UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG | WITS SCHOOL OF LAW

# LIQUIDATION OF SOLVENT COMPANIES BASED ON A DEADLOCK BETWEEN DIRECTORS AND SHAREHOLDERS

*By*


## MUNYAI UNARINE GIFT

1728331


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Supervisor: Associate Professor MC Marumoagae

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## DECLARATION

I, MUNYAI UNARINE GIFT (1728331) declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

Signature: *Munyai UG*

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## ABSTRACT

This research report discusses challenges experienced by solvent companies when there are deadlocks between directors or shareholders leading to the liquidation of these companies. This report illustrates that currently, section 81(1)*(d)* of the 2008 Act only offers liquidation of solvent companies as a sole mechanism to unlock deadlocks. Further that, the 2008 Act prohibits courts from crafting remedies they consider appropriate to unlock deadlocks between company directors and or shareholders.

This report argues that the 2008 Act is not adequately placed to assist directors and shareholders to unlock deadlocks that can lead to the liquidation of their companies. In line with the Canadian model relating to shotgun provisions, this report proposes the amendment of section 81(1) of the 2008 Act to grant courts powers to craft remedies that they consider appropriate to unlock deadlocks between company directors and or shareholders.

**TABLE OF CONTENTS**

## I INTRODUCTION

In South Africa, two different pieces of statutes regulate the liquidation of companies depending on whether the entity being liquidated is solvent or insolvent.[1] The 2008 Act regulates the liquidation of solvent entities. The applicable parts of the repealed 1973 Act govern the liquidation of insolvent entities. Liquidation of insolvent companies has received some judicial and academic attention.[2] There are, however, areas of concern that merits scholarly attention, such as the application of the just and equitable concept in the winding up of solvent companies.[3] Particularly when there is a deadlock between company directors that shareholders cannot resolve. This raises a fundamental question of whether the current legal framework adequately provides an enabling environment for the resolution of disputes between directors and /or shareholders that lead to deadlocks.

This research report discusses how the 2008 Act deals with deadlocks that lead to the liquidation of solvent companies. In particular, this report illustrates that there are instances where irreconcilable disagreements between directors can lead to the liquidation of such companies. Particularly when these directors are not willing to compromise. The purpose of this report is to evaluate whether the 2008 Act is adequately placed to assist directors and shareholders to unlock deadlocks that can result in liquidations of these companies. To also critically assessing whether section 81(1)(*d*) of the 2008 Act enables shareholders to break these deadlocks.

The discussion is structured as follows: Part 2 provides a conceptual framework for the winding up of solvent companies in South Africa. Part 3 evaluates circumstances that give rise to deadlocks. Herein, the importance of the just and equitable principle in the liquidation of solvent companies will be discussed. Part 4 deals with cases where South African courts have determined whether solvent companies should be

[1] These two statutes are Companies Act 71 of 2008 (hereafter 2008 Act) and the repealed Companies Act 61 of 1973 (hereafter 1973 Act), some parts are still applicable. See also Farouk HI Cassim (ed), Maleka Femida Cassim & Rehanna Cassim *The Law of Business Structures* (2012) 496.

[2] See generally *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 2 SA 518 (SCA). See also CT Maloka and S Muthugulu-Ugoda '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)' (2016) 19 *PELJ* 1 at 2.

[3] *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting Investment (Pty) Ltd* 2014 (5) SA 1 (SCA) para 12 and *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) para 3.

liquidated based on deadlocks between directors. Part 5 evaluates how Canada has addressed solvent companies' deadlocks with a view to assess lessons (if any) that can be drawn from its experiences. Throughout the report recommendations for law reform will be made.

