

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO: HC-MD-CIV-MOT-GEN-2018/00121**

In the matter between:

**BENEDICT MASULE MBALA** **1<sup>ST</sup> APPLICANT**

**NDJAWAKI FOTTA KATYONGO** **2<sup>ND</sup> APPLICANT**

**JOHN MUSIALIKE** **3<sup>RD</sup> APPLICANT**

**THERESIA NTELAMO MBALA** **4<sup>TH</sup> APPLICANT**

**ABRAHAM MABUTA NSUNDANO** **5<sup>TH</sup> APPLICANT**

and

**ONE BODY APOSTOLIC FAITH CHURCH** **1<sup>ST</sup> RESPONDENT**  
(Association Incorporated not for gain)

**CAVIN MATTIAS MWINGA** **2<sup>ND</sup> RESPONDENT**

**LUKA MASULE** **3<sup>RD</sup> RESPONDENT**

**MAVIS KAKWIBU MASULE** **4<sup>TH</sup> RESPONDENT**

**CALVIN MUNISWASWA** **5<sup>TH</sup> RESPONDENT**

**DAVID MAZILA** **6<sup>TH</sup> RESPONDENT**

**FRANCISCO ESTEVAO SALOMAO** **7<sup>TH</sup> RESPONDENT**

**THE MASTER OF THE HIGH COURT** **8<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Mbala v One Body Apostolic Faith Church (Incorporation Association not for gain)* (HC-MD-CIV-MOT-GEN-28-018/00121) [2020] NAHCMD 17 (23 January 2020)

**CORAM:** MASUKU J

Heard: 23 July 2019

Delivered: 23 January 2020

**Flynote:** Commercial Law – Companies Act 2004 – section 349 (*h*) – Winding up of companies – Just and equitable reasons to wind up must exist – Church not a company in the classical sense – Court to exercise its discretion judicially and judiciously in granting a winding up order on the basis of the just and equitable rule.

**Summary:** The applicants approached this court seeking an order winding up the 1<sup>st</sup> respondent, One Body Apostolic Faith Church in terms of the provisions of s 349(*h*) of the Companies Act, 2004, ‘the Act’). It is claimed on the part of the applicants that there exists a serious deadlock within the membership of the 1<sup>st</sup> respondent in respect of its leadership. It is accordingly alleged, in the circumstances, that the insoluble dispute resulting in a deadlock, constitutes a just and equitable reason in terms of the Act, for the winding up of the 1<sup>st</sup> respondent. This position is disputed by the respondents who argue that this is not a proper case in which the court should grant the order sought by the applicants when regard is had to the 1<sup>st</sup> respondent and its core business.

Held: that a company may be wound up if it appears to the court that it is just and equitable to do so.

Held further: that in determining whether a case for winding up on the grounds of the just and equitable rule, the court needs to look at the matter before it holistically and then make a judgment, not only from the facts proved, or apparent.

Held: that the court must additionally partake from the reservoirs of the law, equity, justice and fairness in determining whether the case before court is one which resonates with an order for winding up.

Held further that: the peculiar circumstances of each case for winding up to be taken into account, as there is no one size fits all.

Held: that the issues in *casu* involve matters of an ecumenical nature, which if properly considered in the context of the instant case, were not ever contemplated by the Legislature, as being the legal basis or part of the basis for issuing a winding-up order under the just and equitable principle in ordinary company law parlance or setting.

Held further: that the 1<sup>st</sup> respondent is not just an ordinary company, floated to offer goods and services or to be involved in one or other branch of commerce in the classical sense and it would be irresponsible of this court to deal with the matter as a normal dispute that afflicts the boardroom or the running of the company.

Held: that the court, albeit being the body tasked with resolving disputes, does not always provide a panacea for all human ills, particularly those whose DNA is ecclesiastical in nature.

The court accordingly finding that in exercising its powers properly and judicially, this is not a proper case in which the demands of the law, justice fairness and equity can be said to favour the granting of a winding up order. Application consequently dismissed with costs.

