



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

JUDGMENT

In the matter between

Case No: 270/09

**RICHARD JAMES SMYTH
COCO HAVEN 1325 CC**

**First Appellant
Second Appellant**

and

BERNARD DARREN MEW

Respondent

Neutral citation: Smyth v Mew (270/09) [2010] ZASCA 56 (1 April 2010)

Coram: NAVSA, CLOETE, VAN HEERDEN, BOSIELO JJA et SERITI AJA

Heard: 22 FEBRUARY 2010

Delivered: 1 APRIL 2010

Summary: Close Corporations Act 69 of 1984 – whether the judge in the court below erred in granting a winding-up order instead of an order in terms of s 36 of the Close Corporations Act that the respondent cease to be a member of the 2nd appellant and further that his membership be acquired by the 1st appellant.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (De Waal AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (Navsa, Cloete, Van Heerden JJA and Seriti AJA concurring)

[1] Mr Bernard Darren Mew (Mew) applied to the South Gauteng High Court on an urgent basis for a winding-up of the second appellant, Coco Haven 1325 CC (Coco Haven) in terms of s 68(d) of the Close Corporations Act 69 of 1984 (the Act). In addition to opposing the application for a winding-up order, the first appellant, Richard James Smyth (Smyth) launched a counter-application for (inter alia) an order in terms of s 36 of the Act terminating Mew's membership of Coco Haven and an order that Mew's membership's interest in Coco Haven be acquired by Smyth against payment to Mew of R400 000 (alternatively an amount to be determined by the court). The court below granted an order for the final liquidation of Coco Haven and dismissed Smyth's counter-application. The appellants are appealing against that judgment with the leave of this court. Since the judgment of the court below, Smyth has passed away and has been substituted by the executors of his estate.

[2] Coco Haven is a close corporation trading under the name and style of The Corner House Pub (the pub) in Randburg, Johannesburg. Smyth and Mew are the only members of Coco Haven. Mew became involved in Coco

Haven in September 2007 when he paid Smyth R200 000 for a 50% member's interest.

[3] In terms of an association agreement concluded by Smyth and Mew on 5 September 2007, the management of the business was vested in Smyth who was employed by Coco Haven in a full time capacity earning a salary of R25 000 per month. Mew was a 'sleeping partner' and was to receive an amount of R5 000 per month, 'profits permitting'.

[4] The association agreement provided further that all monthly accounting records were to be made available to the members fortnightly or upon request within a reasonable time. Furthermore, Smyth who was the managing member could not, save with the authority of a resolution of the members, incur any capital expenditure in excess of an amount of R5 000.

[5] Mew complained that since the inception of the business, Smyth refused to allow him, as a member of Coco Haven, to inspect its accounting records, source documents, bank statements, management accounts or books of account. At the same time, Smyth was not paying Mew the R5 000 per month agreed upon. Smyth averred that this amount was accruing to Mew's loan account. According to Mew, Smyth's explanation for non-payment of this amount was that the business was not making a profit, but was merely breaking even.

[6] In the course of all these developments, Mew discovered that Smyth had, without his consent, bought a double cab Mazda Drifter 4x4 motor vehicle for himself. It is common cause that the monthly payments for this vehicle came from Coco Haven. These payments were not debited to Smyth's loan account. According to Mew the registered owner of this vehicle is Ms M du Plessis who is Smyth's fiancée. It is common cause that Smyth was busy with extensive structural alterations to the premises, without Mew's prior approval. This was in contravention of clause 3.6 of the association agreement. According to Smyth the money expended on the alterations

between 1 March 2007 and 29 February 2008 amounted to R793 057.82, although Coco Haven's draft financial statements for the year ending 29 February 2008 reflected the costs of these improvements to be R269 703.

[7] According to Mew, he met with Ms Nicolene Botes, who was a night manager at Coco Haven. Botes made a number of disclosures to Mew which were disturbing. Amongst others, she told Mew that Smyth conducted the close corporation's business through a bank account at First National Bank in the name of Smyth's daughter. It is common cause that the bank account was in the name of Nicola Ann Prinsloo, t/a The Corner House. Ms Prinsloo is Smyth's daughter and she had signing powers on this bank account. It transpired that the close corporation had no bank account of its own, with the result that all the money which the close corporation was banking was deposited into Prinsloo's account. No reference was made in the bank statements relating to this account to the close corporation's registration number and the statements indicate that the VAT registration number of the account holder is 'not available'. In fact, it subsequently emerged that the close corporation had failed to register for VAT, PAYE, UIF, SDL and WCA.

