The Deadlock Principle as a Ground for the Just and Equitable Winding Up of a Solvent Company: *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting Investment (Pty) Ltd* 2014 5 SA 1 (SCA)

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Abstract

The question addressed by the Supreme Court of Appeal in *Thunder Cats Investment 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investments (Pty) Ltd* 2014 5 SA 1 (SCA) *(*hereafter the "*Thunder Cats*"*)* provides much-needed guidance on the deadlock principle as well as the breadth and scope of the "just and equitable ground for winding up in terms of s 81(1)(d)(iii) of the Companies Act 71 of 2008. The facts, the issues and the contextual authority of *Thunder Cats* also bring to fore the lacuna in the just and equitable winding up provisions of the current Companies Act which lacuna has so far received no judicial or academic consideration. This Note contends the fact that the just and equitable winding up provisions do not countenance any deviation from the statutory prescriptions once the factual grounds for just and equitable winding up have been established is not in consonance with the spirit, purport and objects of Companies Act, and, in particular those of Chapter Six of the Act which have introduced the innovative business rescue scheme into South African corporate law landscape. The facts, the issues and the contextual authority of *Thunder Cats* will be reviewed at length in the ensuing discussion.

Keywords

corporate deadlock, just and equitable winding up, partnership analogy, clean hands, solvent company.

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1 Introduction

Until fairly recently, the winding up provisions in sections 79 to 81 of the *Companies Act* 71 of 2008[1] in respect of solvent companies had attracted relatively little attention from the courts. However, with the burgeoning business rescue jurisprudence in the South African corporate law landscape,[2] the provisions pertaining to winding up on the just and equitable ground are increasingly being tested before the courts.[3] An order for the winding up of a solvent company is a drastic and draconian remedy.[4] It has been aptly described as a "bludgeon".[5] For the purposes of the thesis advanced in this paper, it is especially significant that the judicial discretion

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1 *Companies Act* 71 of 2008 (hereafter referred to as the 2008 Act).

2 Generally *Richter v Bloem CC* 2014 6 SA 38 (GP); *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2014 3 SA 90 (GNP); *Absa Bank v Makuna Farm CC* 2014 3 SA 86 (GJ); *Ex parte Nell* 2014 6 SA 545 (G); *Van Staden v Angel Ozone Products* 2013 4 SA 630 (GNP); *Koen v Wedgewood Village Golf & Country Estate* 2012 2 SA 378 (WCC); *Oakdene Square Properties (Pty) Ltd v Farm Bothsfontein (Kyalami) (Pty*) *Ltd* 2013 4 SA 539 (SCA). For a sampling of prominent works: Loubser *Corporate Rescue*; Loubser 2013 *SA Merc LJ*; Loubser 2010a *TSAR*; Loubser 2010b *TSAR*; Loubser 2008 *SA Merc LJ*; Loubser 2004 *SA Merc LJ*; Bradstreet 2013 *SALJ*; Bradstreet 2010 *SA Merc LJ*; Bradstreet 2011 *SALJ*; Bradstreet "Navigating *Kariba*"; Bradstreet and Klopper 2014 *Stell LR*; Kloppers 2001 *SA Merc LJ*; Rushworth 2010 *Acta Juridica*; Burdette 2004a *SA Merc LJ*; Burdette 2004b *SA Merc LJ*; Joubert 2013 *THRHR*; Locke 2015 *SA Merc LJ*; Osode 2015 *Penn State Journal of Law & International Affairs*; Lombard and Swart 2015 *THRHR*.

3 See generally *Knipe v Kameelhoek (Pty) Ltd* 2014 1 SA 52 (FB); *Scania Finance SA (Pty) Ltd v Thom-Gee Rood* 2013 2 SA 439 (FB); *Herman v Set-Mak Civils CC* 2013 1 SA 386 (FB); *Cilliers v Duin & See (Pty) Ltd* 2012 4 SA 203 (WCC); *Budge v Midnight Storm Investments* 2012 2 SA 28 (GSJ); *HBT Constructors v Uniplant Hire* CC 2012 5 SA 197 (FB).

4 Section 81 of the 2008 Act provides that a court may order the winding up of a solvent company where the company has resolved by a special resolution that it be wound up by the court (s (a)(i)); or has applied to have its voluntary winding-up continued by the court (s (a)(ii)). The court may further order the winding up of a solvent company where the practitioner appointed during business rescue proceedings applies for liquidation in terms of s 141(2)(a) on the ground that there is no reasonable prospect of the company being rescued (s 81(1)(b)). Ss 82 and 83 deal with the deregistration of companies. For serious scholarly engagement: Matlala *Deregistration and Dissolution of Companies.*

5 *Re Levine Developments (Israel) Ltd* 1978 5 BLR 164, 172.

to grant equitable relief is not unbounded. It must be exercised judicially, on a principled basis, and in recognition of the courts' disinclination to interfere lightly in the internal affairs of a company. Consequently, the applicant bears a formidable onus of establishing that a winding up order is warranted on the ground that such an order would be just and equitable.

The question addressed by the Supreme Court of Appeal in *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investments (Pty) Ltd*[6] provides much-needed guidance on the deadlock principle as well as the breadth and scope of the "just and equitable" ground for winding up. The factual matrix in *Thunder Cats* may be stated briefly.[7] The appellants sought to appeal a winding up order granted in terms of section 81(1)(d) (iii) due to shareholders' impasse in *Thunder Cats*, the first respondent company whose main asset was an 11% shareholding in Ntsimbintle Mining (Pty) Ltd worth R132 million. The parties challenging the winding up order were Thunder Cats and Turquoise Moon Trading 8 (Pty) Ltd. In support of the winding up order were the second and third respondents, who were the successful applicants in the court below, namely Bosasa Operations (Pty) Ltd and Bosasa Youth Development Centres (Pty) Ltd, each holding 25% of the issued shares in Nkonjane. The warring parties were equipollent at management and shareholder level. In other words, the appellants' nominees and the respondents' nominees each had 50% of the vote at both board and management level. The shareholders appointed directors who vote in blocks in proportion to their shareholding. The rights of the shareholders to dispose of their shares were limited so that a shareholder could not sell its shares without the approval of other shareholders. The facts, the issues and the contextual authority of *Thunder Cats* will be reviewed at length in the ensuing discussion.