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**ORDER**

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1. The application is dismissed.
  2. The applicants are ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed counsel.
  3. The matter is removed from the roll and is regarded as finalised.
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## JUDGMENT

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### **MASUKU J:**

#### Introduction

[1] Presently serving before court is a dispute among members of an ecclesiastical entity. The dispute is, however, on the surface, not ecumenical in nature but one steeped in the interpretation of the Company laws of this Republic as the entity in dispute, is an association incorporated not for gain in terms of the applicable provisions of the company laws.

[2] In essence, the applicants have approached this court seeking the winding up of 1<sup>st</sup> respondent, One Body Apostolic Faith Church in terms of the provisions of s. 349(*h*) of the Companies Act, 2004, 'the Act'.<sup>1</sup> It is claimed on the part of the applicants that there exists a serious deadlock within the membership of the 1<sup>st</sup> respondent in respect of its leadership. It is accordingly alleged, in the circumstances, that the insoluble dispute resulting in a deadlock, constitutes a just and equitable reason in terms of the Act, for the winding up of the 1<sup>st</sup> respondent.

[3] It is important to mention at this nascent juncture, that the human respondents cited in the application are all members and directors of the 1<sup>st</sup>

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<sup>1</sup> Act No. 28 of 2004.

respondent and can as such be regarded as involved in the day to day running of the affairs of the 1<sup>st</sup> respondent.

[4] It is fair to mention that a reading of the papers filed of record in this matter yields one conclusion, namely, that the parties are seriously disputing the version of the other and on many and material issues, with each side not prepared to concede an inch. In the instant case, it is not necessary for the court to traverse each and every allegation placed in dispute, to determine whether the disputes raised are *bona fide* and genuine.

[5] What should be mentioned though is that not all the disputed issues constitute a bar to the court determining the propriety of hearing and deciding the application before it. In this regard, it is clear, even from the respondents' version, although disputed in some portions of their affidavits, that there is indeed a deadlock in the management of the 1<sup>st</sup> respondent.

[6] That this is the case is evident from a close reading of some portions of the respondents' answering affidavit, thus leading to a decision that the denial of the deadlock by the respondents is not *bona fide* in the instant case, thus entitling the court to reject that disputation. The court is accordingly entitled to decide that aspect of the case on the version of the applicants.<sup>2</sup>

[7] From a reading of the papers, it would appear that the bone of contention giving rise to the present dispute, relates to the affiliation of the 1<sup>st</sup> respondent to what I will refer as the founding church, which is headquartered in Bournemouth, England, to which the applicants appear to subscribe, and the respondents, who want nothing to do with the 'white men' from England, as it were.

[8] Without delving much into the intricacies of the matter, what will be seen is that the applicants have applied for an order winding up the 1<sup>st</sup> respondent, which I must say, was not independently represented in the

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<sup>2</sup> Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) 623 (A) at 643.

current proceedings and thus does not appear to have had a say as to the propriety or otherwise of granting the order.

[9] The applicants' claim, as stated above, that there is a deadlock in the management of the 1<sup>st</sup> respondent, thus giving rise to a need, in the circumstances, to wind up the respondent. The question is whether the applicants are correct in that regard. In their papers and brief heads of argument, the respondents adopt a totally different posture on the case, as would be expected, given the deep fissures apparent from the issues raised in the dispute.

[10] In the first place, the respondents argue that this is not a proper case in which the court should grant the order sought. Firstly, they argue that it is not clear from the papers, if there is indeed a deadlock, which they deny, whether same is in relation to the management of the 1<sup>st</sup> respondent or in the general meeting of the 1<sup>st</sup> respondent.

[11] The respondents further argue that in the event the court finds that there is in any event a deadlock, as alleged by the applicants, this is not a proper case for the grant of the winding up order, having regard to the 1<sup>st</sup> respondent and its core business, so to speak. The respondents further contend that even if the deadlock exists, as alleged, the court should not close its eyes to the fact that this is a case amply grounded in ecumenical underpinnings and which might lead to the court deciding ecclesiastical issues through the backdoor, as it were.