## II WINDING UP SOLVENT COMPANIES

### *(a) Overview*

Sections 79 to 81 in Part G of Chapter 2 of the 2008 Act regulates the liquidation of solvent companies. The term liquidation is not defined in the 2008 Act.[4] South African courts have attempted to describe what liquidation means in South African context. In *Richter v Absa Bank Limited*, Dambuza AJA held that liquidation means '…the exhaustive process by which a company is brought to an end, and the assets thereof, if any, are redistributed'.[5] In *Valley View Homeowners' Association v Universal Pulse Trading 27 (Pty) Ltd*, the court endorsed Blackman's definition that liquidation is the procedure that precedes the ending of a company whether insolvent or not.[6] In *Valley View Homeowners' Association*, it was suggested that winding up and liquidation have the same meaning or leads to the same result, the ultimate closure of the company.[7] The linguistic differences (if any) between these terms is irrelevant for the purposes of this report, depending on context, these phrases will be used interchangeably to refer to the process that leads to the lawful termination of companies.

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[4] Section 1 of the 2008 Act. Corporate insolvency related provisions in Chapter 14 of the 1973 Act also does not refer to the term 'liquidation' but the phrase 'winding up'.

[5] *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100 (01 June 2015) para 9.

[6] *Valley View Homeowners' Association v Universal Pulse Trading 27 (Pty) Ltd* Case NO:70639/2010 para 8.

[7] See Clement Marumoagae and Kgosi Mokgoetsi 'When Can Business Rescue Application Suspend Liquidation Proceedings in South Africa? (2021) 10 *Interdisciplinary Journal of Economics and Business Law* 200 at 203-204, who argued that the corporate insolvency related provisions in Chapter 14 of the 1973 Act did not refer to the term 'liquidation' but the phrase 'winding up'. Thus, the need to distinguish between these two phrases was never accorded serious attention by judges and academics alike. The cases reviewed when writing this report indicate that before the enactment of the 2008 Act, courts used and referred to liquidation and winding up interchangeably, giving the impression that these phrases were regarded as synonymous. For example, Corbett JA in *Kalil v Decotex (Pty) LTD and another* [1988] 2 ALL SA 159 (A) 4-5, held that winding up means liquidation, it appears as if he considers the differences between these two phrases as immaterial. See also *Richter* supra note 5 para 11 and *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another 1980 (2) SA 636 (A)* 660, where the court endorsed dictionary definition that winding up is 'the process of closing a business that is not successful and has debts that it cannot manage'.

Neither the 2008 Act nor the 1973 Act adequately distinguishes between 'solvent companies' and 'insolvent companies'.[8] A solvent company is a company that is able to pay its debts when they fell due in the ordinary course of the business.[9] King AJ in *Standard Bank of South Africa Ltd v R-Bay Logistics*, held that the use of term 'solvent' demonstrates that the company should at the very least, be commercially solvent prior to any winding up in terms of Part G of the 2008 Act.[10] The SCA in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd,* held that a solvent company refers to a commercially solvent company while insolvent company refers to a commercially insolvent company.[11] Commercial insolvency refers to a situation where companies are unable to pay their debts when they fall due, even though their assets may still be exceeding their liabilities.[12] According to Luis and van der Linde, commercial insolvency means the state of illiquidity where companies are unable to pay their debts when they are lawfully claimed by their creditors.[13] In *First Rand Bank Ltd v Lodhi 5 Properties Investment CC and Another*, it was held that for purposes of section 81(1) of the 2008 Act, a company must not only be commercially solvent but also factually solvent.[14] The phrase factual solvency connotes a situation where company's assets exceed its liabilities, fairly valued.[15] Although, factual solvency is a factor to be considered, it is not an independent test to determine solvency of a company.[16] This is because companies are frequently factually solvent while it is also clear that they are unable to pay their debts when they fall due.[17]

To determine whether the company's assets exceed its liabilities, such company's balance sheet must be assessed.[18] First, the solvency test assesses whether the