2 The statutory framework

The pertinent statutory provisions of section 81(1)(d)(i)-(iii) provide that a court may order a solvent company to be wound up if the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

> (i) The directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –
>
> (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

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6 *Thunder Cats Investment 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd* 2014 5 SA 1 (SCA), hereafter referred to as "*Thunder Cats".*

7 *Thunder Cats* para 1.

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) The shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms expired; or

(iii) it is otherwise just and equitable for the company to be wound up … .[8]

The "just and equitable" phrase is found in a number of related pieces of legislation[9] as well as in the remedial provisions of the 1996 *Constitution*.[10] If not quite ubiquitous, then the phrase is at least exceedingly well-travelled.[11] The words "just and equitable" are intended to be elastic in their application to allow the courts to intervene to relieve against an injustice or inequity.[12] A court retains a broad discretion to make a winding-up order under section 81(1)(c) and (d) or any other order it considers appropriate. In its application, the just and equitable ground does not admit of a strict categorical approach. As Ponnan JA observed in *Apco Africa v Apco Worldwide Inc,*[13] "there is no necessary limit to the words 'just and

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8 The precursor to s 81(1)(d)(i)-(iii) of the 2008 Act, s 344(h) of the *Companies Act* 61 of 1973, provided that a company may be wound up by the court when it is "just and equitable" to do so.

9 Section 4(7) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 provides that the court will grant an eviction order only if it is of the opinion that it is "just and equitable to do so" after considering all the relevant circumstances, including the rights and needs of children, the elderly, disabled persons and households headed by women. See generally *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 12; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newton Urban Village* 2013 1 SA 583 (GSJ) paras 33-50. Also see Strydom and Viljoen 2014 *PER/PELJ* 1207-1261. S 89(5)(b) of the *National Credit Act* 34 of 2005 reads as follows: "If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order..." Also see *Chevron SA (Pty) Ltd v Wilson* 2015 ZACC 15 (5 June 2015) para 34.

10 Section 172(1)(b) of the *Constitution of the Republic of South Africa*, 1996 provides that following upon a declaration of constitutional invalidity a court "may make any order that is just and equitable". See e.g. *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA (No 2)* 2014 4 SA 179 (CC). For sustained engagement see: Sonnekus 2014 *TSAR*; Osode 2013 http://tinyurl.com/jherbhq; Okpaluba 2003 *Stell LR*; Okpaluba 2002 *SAPR/PL* 124-129.

11 Section 8(1) of the *Human Rights Act*, 1998 (UK) provides that where the court finds that an act of a public authority is unlawful, it "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate". In the same breadth, see s 25 of the *New Zealand Bill of Rights Act*, 1990; s 5 of the *Hong Kong Human Rights Act*, 1991 both of which share similar wording to s 24(1) of the *Canadian Charter of Rights and Freedoms*, 1982. These provisions use the terms "appropriate and just" or "just and appropriate" to qualify the wide discretionary powers the courts may exercise in considering the remedies to vindicate these statutorily and constitutionally guaranteed rights. See further Okpaluba 2006 *SAPR/PL*.

12 *Ebrahimi v Westbourne Galleries Ltd* 1972 2 All ER 492 (HL) 500A-H; *Moosa v Mavjee Bhawan (Pty) Ltd* 1967 3 SA 131 (T) 136H-I.

13 *Apco Africa v Apco Worldwide Inc* 2008 5 SA 615 (SCA). Also see *Davis & Co Ltd v Brunswick (Australia) Ltd* 1936 1 All ER 299 (PC); *Re Rogers and Agincourt Holdings Ltd* 1976 14 OR (2d) 489, 493.

equitable'". A court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories.[14] Each case depends to a large extent on its own facts. The judicial inquiry must extend beyond an examination of the legal rights of the shareholder to include a broader spectrum of equitable rights.[15]

The decisive question therefore is: When is it "just and equitable" for the court to order that a company be wound up on the "just and equitable" ground? The answer to this question emerges from certain principles distilled from the cases which have considered the just and equitable ground since *Ebrahimi v Westbourne Galleries Ltd*.[16] The ground is usually applied in four situations: (1) where there has been a disappearance of substratum; (2) where there exists justifiable lack of confidence among members; (3) where, in practical terms, the relationship resembles that of a partnership and lacks the protection of a more formal corporate structure; and (4) where the parties are deadlocked. The partnership analogy and deadlock are commonly relied upon to justify judicial intervention. This is because the deadlock and partnership analogy are broad in scope and, at the same time, they are the easiest categories to satisfy in terms of proof. *Thunder Cats* is emblematic of the deadlock principle envisaged several decades ago in *Re Yenidje Tobacco Co Ltd*[17] for scenarios where in substance a partnership exists in the guise of company. The analogy to this could be found in the familiar questions which English and other Commonwealth courts have grappled with for decades.

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14 See generally *Sweet v Finbain* 1984 3 SA 441 (W); *Sunny South Canners (Pty) Ltd v Mbangxa* 2001 2 SA 49 (SCA); *Re Rogers and Agincourt Holdings Ltd* 1976 74 DLR 3d 152, 156; *Eiserman v Ara Farms Ltd* 1988 52 DLR 4th 498; *Resnick v Bilecki* 1986 49 Sask R 232.

15 *Erasmus v Pentamed Investments (Pty) Ltd* 1982 1 SA 178 (W) 181C-H. For further discussion: Cassim "Shareholder Remedies" 757-823; Peterson *Shareholder Remedies* para 20.33; Koehnen *Oppression and Related Remedies* 396-397.