[8] From other disclosures which Botes made to Mew it is clear that Smyth did not have a proper cash management system in place. All the cash takings for the day were put in a bag at the end of each business day and thrown through the window of the cottage on the premises occupied by Smyth and Du Plessis. Both Smyth and Du Plessis had keys to the cottage and therefore had access to the money. Significantly, Smyth confirmed this state of affairs.

[9] Smyth admitted that he was not banking all the takings from the business but was retaining large amounts of cash, allegedly to pay the operating costs of the close corporation. This is notwithstanding the fact that, on Smyth's version, the business had a turnover in the region of R750 000 per month. The time period report for 1 April 2008 to 23 September 2008 shows that the business generated sales of R3 728 823.60.

[10] Mew made various unsuccessful attempts to gain access to Coco Haven's financial records. He was forced to resort to court for an order to give him access to these financial records. The application was vigorously opposed by Smyth. The refusal by Smyth to allow Mew access to Coco Haven's financial records increased the tension and acrimony between the two. As a result both Smyth and Mew became embroiled in a number of abrasive legal skirmishes.

[11] Before Mew became a member of Coco Haven, Smyth had signed a written agreement of lease on behalf of Coco Haven with Mr and Mrs Strachan (the Strachans) in respect of the premises where Coco Haven conducted its business. The lease was to endure from 1 February 2006 to 31 January 2009. Smyth had the option to renew the lease on written notice of at least eight months before the expiry of the lease, but failed do so timeously.

[12] Smyth had agreed in terms of the agreement of lease to pay the rent, municipal charges including rates and taxes as well as charges levied in respect of electricity and water consumed at the leased premises.

[13] During February 2008, Mew concluded a written agreement of sale with the Strachans in respect of the premises where Coco Haven conducted its business. Subsequent to the agreement of sale, Mew was unable to take transfer of the property as it transpired that Smyth had not been paying rates and taxes and charges for water and electricity. According to Mew the arrears amounted to about R120 000. On being confronted, Smyth did not dispute that he owed such charges. All that he disputed was the amount.

[14] Section 68(d) reads as follows:

'A corporation may be wound up by a Court, if –

. . . .

(d) it appears on application to the Court that it is just and equitable that the corporation be wound up.'

[15] Section 36 of the Act reads as follows:

'(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

- (a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;
- (b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;
- (c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or
- (d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to –

- (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or
- (b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or
- (c) any other matter regarding the cessation of membership which the Court deems fit.

[16] It was common cause that Mew and Smyth had serious irreconcilable differences and the relationship between them had broken down irretrievably. Mew alleged that it was important that a liquidator be appointed so that (inter alia) a thorough investigation of Coco Haven's financial affairs could be conducted to determine its financial position.

[17] Smyth agreed that the relationship between them had broken down irretrievably, although he attributed this to Mew. He accused Mew of conduct

which was likely to have a prejudicial effect on the carrying on of their business. He avered that by purchasing the property on which the business is being conducted for himself, Mew acted in breach of his fiduciary duty to Coco Haven. Smyth avered further that the apparent unwillingness on the part of Mew to renew the lease in favour of Coco Haven was prejudicial to the continuation of their business. He accused Mew of acting mala fide. Smyth was unequivocal that, given the prevailing circumstances, there was no possibility that he and Mew could continue to work together in future or to remain co-members in the close corporation.

[18] Smyth stated that it would be just and equitable if the court were to make an order that Mew cease to be a member of Coco Haven and that he be allowed to take over his membership at R400 000 or any other amount which the court might find to be reasonable. This assertion is based amongst others on the fact that he had single-handedly built the business from a struggling small business to a lucrative one; that the business employed 42 people who would lose their jobs if Coco Haven were to be liquidated and lastly, that it was better to keep a thriving business than to have it liquidated.

[19] Smyth relied on a valuation done by Coco Haven's accounting officer and auditor, Mr Haasbroek (Haasbroek), in an amount of R400 000 which he stated should be paid to Mew in return for the latter's member's interest. It is common cause that in determining the value of the member's interest Haasbroek did not consult Mew. His valuation was based exclusively on the information supplied to him by Smyth and Ms Woolmer, Coco Haven's bookkeeper. Smyth asserted that the valuation was acceptable as it was done in terms of clause 8 of the association agreement, signed by both parties.

[20] Having analysed the evidence the learned judge found that there was indeed a complete breakdown of the working relationship between Smyth and Mew. Relying on a dictum by Neppen J from *De Franca v Exhaust Pro CC (De Franca intervening)* 1997 (3) SA 878 (SE) at 891E, the learned judge found that indeed 'the breakdown in their relationship is so complete that any confidence and trust they may have had in each other no longer exists'.

