit of the central dispute between the parties is small. If Brian Thorpe did cause Timbers to breach the terms of its lease by subletting, or to appropriate common terrain for its own benefit, the prejudice to NLA would be substantial.

[21] If I were to accede to the present application, I would be obliged to reject Brian Thorpe's version of the lease between Properties and Timbers. On the other hand, to dismiss the application could do an injustice to NLA, should the allegations of Brian Thorpe be true.

[22] Faced with a similar situation in an application for an order provisionally winding-up a company, Leon J held *Emphy and Another v Pacer Properties (Pty) Ltd,* 1979 (3) SA 363 (D) as follows (at 369G-H):

> In an application for liquidation it would frequently be quite inappropriate for a Court to refer the matter for the hearing of oral evidence: considerations such as urgency would often militate against such a direction. But the possibility of doing so in a proper case was recognized by RAMSBOTTOM J in *Mcleod v Gesade Holdings (Pty) Ltd* 1958 (3) SA 672 (W) at 678 – 9 and in such a case there seems to be no reason in principle or in logic why a Court should not make such an order.
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> The dangers inherent in attempting to resolve disputed matters of fact in motion proceedings, without recourse to *viva voce* evidence, were recently reaffirmed by the Full Bench of the Natal Provincial Division in *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (N) and by the Appellate Division in *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO,* 1978 (4) SA 281(A). I consider this to be a case in which it would be proper, in all the circumstances, to refer the matter for hearing of oral evidence.

[23] For the reasons set forth above, I make the following order:

(a) this application is adjourned to a date to be arranged with the registrar in order that oral evidence be head on the following issues:

(i) What portion of the premises on Forsdick Road Roodekop, owned by Thorpe Properties (Pty) Ltd, is let to Thorpe Timber (Pty) Ltd.

(ii) Does the lease between Thorpe Properties (Pty) Ltd and Thorpe Timbers (Pty) Ltd contain a provision that the leased land may not be sublet without the consent of Thorpe Properties?

(b) For the purpose of hearing the said oral evidence, Sean Lourens, Nicholas Lourens and Brian Thorpe must appear personally and be examined and cross-examined as witnesses.

(c) Leave is granted to the applicant and to the respondent to subpoena any other person to be examined and cross-examined as a witness.

(d) Costs are reserved

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A Gildenhuys

Judge of the High Court.

APPEARANCES:

For Applicant

Ms S Weiner

with her

Mr A Berkowitz

instructed by

Darryl Ackerman Attorneys

For the respondents

Mr P M G Beltramo

instructed by

Ramsay Webber