16 *Ebrahimi v Westbourne Galleries Ltd* 1972 2 All ER 492 (HL).

17 In *Re Yenidje Tobacco Co* 1916 2 Ch 426 it was submitted that 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".

3 Deadlock

In *Palmieri v AC Paving Co Ltd*[18] Levine J (as she then was) provided a succinct statement of the types of situations in which it will be just and equitable to order a winding up on the grounds of deadlock:[19]

> Some of the circumstances ... that will lead to a finding that it is just and equitable to wind up the company because of deadlock are: there are no other effective and appropriate remedies; there is an equal split or nearly equal split of shares and control; there is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; there is a resulting deadlock; and the deadlock paralyzes and seriously interferes with the normal operations of the corporation.

The shareholder feud and impasse in *Thunder Cats* is not too dissimilar to the corporate stalemate in *Apco Africa* and *Kinzie v Dell Holdings.*[20] In *Thunder Cats* shareholders were hopelessly at loggerheads. The shareholder relationship was strained from the moment the respondents gave notice of their intention to extricate themselves from Nkonjane. They could not do so because the provision in the shareholder agreement dealing with the disposal of shares required that all other shareholders consent thereto in writing. The appellants were unwilling to consent to the respondents selling their shares or to meet to discuss a reasonable basis for their leaving the company. The appellants considered disinvestment before Ntsimbintle began mining and disposing of its minerals as likely to diminish the full value of their long-term investment. The strain on the parties' relationship intensified as time went on.

The obstructive conduct of both sides did little to help the situation. Mediation efforts floundered due to the confrontational attitude of the warring shareholders. The internal wrangling, mutual disillusionment and distrust, and the consequent breakdown of the relationship between the shareholders paralysed the company. The shareholder agreement could not provide a resolution to the stalemate as there was no deadlock breaking method such as the Texas Auction clause.[21] Clause 8.2 dealing with deadlock at board level excluded the inability to obtain the required vote at

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18 *Palmieri v AC Paving Co Ltd* 1999 48 BLR (2d) 130 (BCSC).

19 *Palmieri v AC Paving Co Ltd* 1999 48 BLR (2d) 130 (BCSC) para 28.

20 *Kinzie v Dell Holdings* 2010 BCSC 1360.

21 A Texas Auction is conducted as follows: The unanimous consent of directors appointed by shareholders or where appropriate, the unanimous consent of shareholders in general meeting of the Company, shall be required for a resolution to be of any force or effect if the resolution provides for: the company to change the nature of or discontinue its business; the company to dispose of or otherwise deal in or with the whole or any part of its assets or undertaking except in the ordinary course of business.

board meetings as a ground for winding up the company. If there was a reasonable hope of tiding over the period of deep conflict and of Nkonjane emerging from its malaise to carry on at a profit, there may well have been insufficient reason for a court to wind up the company on the just and equitable provision. However, the evidence showed a justifiable breakdown of mutual trust and confidence between the shareholders regarding the conduct and management of the company's affairs. In particular, the state of animosity precluded all reasonable hope of cooperation in the attainment of the company's financial goals.

The facts and issues for determination by the Supreme Court of Appeal in *Apco Africa v Apco Worldwide Incorporated*[22] appropriately capture the problem of deadlock. The somewhat simple question confronting Ponnan JA was whether the first appellant, Apco Africa (Pty) Ltd ("the Company"), ought to be wound up on the ground that this course was just and equitable within the meaning of section 344(h) of the old *Companies Act* 61 of 1973, or more accurately, whether such an order was properly granted by the court below. Briefly, the company was set up as a joint venture partnership between the second appellant, Arcay Communications Holdings (Pty) Ltd ("Arcay") and the respondent, Apco Worldwide Inc. The appellant and respondent held interest in the company in the same proportion. Apco was to refer clients' work required to be performed on the African continent to the company. The residual profit generated by the company was to be shared on an equal footing while the directors seconded by Arcay were to manage the affairs of the company.

The parties disagreed from the outset on important corporate decisions and Arcay's response to matters relating to performance and accountability. There were complaints from disgruntled clients concerning the services rendered by the company. Another bone of contention was the fact that Arcay had been appropriating for itself 90% of the revenue generated by the company. A director seconded by Apco to help salvage matters was met with hostility by the local directors of the company. As result of animosity and altercation with the company's local directors, she had to operate from another office until the dispute between the shareholders could be resolved. The flurry of court applications involving shareholders underscored the failure of the business relationship. Several attempts by the respondent to convene a shareholders' meeting in order to discuss its exit proved futile. As a result, the company lost its ability to function and the board became unable to take decisions. It is submitted that the state of affairs prevailing in

22 *Apco Africa v Apco Worldwide Inc* 2008 5 SA 615 (SCA).

the company would compel any court to exercise its discretion to wind up the company on the just and equitable basis.

The judgment of the British Columbia Supreme Court in the Canadian case of *Dell Holdings*[23] provides another illustration of a corporate deadlock justifying liquidation on equitable grounds in terms of section 324 of the *Business Corporations Act of British Columbia*.[24] As in *Thunder Cats* and *Apco Africa*, the two warring shareholder groups were, in fact, agreed that there was a deadlock in the management of the affairs of the company and that there was no suitable mechanism for resolving it. Dell Holdings owned and operated a shopping centre. Its income was derived entirely from the rents collected under the various lease agreements in place with retailers in the mall. An intractable dispute arose in connection with efforts which were being made by the shareholders to sell the shopping centre for redevelopment purposes. While the applicants in *Dell Holdings* were not opposed to a sale of the shopping centre to a third party, they disagreed with the insistence of the respondents that any new leases contain a demolition clause.[25] The respondents were of the view that in the absence of a demolition clause, developers would be disinclined to purchase the shopping centre due to the substantial pay-outs that would otherwise be required to terminate a tenant's lease. As a consequence of this disagreement, the parties were unable to present a common front to prospective purchasers. The difference of opinion led to conflict between the opposing shareholder groups during negotiations with a grocery chain seeking to lease a sizable space in the mall. The disagreement was found by Bruce J to be "paralyzing the proper management of Dell's business affairs".[26] Accordingly, relief was granted in the form of a shot-gun sale.[27]

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23 *Kinzie v Dell Holdings* 2010 BCSC 1360.