[21] Concerning the issue whether to grant the winding-up order in terms of s 68(d) of the Act or the compulsory buy-out of Mew by Smyth in terms of s 36 the learned judge, relying on *Kanakia v Ritzshelf 1004 CC t/a Passage to India & another* 2003 (2) SA 39 (D) at 48E-F, found that Smyth had to adduce evidence that the relief which he sought should be granted. However, having accepted, without deciding, that Smyth had discharged the onus for the purposes of establishing conduct falling within the purview of s 36(1)(b), (c) and (d), the learned judge found that Smyth had not adduced sufficient evidence to enable him to exercise his discretion in Smyth's favour in terms of s 36(2) of the Act. The learned judge was not content with the fact that Smyth relied solely on the valuation made by Haasbroek. He found Haasbroek's valuation not to be reliable as it was based entirely on the information submitted to him by Smyth and Coco Haven's bookkeeper, Ms Woolmer.

[22] The learned judge found that Smyth had failed to adduce sufficient evidence to prove that it would be just and equitable for the learned judge to exercise his discretion in his favour and make an order in terms of s 36(1) that Mew cease to be a member of Coco Haven and further, in terms of s 36(2), that Smyth acquire his interest upon payment of a particular amount. In the result, the learned judge dismissed the counter application and granted a final winding-up order in terms of s 68(d) of the Act.

[23] Before us counsel for Smyth submitted that the court a quo had erred in refusing to grant the counter application. It was submitted that, as the parties had bound themselves in terms of clause 8 of the association agreement to a particular method of calculating a member's interest, the learned judge was wrong in refusing to accept the valuation by Coco Haven's accounting officer and auditor, Haasbroek. Counsel argued that, even if Haasbroek's valuation is found to be unreliable, the court was bound to accept it as the parties had agreed to be bound by it. It was submitted further that, as Mew had failed to attack the valuation on any of the recognised grounds,

namely fraud, collusion, capriciousness or manifest injustice, it was not open to the court to reject it.

[24] In the main, counsel for Mew argued that the evidence showed clearly that Smyth was guilty of serious financial mismanagement, in that (inter alia) he incurred personal expenses amounting to R90 722,90 which were paid for by Coco Haven and made unauthorised payments to his erstwhile partner for his membership interest in the amount of R500 458,08 which was not allocated to Smyth's loan account. Further, that he incurred huge expenses in respect of improvements which were done to the premises without a resolution as required by the association agreement. In conclusion, she submitted that as Smyth had failed to adduce sufficient evidence to satisfy the court that it was just and equitable to order a cessation of Mew's membership, as opposed to a winding-up, the court below was correct in dismissing the counter-application and ordering that Coco Haven be liquidated.

[25] It should be clear from the provisions of s 36(1) and (2), as quoted above, that the court retains a discretion, firstly whether to grant an order for the cessation of a member's interest in the corporation, and secondly as regards the disposition of such member's interest and the terms and conditions under which such disposition should occur.

[26] Counsel's reliance on clause 8 of the association agreement is misplaced in that this clause simply does not provide for a valuation of the business by Coco Haven's accounting officer and auditor in the event of a compulsory buy-out in terms of s 36 of the Act. The court was accordingly not bound by Haasbroek's valuation. The court had to be placed in a position which would have enabled it to exercise its discretion and carry out its functions in terms of s 36(2) and, in particular, to decide what financial adjustments should be made: see *De Franca* at 894F-G; *Geany v Portion 117 Kalkheuwel Properties CC & another* 1988 (1) SA 622 (T) at 631H-632A; *Kanakia* at 48E-F. Such discretion can only be exercised if there is sufficient information before the court to enable it to 'make such further orders as it deems fit' in regard to the matters referred to in s 36(2): *De Franca* at 896H;

Gearny at 631H-I. The member who makes the application in terms of s 36(1) must place the necessary evidence before the court: see *Gearney* at 631 H and *Kanakia* at 48E-F.

[28] I agree with the court below that Smyth failed to do so. Based on the above, I have no doubt that the court below was correct in finding that, given the circumstances of this case, a winding-up was not only just and equitable as required by s 68)(d) of the Act but was inevitable.

[29] In the result I make the following order:

The appeal is dismissed with costs.

L O BOSIELO
JUDGE OF APPEAL

APPEARANCES:

For appellant: J F ROOS SC

Instructed by:
J J S Manton Attorneys, Johannesburg
Webbers, Bloemfontein

For respondent: K Bailey SC

Instructed by:
Tanya Brenner Attorney, Northcliff
McIntyre & Van Der Post, Bloemfontein