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8 *Boschpoort* supra note 2 para 14.
9 Eberhard Bertelsmann, Walter Herbert & Adam Harris *Mars the Law of Insolvency in South Africa* 9ed (2008) 2.
10 *Standard Bank of South Africa Ltd v R-Bay Logistics CC* (4165/2012) [2012] ZAKZDHC 69 para 26.
11 *Boschpoort* supra note 2 para 21.
12 Howard Chitimira 'Some Thoughts on the Meaning and Application of Commercial Insolvency in Winding-Up Proceedings Involving Contingent Creditors: *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA)' 2017 *Obiter* 446 at 449.
13 SM Luiz and KE Van der Linde 'Trading in insolvent circumstances: its relevance to sections 311 and 424 of the Companies Act' (1993) 5 *SA Merc LJ* 230 at 231-233.
14 *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC and Another* 2013 (3) SA 212 (GNP) para 30.
15 *Boschpoort* supra note 2 para 8.
16 Ibid paras 23 and 25.
17 Ibid paras 8, 16 and 23.
18 A balance sheet is also known as solvency test-it is designed to determine the net assets (total value of company's assets minus its liabilities) or liabilities at specific moment in time.

company's assets exceed its liabilities.[19] Second, the company's liquidity must be examined by evaluating whether the company can satisfy its debts when they become due.[20] This exercise calls for the utilisation of the solvency and liquidity test as provided for in section 4 of the 2008 Act. The solvency and liquidity aspects cannot be segregated from one another because they are conjoined.[21] Solvency and liquidity test is founded on the rule that as long as the test is satisfied, creditors cannot be subjected to any prejudice if the capital of the company is being utilised for any purposes other than for ordinary business purposes of such entity.[22] It involves factual and commercially solvency status of the company. The relevancy of application of solvency and liquidity test to liquidation of companies has been subject of litigation.[23]

In *Firstrand Bank Ltd v Wayrail Investments (Pty) Ltd*, Vahed J held that the solvency and liquidity test can only be applied in circumstances concerning loans or any financial assistance to directors of the company, distributions, capitalisation of shares and proposals for merger.[24] Vahed J also held that solvency and liquidity test can be applied to situations where liability of directors is attributed to failure to vote against distributions.[25] He further held that the test can be applied to situations whereby a court ordered that a person should be placed under probation and to cases that deal with dissenting shareholders appraisal rights.[26] The solvency part of this test can provide a clear indication whether a company can potentially be liquidated, which is not the case in relation to the solvent companies.

*(b) Solvent companies*

Under the 2008 Act, a solvent company can be voluntarily and compulsorily liquidated. Solvent companies can be liquidated by creditors and members voluntary liquidation

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[19] Joshua Jasha Kadisdh 'Possible Manipulation of the Solvency and Liquidity Test under the Companies Act makes the test an ineffective Alternative to the Maintenance of Capital Principle' (2020) 6 *Journal of Corporate and Commercial Law and Practice* 40 at 43-44.
[20] Ibid at 44.
[21] *Firstrand Bank Ltd v Wyrail Investments (Pty) Ltd* [2013] 2 ALL SA 295 (KZD) para 22.
[22] *Capitex Bank Ltd v Qorus Holdings Ltd* 2003 (3) SA 302 (WLD) 308I-309A; F.H.I Cassim and Rehana Cassim 'The Capital Maintenance Concept and Share Repurchases in South Africa' 2004(15) *International Company and Commercial Law Review* 188 at 188.
[23] *Firstrand* supra note 21 paras 13-16.
[24] Ibid para 24 -34.
[25] Ibid.
[26] Ibid.

pursuant to the adoption of a special resolution.[27] Creditors voluntary liquidation can be lodged at the High Court by directors or creditors of solvent companies once the resolution has been adopted.[28] Members or shareholders of the solvent company can voluntarily apply for liquidation provided that the resolution to liquidate their company was adopted.[29] Section 81 of the 2008 Act provides that a solvent company may be wound up compulsorily if: the board of the company adopted a special resolution to have the company liquidated by the court order or have instituted an application to have their voluntary liquidation finalised by the court.[30] The application is initiated by one or more creditors of the company.[31] Shareholders of the company may, with the permission of the court, institute an application to liquidate a company.[32]