24 Section 324 of the *Business Corporations Act*, 2002 provides as follows: "324(1) On an application made in respect of the company by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if: (a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or (b) the court otherwise considers it just and equitable to do so. (3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following: (a) make an order that the company be liquidated and dissolved; (b) make any order under section 227(3) it considers appropriate***."***

25 *Kinzie v Dell Holdings* 2010 BCSC 1360 para 5.

26 *Kinzie v Dell Holdings* 2010 BCSC 1360 para 11.

27 Subsection 227(3) of the of the *Business Corporations Act*, 2002 provides that: "On an application under this section, the court may, with the view to remedying or bringing

As noted above, for a winding up order to be justified on the grounds of deadlock, there must be a serious and persistent disagreement on some important questions respecting the management or functioning of the company and a deadlock which has the effect of paralysing or seriously interfering with its normal operations.[28] This brings to focus the partnership analogy, that is, circumstances in which it may be appropriate to apply the kind of equitable considerations that govern the dissolution of partnerships to applications to wind up the business of a company.

4 The partnership analogy

Where the relationship between the parties resembles a partnership between more than arm's length shareholders such that it can be said that the entity is, in substance, a partnership in the guise of a private company, courts have been prepared in some circumstances to liquidate a corporation on the same grounds that would justify the winding up of a partnership.[29] In determining to apply the partnership analogy in the famous English case of *Ebrahimi*,[30] Lord Wilberforce made it clear in his judgment that it was a fact of "cardinal importance" to the determination of that case that, prior to its incorporation, the business had been carried on by the shareholders as a partnership, with each partner equally sharing the management and profits of the firm. The equitable intervention of the court on the "partnership analogy" ground requires the satisfaction of two conditions: firstly, the existence of an undertaking that is in substance a partnership in the guise of a private company, and secondly, a breakdown of the mutual trust and confidence upon which the original undertaking was founded.[31]

Two Canadian decisions further illustrate this principle. *Kurt v Pryde*[32] concerned former spouses and equal shareholders in a trucking company. Kurt was in charge of administrative support while Pryde led the service operations of the company. Importantly, the parties agreed that they could not, following their divorce, continue to work closely together in the company. The applicant, Kurt, wished to realise on her interest in the

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to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order: (a) directing or prohibiting any act, … (h) *directing any shareholder to purchase some or all of the shares of any other shareholder,* **…** (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security." Emphasis added.

28 *Palmieri v AC Paving Co Ltd* 1999 48 BLR (2d) 130 (BCSC) para 28.

29 *Golden Pheasant Holding Corp v Synergy Corporate Management* 2011 BCSC 173.

30 *Ebrahimi v Westbourne Galleries Ltd* 1972 2 All ER 492 (HL).

31 *Ebrahimi v Westbourne Galleries Ltd* 1972 2 All ER 492 (HL) 495.

32 *Kurt v Pryde* 2007 160 ACWS (3d) 94 (Ont SC).

business, proceed on her separate way and pursue a career in real estate sales. She brought an application to wind up the affairs of the company. Although both parties recognized that a winding up order was not in their respective best interests, the judgment reflects an inability on their part to compromise in their respective positions. The Ontario Supreme Court declined to issue a winding up order but instead imposed a framework for the voluntary purchase by Pryde of Kurt's interest in the company.

In *Paulson v Dogwood Holdings Ltd,*[33] a case which has some features in common with the case at bar, the court found no evidence of a breakdown in trust and confidence between the shareholders to warrant winding up on deadlock grounds. The shares of Dogwood Holdings were held equally by Paulson and Dorothy Dawson. Paulson's application for a winding up order was motivated by a desire to liquidate his investment in the company and satisfy his creditors. As in *Kurt v Pryde*,[34] there was no question that Dogwood Holdings, which had been incorporated 27 years earlier, was a profitable endeavour. The Articles of the company provided that either shareholder had the right to sell his or her shares to a third party, subject to the other shareholder's right of first refusal. Paulson had made unsuccessful efforts to dispose of his shares to third parties. He offered Dorothy a shot-gun buyout whereby he would sell his shares to her at a fixed price or buy hers at that price if she declined his offer. She refused to do either. Paulson also sought Dorothy's concurrence in the sale of the company's assets to an interested third party purchaser. But she would not agree to the sale. Paulson's application for a winding up order rested on a contention that the affairs of the company were in deadlock or, alternatively, that it was justifiable on the partnership analogy ground.

It is in this regard that the judgement of the court of first instance in *Thunder Cats* is instructive for applying the partnership analogy to the shareholder relationship that had been clearly marred by difficulty and disagreement.[35] According to the High court, the application of the just and equitable ground does not require a finding that the company was in fact a partnership or "quasi-partnership", but rather requires a finding that it has some of the attributes that also describe a partnership. In importing the partnership analogy to Nkonjane, Vermeulen J took into consideration the fact that the company comprised of only four members, each having the right to appoint a director. Each of the shareholders had the right to participate in the

33 *Paulson v Dogwood Holdings* Ltd 1990 BCJ No 2281 (SC).
34 *Kurt v Pryde* 2007 160 ACWS (3d) 94 (Ont SC).
35 *Thunder Cats* para 2.

management of the company. Furthermore, there was no body of shareholders separate from the board. In the view of Vermeulen J, no deep analysis was required but rather the bare facts spoke for themselves. Not surprisingly, the court concluded that the disagreement between the shareholders affected the operation of the company so as to impair the attainment of its economic ends. In those circumstances it seemed just and equitable to dissolve the company pursuant to the relevant legislative provision.[36]

5 Clean hands

There can be no dispute that the contribution of the contending parties to the breakdown of the relationship is a weighty factor. Thus the question arises: to what extent is the degree of the moral turpitude attributable to the applicant for winding up material to the enquiry whether it is just and equitable to liquidate the company? This leads squarely to the argument pressed by the appellants in *Thunder Cats* in their challenge against the granting of the winding up order. It was contended that as the respondents were the *causa causans* of the management paralysis, they could not insist upon the company being wound up.