[12] In order to decide this matter, it is pertinent to first have regard to the law, which governs the application in question. Section 349(h) of the Companies Act, provides that a company may be wound up if it appears to the court that it is just and equitable to do so.

[13] The circumstances in which the court can exercise the powers conferred by the above provision, have been the subject of determination by

this court in *Bank of Namibia v Small and Medium Enterprises Bank Ltd.*<sup>3</sup> In that case, Prinsloo J held as follows:

[38] This subsection, unlike the preceding subparagraphs of s 349, postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding up.

[14] At para 39 and [41], respectively, the learned Judge continued to say the following:

[39] In the matter of *Moosa N O v Mavjee Bhawan (Pty) Ltd and Another*, Trollip J while interpreting the 'just and equitable' ground said:

"The ground relied upon for a final winding-up order is that . . . it is 'just and equitable' that the company should be wound up. That paragraph . . . postulates not facts but a broad conclusion of law, justice and equity, as a ground for winding up . . . In its terms and effect, therefore, [it] confers upon the Court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned." . . .

[41] The courts have proposed five categories of circumstances in which it would be prima facie be just and equitable to wind up a company under the provision:

- (1) Disappearance of its substratum;
- (2) Illegality of its objects and if it has a fraudulent purpose;
- (3) fraud, misconduct and oppression'
- (4) deadlock in its administration; and
- (5) irretrievable breakdown in the relationship between the shareholders of a domestic company'

[15] The upshot of the law stated above, is that in determining whether a case for winding up on the grounds of the just and equitable rule has been made, the court needs to look at the matter before it holistically and then make a judgment, not just from the facts proved, or apparent, but the court should descend partake from the reservoirs of the law, equity, justice and fairness, and then establish whether the case before court is one which resonates with an order for winding up.

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<sup>3</sup> 2018 (1) NR 183 (HC).

[16] In this regard, the court, as in many other matters, exercises a discretion that must be judicially and judiciously exercised, taking into account the peculiar circumstances of that case. There is no one size-fits-all approach to this enquiry.

[17] At para 59 of the founding affidavit, the 1<sup>st</sup> applicant states the following regarding the deadlock:

‘The “deadlock” exists on several levels, both procedurally and in respect to the day to day running of the first respondent and Church and more fundamentally in respect to the core beliefs of the members and the first respondent’s affiliation and “membership” of the international church.’

[18] I pause to observe that having regard to this paragraph, the 1<sup>st</sup> applicant appears to draw a distinction between the 1<sup>st</sup> respondent as a company as well as a Church. Secondly, it appears that the deadlock, is informed more by matters of core Christian beliefs and affiliation, which would, all things being equal, transcend the narrow confines of the 1<sup>st</sup> respondent as an entity governed by the provisions of the Companies Act.<sup>4</sup>

[19] That this is indeed the case, can be seen from paragraph 17 of the founding affidavit, where the 1<sup>st</sup> respondent states that, ‘This application is brought in terms of section 349(h) Companies Act. The applicants seek an order winding up the first respondent, by virtue of this being just and equitable, due to a deadlock, which currently exists, (predominantly in respect to the leadership of the church) between the applicants and the second to seventh respondents.’ (Emphasis added).

[20] It becomes abundantly clear, on a deeper reflection, that the issues at play, at the root, also involve matters of an ecumenical nature, which if properly considered in the context of the instant case, were not ever

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<sup>4</sup> New African Methodist Episcopal Church in the Republic of Namibia v Kooper (A293/2013) NAHCMD 105 (29 April 2015).



contemplated by the Legislature, as being the legal basis or part of the bases for issuing a winding-up order under the just and equitable in ordinary company law parlance or setting.

[21] In *Zhau v Erf One Eight One Eight Five Three (CC/2007/000710 Klein Windhoek Property CC*,<sup>5</sup> the court helpfully considered the principles applicable to winding up of a company and stated in part at para [23]:

‘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 shareholders, usually in a private company, who hold equal voting shares or rights and have irreconcilably fallen out.’