There are several reasons that can lead to the liquidation of solvent companies. One of the reasons may be where shareholders are equally divided and failed '…for a period that includes at least two consecutive annual general meetings dates, to elect successors to directors whose terms have expired'.[33] Solvent companies can also be liquidated where it is otherwise just and equitable to do so.[34] Just and equitable is a distinct ground for the liquidation of solvent companies and not an additional requirement.[35] The application for the liquidation of companies based on the just and equitable ground is predominantly brought in the alternative to other grounds in section 81 of the 2008 Act. In *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*, Coetzee J stated that just and equitable ground is a special ground under which only specific aspects of the way a company is managed can be scrutinised to an extent of asking the court to liquidate the company.[36] Finally, directors or shareholders of the company can also lodge an application to liquidate a company when there is a deadlock between directors in respect of the management of the company.[37]

[27] Howard Chitimira 'Overview Analysis of the Voluntary Winding up of Solvent Companies under the Companies Act 71 of 2008' (2019) 15 *Acta Juridica* at 54 to 68.
[28] See Section 79(1)*(a)*(ii) read with section 80(1)- (2) of the 2008 Act.
[29] See Section 79(1) *(a)*(i) read with Section 80 (1)-(2) of the 2008 Act.
[30] Section 81*(a)* of the 2008 Act.
[31] Section 81*(c)* of the 20008 Act..
[32] Section 81*(e)* of the 2008 Act.
[33] Section 81(1)*(d)*(ii) of the 2008 Act.
[34] Section 81(1)*(d)*(iii) of the 2008 Act.
[35] *Trade First 2124 CC v ENM Trading CC* [2019] JOL 46164 (FB) para 14 and Pennington Robert, R *Company Law* 4ed (1979) 461.
[36] *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (WLD) at 349I.
[37] Section 81*(d)* of the 2008 Act..

### (c) The meaning of deadlock

The term deadlock is not expressly defined in the 2008 Act and 1973 Act. In terms of the Shorter Oxford English Dictionary, a deadlock is a 'condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement or equal opposing forces'.[38] This definition has been endorsed by Malan JA in *Thunder Cats*.[39] There appears to be a bifurcation between two concepts of deadlock, complete deadlock and deadlock principle.[40] Binns-Ward J in *Cilliers NO and Others v Duin & See (Pty) Ltd,* stated that complete deadlock can be referred to as deadlock in a strict literal sense and applies to cases that involves pure form of deadlock.[41] Further that the equal split of voting power between directors and /or shareholders of the paralysed company makes it difficult to pass resolutions that are vital to the success of the company.[42] He further held that the deadlock principle is a deadlock in wide sense and attributed to consequences of destruction of relationship of trust and confidence between directors who constitute the board of the company and or shareholders.[43]

For solvent companies to be liquidated based on the deadlock, they must be commercially and factually solvent. Particularly, where there is a deadlock between directors, and shareholders having failed to resolve such deadlock.[44] There should be irreparable harm to the company that resulted or may result from such deadlock. The company's ability to conduct its business to the advantage of shareholders generally should also be diminished because of the deadlock. The liquidation application can also be brought when the deadlock led to the destruction of a relationship of trust and confidence between shareholders of the company.

[38] The Shorter Oxford English Dictionary 6 ed 2007 (1) at 611.
[39] *Thunder Cats* supra note 3 para 10. See also *Malgas v Onega Investment CC and Others* (1003/2020) [2021] ZAECGHC 15 (18 February 2021) para 27 and Gabriel Smit 'Winding-up solvent companies in deadlock' 2021 *Without Prejudice* 7 at 8.
[40] *Cilliers NO and Others v Duin & See (Pty) Ltd* (12442/2011) [2012] ZAWCHC 12 para 5.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Yaniv Kleitzman and Standre Bezuidenhout 'Deadlock on deadlocks' 2014 *Without Prejudice* 22 at 23.