It is a cardinal principle that in the interpretation of the "just and equitable" ground, general rules regarding equitable remedies apply such that a person seeking relief must come to court with "clean hands".[37] It is a principle that Lord Mildew expressed equally well, if less decorously: "A dirty dog will get no dinner from the courts".[38] Echoes of the clean hands doctrine are legion in a variety of cases.[39] For example, the clean hands principle has been invoked to bar a minority shareholder's derivative action.[40]

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36 See *Muller v Lilly Valley Ltd* 2012 1 All SA 187 (SGJ).

37 See generally Christie and Bradfield *Law of Contract* 406-417; Anenson 2010-2011 *Ky LJ* 63; Kennedy 1997 *U Det Mercy L Rev* 609; Chafee 1947 *Mich L Rev* 877.

38 *French Plays Ltd v The Mayor of Hackney* 1910 2 KB. The US Supreme Court in *Keystone Drillller Co v General Excavator Co* 290 US 240, 244-45 (1933) articulated unclean hands as follows: "Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the door of the court will be shut against him *in mimine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy".

39 *Kylie v CCMA* 2010 4 SA 838 (LAC); *Kylie v CCMA* 2008 9 BLLR 970 (LC) (a claim for unfair dismissal by a sex worker); *Essop v Abdullah* 1988 1 SA 424 (A) (a claim for specific performance); *Brits v Van Heerden* 2001 3 SA 257 (C) (rectification of an illegal contract).

40 Payne 2002 *CLJ* 76; Peterson *Shareholder Remedies* para 20-33. See further *Amdoes v Kwezi Technologies* 2014 5 SA 532 (GJ); *Mourutzen v Greystone Enterprises* 2012 5 SA 74 (KZD).

Similarly, in determining whether it is just and equitable to liquidate a company, the court will take into account the fact that the applicant's hands are not completely clean, and this is so when the reason for the breakdown of the parties' relationship is the result of his or her own misconduct. It follows that a party who is responsible for the collapse of the relationship is precluded from seeking the liquidation of a company.[41]

Trite and obviously necessary as this equity principle may be, it must not be thought of as being of universal application. If the rigid application of the clean hands principle would work manifest unfairness on one of the parties, a departure would be justified on the grounds that "public policy should properly take into account the doing of simple justice between man and man".[42] Where all the parties lack clean hands, the policy behind the clean hands doctrine is not applicable. The Australian case of *Ruut v Head,*[43] where the warring partners were at fault, affirms the principled view that the lack of cleans hands is not decisive of the question whether it was just and equitable to grant a winding up order, but Santow J added that "it must be an important factor in the exercise of the court's discretion along with other factors, such as whether the partnership is truly deadlocked".[44] It should be remembered that at stake here is the best interests of the company. Where a company is effectively deadlocked and paralysed, the granting of an order for dissolution coupled with the appointment of a liquidator may be the only viable option for bringing an end to the paralysis and securing the company's best interests.[45]

In the case at bar, the Supreme Court of Appeal could not find fault with the reasoning of Vermuelen AJ that both parties were culpable for the inevitable breakdown of the relationship. In other words, the court *a quo* had thought that "an equal apportionment of blameworthiness might be somewhat charitable to the appellants but not an outright injustice to the respondents".[46] Moreover, the agreement reached at the meeting of

41 See eg *Sevaal Holdings Inc v LCB Properties Inc* 2014 SKQB 47 (CanLII) para 89; *Safarik v Ocean Fisheries Ltd* 1995 12 BCLR (3d) 369-70; *Apco Africa v Apco Worldwide Inc* 2008 5 SA 615 (SCA) para 19; *Emphy v Pacer Properties (Pty) Ltd* 1979 3 SA 363 (D) 368G-I; *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL) at 387G-H.

42 *Jajbhay v Cassim* 1939 AD 537. Also see *Petersen v Jajbhay* 1940 TPD 82; *Klokow v Sullivan* 2006 1 SA 259 (SCA). See also Van der Merwe *et al Contract* 177-182.

43 *Ruut v Head* 1996 20 CSR 160. Also see *Portfolios of Distinction Ltd v Laird* 2004 2 BCLC 741; *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* 2002 1 WLR 1269.

44 *Ruut v Head* 1996 20 CSR 160 162 cited with approval in *Thunder Cats* para 28.

45 *Pham Thai Duc v PTS Australian Distributor Pty Ltd* 2005 NSWC 98 para 17 cited with approval in *Thunder Cats* para 28.

46 *Thunder Cats* para 29.

shareholders after the launching of the liquidation application underscored the point that both parties were to blame for the irrevocable breakdown of their relationship. In a sense, the most appropriate qualifier to the paralysis that haunted the company was winding up. Malan JA on behalf of a unanimous SCA, held:[47]

> The shareholder agreement and the equal holding of shares and voting power on the board require the shareholders to co-operate. Without such co-operation the company cannot function. It was not possible to meet and approve the financial statements for the year ending February 2010. In these circumstances their relationship has broken down irretrievably and the court below correctly found that it was just and equitable that the company be wound up.

