IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
JOHANNESBURG

CASE NO: 20152/2010

DATE: 22/09/2010

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

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DATE SIGNATURE

In the matter between:

SHARLENE RAVINSKY	First Applicant
LEON SELWYN JANKELOWITZ	Second Applicant
And	
ROBERT DAVID GOSSEL	First Respondent
GOSSEL'S RECORD CLUB (PTY) LTD	Second Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is an application for the liquidation of the second respondent, a company by the name of Gossel's Record Club (Pty) Ltd trading as GRC Properties. The basis upon which the application was brought is that an alleged deadlock has occurred between the shareholders and directors. The first and second applicants each hold 25% of the shares and the first respondent 50%. The second applicant has given a full power of attorney to the first applicant to act on his behalf while he is out of the country.

[2] The case will have to be determined on the basis that the applicants own 50% and the first respondent 50% of the shares. There are only two directors on the Board of Directors being the first applicant and the first respondent. The memorandum of Articles of Association in paragraph 81(a) actually requires three directors for purposes of establishing a quorum. The fact that a third director has not been appointed undermines the managing and running of the business.

[3] There is, however, a saving clause in clause 81(b) which states that the current directors may act notwithstanding any vacancy in their number. Clause 80 of the Articles of Association specifically states that in the case of equality of votes the chairman shall not have a second or casting vote.

[4] What the applicants have been complaining about is the attitude of the first respondent towards the running of the company. It is true that the company was initiated by the first respondent. Thereafter he obtained a co-shareholder and a co-director, Mr Jankelowitz who subsequently died. The current two applicants are the heirs of the deceased Mr Jankelowitz.

[5] Several issues have arisen between the parties the most recent one being the allocation of dividends from the company's three financial resources. It is common cause on the papers that the first respondent took it upon himself to declare the dividend. The applicants were not happy with that dividend and the matter could not be resolved because of the equality of votes both at shareholder and director levels.

[6] It is not necessary for me to traverse all the various disputes. Suffice to say that the first respondent has suggested that the impasse can be resolved by appointing a third director, alternatively that the first and second applicants sell their shares on the open market. In my view, that is an acknowledgement on the part of the first respondent that

animosity reigns supreme and that there has in fact been a loss of trust in him by the first and second applicants.

[7] I was referred to the legal principles involved when a situation like this occurs in small private companies such as the second respondent. In the case of **Moosa NO v Mavjee Bhawan (Pty) Ltd and Another** 1967 (3) SA 131 (TPD) Trollip J, as he then was, had to deal with a similar situation. At page 137 he referred to various overseas publications including a particular article written by a lecturer at the University of Queensland reported in 1964 Modern Law Review 282.

[8] It has now been established that there are two principles of importance when deciding whether or not a deadlock has occurred entitling a company to be liquidated as a result thereof. The second principle is the one applicable to the present case and in this regard Trollip J stated at page 137 as follows:

> "The principle enunciated by Lord Shaw in *Loch's* case at p. 788 is that it may be just and equitable for a company to be wound where there is
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> > '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';
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> that lack of confidence is not justifiable if it springs merely from
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> > 'dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company',
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> but it is justifiable if in addition there is a lack of probity in the directors' conduct of those affairs. The other principle derived from the *Yenidje Tobacco Co* case, usually called the 'deadlock' principle, 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. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly co-operation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership.
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> That is my understanding of the general principles in the *Yenidje Tobacco* case, as explained in the article in the Modern Law Review. In the particular facts of that case it was constant quarrelling, disputes, with resulting animosity between the two members which irretrievably destroyed the personal relationship of confidence and co-operation that their arrangement

> contemplated would prevail between them in conducting the company's affairs, thereby warranting the winding-up of the company."[1]

[9] The learned judge then quotes a further portion from the Modern Law Review article in the following terms:

> "According to these decisions, proof that relations between the parties have deteriorated to a point where all hope of future co-operation between them is precluded is sufficient to justify winding-up, and the mere fact that one side may possess the preponderating or casting vote by which a deadlock can be ended will not prevent the making of an order in such circumstances, since, as is pointed out in one of the decisions, it may never have been intended that the casting vote should be used to enable one party to obtain sole control of the company which he can exercise regardless of the wishes of the other."

[10] It is common cause on the papers that the first respondent regards himself as the manager or managing director of the second respondent. He stated as much himself in his longwinded answering affidavit. His attitude towards the company is also that he regards it as his pension. It is common cause that the company is well run and that it is producing profits and that it is a viable company. However, that does not preclude a liquidation order of the company where its members are quarrelling and having disputes resulting in animosity between them. The mere fact that the first respondent suggests the appointment of the third director alternatively that the applicants sell their shares, is, to my mind, indicative of the existence of such animosity and a unilateral attempt by the first respondent to resolve such animosity. Now that, in itself, in my view, based on the authorities, is sufficient for a liquidation order to be issued.

[11] The remaining question is whether a final or provisional liquidation should be ordered. In my view, it is wise in these circumstances to order a provisional liquidation to enable both sides to reflect upon their position and decide whether or not they would want to intervene to save the company from liquidation or adopt any other scheme of arrangement.

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[1] These principles were approved and applied by Ponnan JA in **Apco Africa (Pty) Ltd and Another v Apco Worldwide Incorporated** 2008 (5) SA 615 (SCA) at para [16].

[12] I am of the view that the common cause facts in this matter are such that a liquidation order is inevitable and that there is very little hope of future co-operation. Hence the respondent's suggestion that a third director be appointed alternatively those shares is to be sold in order to avoid any future deadlock. In these circumstances I am of the view that the applicants have made out a case for the liquidation of the second respondent. I therefore make the following order:

1. A provisional liquidation order of the second respondent is issued returnable on 2 November 2010.
2. The costs of this application are to be costs in the liquidation of the second respondent.

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