## III CIRCUMSTANCES THAT GIVE RISE TO SOLVENT COMPANIES DEADLOCKS

### *(a) Section 81(1)(d) of the 2008 Act*

Section 81(1)*(d)* of the 2008 Act makes provisions for the board of the company or shareholders to initiate liquidation proceedings of solvent companies at the High Court when there is a deadlock between directors or when it is otherwise just and equitable to liquidate the company. The grounds upon which this application can be brought are discussed below:

### *(b) Management and failure to break the deadlock*

First, an application for the liquidation of a solvent company should be brought when the deadlock relates to the management of the company.[45] There must be a deadlock between company directors. This refers to the deadlock which results in the administration of the company's affairs because the voting power at shareholders or directors meeting is an equal or nearly equal split between dissenting groups, making it difficult to break the deadlock without ordering liquidation of the company.[46] This is usually the case where there are only two directors or shareholders in private companies with equal or nearly equal split of both voting power and control and any amicably intervention and attempt to resolve such deadlocks has proved futile.[47] Shareholders must have tried to resolve the deadlock before an application for liquidation is brought by one or more directors or shareholders of the company. There must be an irreparable harm to the company resulting or which may result from the deadlock.[48] The deadlock must have made it difficult for the company to conduct its business.[49] In attempting to resolve the deadlock, shareholders may consider removing obstructive directors in terms of section 71 of the 2008 Act. This may, however, be difficult when directors sought to be removed are also shareholders of the company. In *Malgas v Onega Investments CC and Others*, shareholders were not noticeably different from the board and most of the important business decision could

[45] Section 81(1)*(d)*(i) of the 2008 Act.
[46] *Rand Air* supra note 36 at 349G – 350H.
[47] Ibid.
[48] Section 81(1)*(d)*(i) (aa) of the 2008 Act.
[49] Section 81(1)*(d)*(i) (bb) of the 2008 Act.

only be taken with the obstructive directors.[50] Any attempt to mediate was futile and it was very clear that other remedies in the 2008 Act would not break the deadlock between directors except an order to liquidate the company.[51]

*(c) Shareholders deadlock*

A liquidation application can also be made where shareholders are deadlocked.[52] This refers to deadlock which occurs at shareholders meetings where shareholders have equal voting power and cannot agree on the position to be taken. Such disagreements should have lasted for at least two consecutive annual general meetings and led to the failure to elect successors to replace those whose terms have lapsed.[53] When the shareholder applies for liquidation, they must have acted in such capacity for a period of at least six months immediately before the date of the application to be eligible to bring such application to the High Court.[54] There are cases where a person becomes a shareholder by virtue of acquiring shares of another shareholder or through 'the distribution of the estate of a former shareholder'.[55] For this type of shareholder to have *locus standi* to bring an application. They must have acted in such capacity for a combined period of at least six months immediately prior to the date of the liquidation application.[56] Conversely, a shareholder who fails to meet any of these requirements would not qualify to bring the liquidation application under this heading.[57]

*(d) Just and Equitable ground*

The just and equitable phrase is found among others in section 344*(h)* of the 1973 Act and section 81(1)*(d)*(iii) of the 2008 Act.[58] This phrase is usually used to allow courts to intervene and relieve parties from an injustice and inequality.[59] The just and equitable ground can be described as circumstances that renders it necessary to wind

[50] *Malgas* supra note 39 paras 4-7.
[51] Ibid paras 10, 12 and 14.
[52] Section 81(1)*(d)*(ii) of the 2008 Act.
[53] Section 81(1)*(d)*(ii) of the 2008 Act.
[54] Section 81(2)*(a)* of the 2008 Act.
[55] Section 81(2)*(b)*(i) and (ii) of the 2008 Act.
[56] Section 81(2)*(b)* of the 2008 Act.
[57] Section 81(2) of the 2008 Act.
[58] The just and equitable words were also included in South African Company's statutes enacted prior to the 1973 Act and the 2008 Act. These words also form part of section 172(1)*(b)* of the Constitution of the Republic of South Africa, 1996.
[59] *Ebrahimi v Westbourne Galleries Ltd* 1972 2 ALL ER 492(HL) at 500A-H.

up companies.[60] Coetzee J in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty)* cited five broad categories that may make it just and equitable to winding up companies: the loss of the company's substratum, illegality of objects and fraud committed in relation therewith, deadlock in the management of company's business and where shareholders are deadlocked in voting power, oppression and grounds akin to that of dissolution of the company.[61]