6 Conclusion

The judgment of the Supreme Court of Appeal in *Thundercats* is welcomed for three obvious reasons. First, it has provided a much-needed clarification on the breadth and scope of the "just and equitable ground" in terms of section 81(1)(d)(iii) of the 2008 Act. Second, it has elucidated the extent to which the clean hands doctrine may bar the granting of just and equitable relief. Finally, the Supreme Court of Appeal spared the evolving just and equitable jurisprudence the confusion inherent in the conflicting opinions held by different Divisions of the High Court as to whether the just and equitable relief in section 81(1)(d)(iii) was as wide as it had been under section 344(h) of the old *Companies Act* 61 of 1973, or was limited by sub-paragraph (i) and (ii) so as to preclude all other grounds of deadlock**.**

The discussion of selected Canadian case law brings to the fore a more imaginative approach and the existence of a wide range of substantive remedies to tackle deadlock situations. The judicial approach to resolving corporate paralysis in Canada by ordering a shotgun sale, exemplified in cases such as *Dell Holdings* and *Kurt v Pryde*, casts an illuminating light on the lacuna in the just and equitable winding up provisions of the current South African *Companies Act*, which lacuna has so far received no judicial or academic consideration. Certainly, the courts in Canada, unlike their

47 *Thunder Cats* para 33.

South African counterparts, have a wide range of remedies available to them to deal with companies overwhelmed by deadlock. It can hardly be argued that if there was a shot-gun sale provision within the all-encompassing provisions of section 81(1)(d)(iii),[48] the courts in *Thunder Cats* would have declined to grant a winding up order and instead ordered a disposal of shares, since the respondents had desired to liquidate their investments. It is submitted that a shot-gun sale, beyond giving primacy to the solvent company's best interests, equally gives due consideration to the interests of other stakeholders such as employees. In this respect, the fact that the just and equitable winding up provisions of the 2008 Act do not countenance any deviation from the statutory prescriptions once the factual grounds for just and equitable winding up have been established is not in consonance with the spirit, purport and objects of *Companies Act*,[49] and, especially those of Chapter Six of the Act, which have introduced the business rescue scheme into South African company law.[50]

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48 A court directs a transfer or sale of shares only if a shareholder of a company seeks relief from oppressive or prejudicial conduct or from the abuse of a separate juristic personality in terms of s 163 of the Companies Act 71 of 2008. See *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 2 SA 331 (GSJ).

49 According to section 7(b)(c)(d) and (f), the purposes of the Act include:(b) promotion of the development of the South African economy encouraging entrepreneurship and enterprise efficiency,(c) promotion of innovation and investment in the South African markets (d) reaffirm the concept of company as a means of achieving economic and social benefits (f) promotion of the development of companies within all sectors of the economy, and encouragement of active participation in economic organisation, management and productivity.

50 This was made clear by the High Court in *Koen v Wedgewood Village Golf & Country Estate* 2012 2 SA 378 (WCC) para 14 as follows: "It is clear that the Legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations". See also Osode 2015 *Penn State Journal of Law & International Affairs* 459; and Osode "Challenging the Rejection of a Business Rescue Plan". A contrary but robust pro-creditor approach to business rescue has been espoused in some cases. For eg *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd* 2015 5 SA 192 (SCA) para 25; *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 1 SA 103 (KZP) paras 40-41; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) para 23; *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 5 SA 515 (GS) paras 13, 14; *Swart v*

Bibliography

Literature

Anenson 2010-2011 *Ky LJ*
Anenson TL "Limiting Legal Remedies: An Analysis of Unclean Hands" 2010-2011 *Ky LJ* 63

Bradstreet 2010 *SA Merc LJ*
Bradstreet R "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy" 2010 *SA Merc LJ* 195-213

Bradstreet 2011 *SALJ*
Bradstreet R "The New Business Rescue: Will Creditors Sink or Swim?" 2011 *SALJ* 352-380

Bradstreet 2013 *SALJ*
Bradstreet R "Business Rescue Proves to be Creditor-friendly: CJ Claasen J's Analysis of the New Business Rescue Procedure in *Oakdene Square Properties*" 2013 *SALJ* 44-52

Bradstreet "Navigating *Kariba*"
Bradstreet R "Navigating *Kariba*: Did Bad (F)acts Make Bad Law?" Paper presented at the *Third Annual International Mercantile Law Conference* (4-6 November 2015 Bloemfontein)

Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening) 2011 5 SA 422 (GNP) para 25; *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 2 SA 423 (WCC) para 20. For further reflection: Sharrock, Van der Linde and Smith *Hockly's Law of Insolvency* 276; Loubser 2013 *SA Merc LJ*; Loubser 2010a *TSAR*; Loubser 2010b *TSAR*; Loubser 2008 *SA Merc LJ*; Bradstreet 2013 *SALJ*; Bradstreet 2010 *SA Merc LJ*; Bradstreet 2011 *SALJ*; Bradstreet "Navigating *Kariba*"; Joubert 2013 *THRHR*. Pro-creditor stance to business rescue has uncanny resonance with judicial pronouncements in the context of restructuring of sovereign debt and vulture fund litigation. Of particular interest is *NML Capital Ltd v Argentina* 699 F 3d 246 (2d Cir 2012) where Griesa J adopted a rather strange interpretation of *pari passu* clause, awarding holdout creditors legal rights to ratable payment via a special injunction against Argentina. For a critical discussion: Wong 2015 *Colum J Transnat'l L*. See eg *Republic Argentina v NML Capital Ltd* 134 S Ct 2819 (2014). For serious engagement of "vulture funds", sovereign debt and human rights, see *United Nations Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Cephas Lumina* UN Doc A.HRC/14.21 (2010).