[22] I am of the considered view that the numbers of directors mentioned by the court above need only be two, but may be a little more and still constitute a proper case in which to issue the winding up order. In this particular case, it must be mentioned that the 1<sup>st</sup> respondent is not just an ordinary company, floated to offer goods and services, or to be involved in one or other branch of commerce in the classical sense.

[23] According to the memorandum of association, the 1<sup>st</sup> respondent sole purpose, main business and object is couched in the following language:

‘Rendering cultural and religious services and/or activities to the congregation of the One Body Apostolic Faith Church and all objects ancillary thereto.’

[24] This provision accordingly lends credence to the conclusion reached above that the 1<sup>st</sup> respondent, although registered as a company, is not in fact a company in the classical sense involved in ordinary commerce. It is in fact a

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<sup>5</sup> (A 342/2014) [2017] NAHCMD 100 (28 February 2017).

religious organisation tasked with meeting the cultural and religious needs and aspirations of the congregation.

[25] In this regard, it would seem to me, the matters at stake extend beyond the narrow confines of the personal interests of applicants and the respondents, cited above. They appear to affect a number of people who are ordinary congregants and it would, in my considered view be irresponsible of this court to deal with the matter as a normal commercial dispute that afflicts the 1<sup>st</sup> respondent's boardroom only.

[26] The burning issue of leadership, affects some general members of the worshipping public, who may tomorrow attend the sanctuary and find that everything has been folded as a result of an order of court winding up the 1<sup>st</sup> respondent, thus depriving them, perhaps without personal notice, that their rights to cultural and religious nourishment enshrined in the 1<sup>st</sup> respondent's memorandum of association stand in serious jeopardy.

[27] Although it is apparent that there is a deadlock, having regard to the nature of the dispute, the parties involved and the ultimate consequences of issuing a winding up order, I am of the considered view that in exercising the court's powers properly and judicially, this is not a proper case in which the demands of the law, justice and equity, can be said to favour the granting of a winding up order.

[28] I have read the papers filed by both parties and it is plain that some length that has been gone into in trying to resolve the issue internally, which efforts have unfortunately been unsuccessful so far. It must be stated that the court, albeit being the body primarily tasked with resolving disputes, does not always provide a panacea for all human ills, particularly those whose DNA is ecclesiastical in nature.

[29] In this regard, even the court does not deal with some disputes, at least not initially, as these are diverted to mediation and at times to arbitration. The court would, in this regard, implore the parties involved in the dispute, to

engage institutions or persons who could assist the parties chart a way forward for the ordinary Namibians who have affiliated to the 1<sup>st</sup> respondent to continue receiving the spiritual and cultural inspiration that the 1<sup>st</sup> respondent was designed to offer.

[30] At the heart of the matter and its possible resolution, must not sit the personal egos of the parties cited in this matter but the interests of the 1<sup>st</sup> respondent, not just as a company, but as an ecclesiastical body, whose core mandate is to provide, amongst other things, spiritual and cultural nourishment of the congregants, regardless of which side of the divide the congregants happen to fall.

### Conclusion

[31] Clearly, having regard to the entire matter and its mechanics, so to speak, this is a matter, even if one were to agree with the applicants as I have, that there is a deadlock, winding up of the 1<sup>st</sup> respondent on the basis of the just and equitable principle is not an appropriate remedy that would meet the ends of justice, equity and fairness in the present circumstances.

### Order

[32] In view of what is stated above, I am of the view that the applicants, upon a consideration of the matter and upon proper exercise of the court's discretion, are not entitled to the order prayed for. In the premises, the following order is considered appropriate:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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T.S Masuku  
Judge

## APPEARANCES:

APPLICANTS: JP. Ravenscroft-Jones  
Instructed by: Sisa Namandje & Co. Windhoek.

RESPONDENTS: T. Muhongo  
Instructed by: Dr. Weder, Kauta & Hoveka Inc. Windhoek.