Complete deadlock cases are covered by Coetzee J's third category. He opined that complete deadlock is deadlock which results in the management of companies' affairs, because the voting power at shareholders or directors meeting level is so equal or nearly equal split between dissenting groups, making it extremely difficult to break the deadlock without ordering liquidation of the company.[62] Malan JA in *Thunder Cats Investment 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd* stated that section 81(1)*(d)*(i) and (ii) of the 2008 Act has codified this position and their application may be extended.[63] He further opined that there is no advantage in describing sections 81(1)*(d)*(i) and (ii) of the 2008 Act as cases of complete deadlock.[64] The deadlock principle appears to be covered by Coetzee J's remaining categories of the just and equitable ground. The deadlock principle appears to be an all-encompassing term as it has been used as a steam engine to cover various grounds in South Africa.[65] It is usually used in cases where the deadlock is a consequent of internal factors. If a shareholder wrecks that personal relationship through wrongful or improper conducts that are prohibited by the arrangement, other shareholders can make the liquidation application on the basis that it is just and equitable to liquidate the company as if they were partners in the liquidation of partnership.[66] In essence, liquidation application based on the deadlock principle relates to the breakdown of personal relationship which results in lack of cooperation between directors and or shareholders. To succeed with this claim, it is not necessary

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[60] *Rand Air* supra note 36 at 349H.
[61] Ibid at 349G – 350H.
[62] Ibid.
[63] *Thunder Cats* supra note 3 para 17.
[64] Ibid.
[65] Kleitzman op cit note 44 at 23 and *APCO Africa (Pty) Ltd v APCO Worldwide Inc 2008* (5) SA 615 (SCA) [2008] 4 All SA para 19.
[66] *Moosa NO v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 (T)* at 137. In *APCO* supra note 65 para 21 and 30. In *Lawrence v Lawrich Mototors (Pty) Ltd* 1948 (2) SA 1029 (W) at 1032-33 where there were only two shareholders of the company and it was proved that the other shareholder committed adultery with the wife of the other and such wrecked the personal relationship between them.

to establish existence of complete deadlock. It is sufficient to establish that due to a particular conduct there is no chance of running the company with cooperation through majority votes.[67] The importance of the distinction (if any) between complete deadlock and the deadlock principle is to determine whether the deadlock at directors or shareholders level is caused by the inability to take decisions and or internal factors related to the management of the company. For purposes of this distinction, the former can be termed a formal deadlock while the latter a substantive deadlock.

Friedman AJP in *Pienaar v Thuso Foundation and another* stated that 'by their very own nature, the just and equitable words are incapable of an all embracing and exhaustive definition'.[68] According to Friedman AJP the word 'just' means among others correct, reasonable, appropriate and the word 'equitable' means among others fair, reasonable, right.[69] He also opined that the court in deciding whether to wind up the company, it is guided by both broad conclusions of the law, justice and equity.[70] It is important for the court to pay attention to competing interests and decide on the premise of judicial discretion which is founded on justice and equity.[71] Friedman AJP opined further that the power of the court to wind up the company on the basis that it is just and equitable to do so is a power that is not confined to the grounds of the same class as those enumerated in the preceding paragraphs *(a)*-*(g)* of section 344*(h)* of the 1973 Act.[72] In *Budge NO and Others v Midnight Storm Investments 256 (Pty) Ltd*, the court was tasked with whether the application of section 81(1)*(d)*(iii) of the 2008 Act should be construed in a bounded manner and limited to strict categorial referred to in the preceding sections 81(1)*(c)* and 81(1)*(d)* of the 2008 Act.[73] The applicants relied in *Muller v Lilly Valley* where Weiner J accepted that the legal basis for liquidation order under section 344*(h)* of the 1973 Act is the same as in section 81(1)*(d)*(iii) of the 2008 Act.[74] As a consequent, the applicant shareholder based their case on circumstances that justified the dissolution of partnership, particularly that it may be just and equitable to liquidate the company because of justifiable lack of