Bradstreet and Klopper 2014 *Stell LR*
Bradstreet R and Klopper H "Averting Liquidations with Business Rescue: Does a Section 155 Compromise Place the Bar too High?" 2014 *Stell LR* 549-565

Burdette 2004a *SA Merc LJ*
Burdette D "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)" 2004 *SA Merc LJ* 249-263

Burdette 2004b *SA Merc LJ*
Burdette D "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 2)" 2004 *SA Merc LJ* 409-447

Cassim "Shareholder Remedies"
Cassim MF "Shareholder Remedies and Minority Protection" in Cassim MF *et al Contemporary Company Law* 2nd ed (Juta Claremont 2012) 755-823

Chafee 1947 *Mich L Rev*
Chafee Z "Coming into Equity with Clean Hands" 1947 *Mich L Rev* 877-906

Christie and Bradfield *Law of Contract*
Christie RH and Bradfield G *Christie's The Law of Contract in South Africa* 6th ed (LexisNexis Durban 2011)

Joubert 2013 *THRHR*
Joubert EP "'Reasonable Possibility' Versus 'Reasonable Prospect': Did Business Rescue Succeed in Creating a Better Test than Judicial Management?" 2013 *THRHR* 550-563

Kennedy 1997 *U Det Mercy L Rev*
Kennedy KC "Equitable Remedies and Principled Discretion: The Michigan Experience" 1997 *U Det Mercy L Rev* 609-656

Kloppers 2001 *SA Merc LJ*
Kloppers P "Judicial Management Reform – Steps to Initiate a Business Rescue" 2001 *SA Merc LJ* 362-378

Koehnen *Oppression and Related Remedies*
Koehnen M *Oppression and Related Remedies* (Thomson Carswell Toronto 2004)

Locke 2015 *SA Merc LJ*
Locke N "The Meaning of 'Solvent' for the Purposes of Liquidation in terms of the Companies Act 71 of 2008: *Boschpoort Ondernemigs (Pty) Ltd v ABSA (Pty) Ltd*" 2015 *SA Merc LJ* 153-162

Lombard and Swart 2015 *THRHR*
Lombard M and Swart WJC "Business Rescue: The Unsurety about Sureties – *Tuning Fork (Pty) Ltd T/A Balanced Audio v Jonker*" 205 *THRHR* 521-533

Loubser 2004 *SA Merc LJ*
Loubser A "Judicial Management as a Business Rescue Procedure in South African Corporate Law" 2004 *SA Merc LJ* 137-163

Loubser 2008 *SA Merc LJ*
Loubser A "The Role of Shareholders during Corporate Rescue Proceedings: Always On the Outside Looking In" 2008 *SA Merc LJ* 372-390

Loubser 2010a *TSAR*
Loubser A "The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 1)" 2010 *TSAR* 501-514

Loubser 2010b *TSAR*
Loubser A "The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2") 2010 *TSAR* 689-701

Loubser *Corporate Rescue*
Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* (LLD thesis Unisa 2010)

Loubser 2013 *SA Merc LJ*
Loubser A "Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African Law" 2013 *SA Merc LJ* 437-457

Matlala *Deregistration and Dissolution of Companies*
Matlala DM *Deregistration and Dissolution of Companies: A Critical Evaluation of the Law and Jurisprudence* (LLD Thesis University of Fort Hare 2015)

Okpaluba 2002 *SAPR/PL*
Okpaluba C "Extraordinary Remedies for Breach of Fundamental Rights" 2002 *SAPR/PL* 98-129

Okpaluba 2003 *Stell LR*
Okpaluba C "Of 'Forging New Tools' and 'Shaping Innovative Remedies': Unconstitutionality of Legislation Infringing Fundamental Rights Arising from Legislative Omissions in the New South Africa" 2003 *Stell LR* 462-483

Okpaluba 2006 *SAPR/PL*
Okpaluba C "Judicial Review of Legislation in an Unfamiliar Constitutional Environment: The United Kingdom Experiment" 2006 *SAPR/PL* 263-285

Osode "Challenging the Rejection of a Business Rescue Plan"
Osode P "Challenging the Rejection of a Business Rescue Plan on the Ground of Inappropriateness of Voting Outcome under Section 153 of the 2008 Companies Act" Unpublished paper presented at the *Third Annual International Mercantile Law Conference (*4-6 November 2015 Bloemfontein)

Osode 2015 *Penn State Journal of Law & International Affairs*
Osode P "Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment" 2015 *Penn State Journal of Law & International Affairs* 459-488

Payne 2002 *CLJ*
Payne J "'Clean Hands' in Derivative Action" 2002 *CLJ* 76-86

Peterson *Shareholder Remedies*
Peterson DH *Shareholder Remedies in Canada* (Butterworths Toronto 1989)

Rushworth 2010 *Acta Juridica*
Rushworth J "A Critical Analysis of Business Rescue Regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* 375-408

Sharrock, Van der Linde and Smith *Hockly's Law of Insolvency*
Sharrock R, Van der Linde K and Smith A *Hockly's Law of Insolvency* 9th ed (Juta Cape Town 2012)

Sonnekus 2014 *TSAR*
Sonnekus JC "Procurement Contracts and Underlying Principles of the Law – No Special Dispensation for Organs of State (Part 1 – The Principles)" 2014 *TSAR* 320-336

Strydom and Viljoen 2014 *PER/PELJ*
Strydom S and Viljoen (Maas) S "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations involved" 2014 *PER/PELJ* 1207-1261

Van der Merwe *et al Contract*
Van der Merwe SWJ *et al Contract: General Principles* 4th ed (Juta Cape Town 2012)

Wong 2015 *Colum J Transnat'l L*
Wong N "*NML Capital Ltd v Republic of Argentina* and the Changing Roles of the *Pari Passu* and Collective Action Clauses in Sovereign Debt Agreements" 2015 *Colum J Transnat'l L* 396-427

Case law

Absa Bank v Makuna Farm CC 2014 3 SA 86 (GJ)

Absa Bank Ltd v Summer Lodge (Pty) Ltd 2014 3 SA 90 (GNP)

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd 2013 6 SA 471 (GNP)

African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd 2015 5 SA 192 (SCA)

AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd 2012 5 SA 515 (GS)

AllPay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA (No 2) 2014 4 SA 179 (CC)

Amdoes v Kwezi Technologies 2014 5 SA 532 (GJ)

Apco Africa v Apco Worldwide Inc 2008 5 SA 615 (SCA)

Brits v Van Heerden 2001 3 SA 257 (C)

Budge v Midnight Storm Investments 2012 2 SA 28 (GSJ)

Chevron SA (Pty) Ltd v Wilson 2015 ZACC 15 (5 June 2015)

City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 6 SA 294 (SCA)

Cilliers v Duin & Dee (Pty) Ltd 2012 4 SA 203 (WCC)

Davis & Co Ltd v Brunswick (Australia) Ltd 1936 1 All ER 299 (PC)

DH Brothers Industries (Pty) Ltd v Gribnitz 2014 1 SA 103 (KZP)

Ebrahimi v Westbourne Galleries Ltd 1972 2 All ER 492 (HL)

Eiserman v Ara Farms Ltd 1988 52 DLR 4th 498

Emphy v Pacer Properties (Pty) Ltd 1979 3 SA 363 (D)

Erasmus v Pentamed Investments (Pty) Ltd 1982 1 SA 178 (W)

Essop v Abdullah 1988 1 SA 424 (A)

Ex parte Nell 2014 6 SA 545 (G)

French Plays Ltd v The Mayor of Hackney 1910 2 KB

Golden Pheasant Holding Corp v Synergy Corporate Management 2011 BCSC 173

HBT Constructors v Uniplant Hire CC 2012 5 SA 197 (FB)

Herman v Set-Mak Civils CC 2013 1 SA 386 (FB)

Jajbhay v Cassim 1939 AD 537

Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newton Urban Village 2013 1 SA 583 (GSJ)

Keystone Drillller Co v General Excavator Co 290 US 240 (1933)

Kinzie v Dell Holdings 2010 BCSC 1360

Klokow v Sullivan 2006 1 SA 259 (SCA)

Knipe v Kameelhoek (Pty) Ltd 2014 1 SA 52 (FB)

Koen v Wedgewood Village Golf & Country Estate 2012 2 SA 378 (WCC)

Konamaneni v Rolls-Royce Industrial Power (India) Ltd 2002 1 WLR 1269

Kurt v Pryde 2007 160 ACWS (3d) 94 (Ont SC)

Kylie v CCMA 2008 9 BLLR 970 (LC)

Kylie v CCMA 2010 4 SA 838 (LAC)

Moosa v Mavjee Bhawan (Pty) Ltd 1967 3 SA 131 (T)

Mourutzen v Greystone Enterprises 2012 5 SA 74 (KZD)

Muller v Lilly Valley Ltd 2012 1 All SA 187 (SGJ)

NML Capital Ltd v Argentina 699 F 3d 246 (2d Cir 2012)

Oakdene Square Properties (Pty) Ltd v Farm Bothsfontein (Kyalami) (Pty) Ltd 2013 4 SA 539 (SCA)

Palmieri v AC Paving Co Ltd 1999 48 BLR (2d) 130 (BCSC)

Paulson v Dogwood Holdings Ltd 1990 BCJ No 2281 (SC)

Peel v Hamon J&C Engineering (Pty) Ltd 2013 2 SA 331 (GSJ)

Petersen v Jajbhay 1940 TPD 82

Pham Thai Duc v PTS Australian Distributor Pty Ltd 2005 NSWC 98

Portfolios of Distinction Ltd v Laird 2004 2 BCLC 741

Re Levine Developments (Israel) Ltd 1978 5 BLR 104

Re Rogers and Agincourt Holdings Ltd 1976 14 OR (2d) 489; 1976 74 DLR 3d 152

Re Yenidje Tobacco Co Ltd 1916 2 Ch 426

Republic Argentina v NML Capital Ltd 134 S Ct 2819 (2014)

Resnick v Bilecki 1986 49 Sask R 232

Richter v Bloem CC 2014 6 SA 38 (GP)

Ruut v Head 1996 20 CSR 160

Safarik v Ocean Fisheries Ltd 1995 12 BCLR (3d) 342

Scania Finance SA (Pty) Ltd v Thom-Gee Rood 2013 2 SA 439 (FB)

Sevaal Holdings Inc v LCB Properties Inc 2014 SKQB 47 (CanLII)

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 2 SA 423 (WCC)

Sunny South Canners (Pty) Ltd v Mbangxa 2001 2 SA 49 (SCA)

Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening) 2011 5 SA 422 (GNP)

Sweet v Finbain 1984 3 SA 441 (W)

Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd 2014 5 SA 1 (SCA)

Van Staden v Angel Ozone Products 2013 4 SA 630 (GNP)

Legislation

Canada

Business Corporations Act, 2002

Canadian Charter of Rights and Freedoms, 1982

Hong Kong

Hong Kong Human Rights Act, 1991

New Zealand

New Zealand Bill of Rights Act, 1990

South Africa

Companies Act 61 of 1973

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

National Credit Act 34 of 2005

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

United Kingdom

Human Rights Act, 1998

International instruments

United Nations Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Cephas Lumina UN Doc A.HRC/14.21 (2010)

Internet sources

Osode 2013 http://tinyurl.com/jherbhq
Osode P 2013 *Remedial Interventions in Public Procurement Processes: An Appraisal of Recent Appellate Jurisprudence in Search of Principles - Inaugural Lecture* http://tinyurl.com/jherbhq accessed 18 June 2016

List of Abbreviations

CLJ	Cambridge Law Journal
Colum J Transnat'l L	Columbia Journal of Transnational Law
KY LJ	Kentucky Law Journal
Mich L Rev	Michigan Law Review
PER/PELJ	Potchefstroomse Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SAPR/PL	SA Publiekreg / SA Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Det Mercy L Rev	University of Detroit Mercy Law Review