[67] In *APCO* supra note 65 para 30.
[68] *Pienaar v Thuso Foundation and another* 1992 (2) SA 552 (BG) at 578J.
[69] Ibid at 580E.
[70] Ibid at 580G.
[71] Ibid.
[72] Ibid at 579A.
[73] *Budge* supra note 3.
[74] *Muller v Lilly Valley (Pty) Ltd* [2012] 1 All SA 187 (GSJ) paras 1 and 2.

confidence in the administration of the company.[75] On the other hand, the respondent shareholder submitted that section 81(1)*(d)*(iii) of the 2008 Act should be construed strictly in line with sections 81(1)*(c)* and 81(1)*(d)* of the 2008 Act.[76] Meyer J accepted the applicant shareholder's argument. In deciding the matter, Meyer J held that the application of section 81(1)*(d)*(iii) of the 2008 Act to situations provided for in section 81(1)*(c)* and to deadlock categories would render provisions of subsections 81(1)*(d)*(i) and (ii) of the 2008 Act impotent because the applicant who cannot meet the requirements of those sections would still be able to rely on the judicially developed category which is an integral part of the just and equitable ground for liquidation in terms of section 81(1)*(d)*(iii) of the 2008 Act.[77] He stated that the application of section 81(1)*(d)*(iii) of the 2008 Act should not be construed strictly because the specific words of sections 81(1)*(d)*(i) 81(1)*(d)*(ii) of the 2008 Act merely indicate instances of deadlocks but do not constitute an exhaustive list.[78] Strict categorial application of the just and equitable principle would not conform with the legislature's object of adopting the same interpretation that has been given to the just and equitable phrase forming the basis for the liquidation of the companies by courts over many years when the same words were made part of section 81(1)*(d)*(iii) of the 2008 Act.[79] The use of the phrase 'or otherwise' in section 81(1)*(d)*(iii) of the 2008 Act does not limit the meaning given to the just and equitable words. The phrase 'or otherwise' must be interpreted so as to allow courts to extend the grounds for liquidation of companies to include other cases of deadlocks.[80] Meyer J further held that the text of the legislation employed in section 81(1)*(d)*(iii) of the 2008 Act is clear and explicit, and effect should be given to it.[81] It is only in cases of the deadlock category where the applicant cannot rely on the broad just and equitable ground for liquidation of solvent companies enumerated in section 81(1)*(d)*(iii) of the 2008 Act.[82] Subject to this qualification, the legal basis for liquidation of solvent companies under section 81(1)*(d)*(iii) of the 2008 Act mirrors the just and equitable ground enumerated in section 344*(h)* of the 1973 Act. The SCA in *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic*

[75] *Budge* supra note 3 para 3.
[76] Ibid.
[77] Ibid para 10.
[78] Ibid.
[79] Ibid para 11.
[80] Ibid para 12.
[81] Ibid.
[82] Ibid.

*Prospecting Investment (Pty) Ltd*, accepted Meyer's J reasons except the fact that section 81(1)*(d)*(iii) of the 2008 Act modified the judicially developed deadlock category.[83] Malan JA held that management and failure to break shareholders deadlock can also constitute a ground for liquidation on the basis that it is just and equitable because they have an effect which renders it just and equitable.[84]

There are various circumstances that may render it just and equitable to liquidate a solvent company. Levin J in *Palmieri v AC Paving Co Ltd*, held that it will be just and equitable where there is a deadlock and there are no effective and appropriate remedies to liquidate a solvent company.[85] Levin J is also of the view that where there is a split of shares and control, it will be just and equitable to liquidate a solvent company.[86] Put differently, if the deadlock has resulted in loss of co-operation between shareholders with equal control and shares of the company and the board has become dysfunctional, it ought to be liquidated as soon as possible.[87] In *Robson v Wax Works (Pty) Ltd,* it was proved that shareholder and the director of the company with equal voting rights were unlawfully barred from participating in the management of the corporation leading to a breach of shareholders agreement which, justified the liquidation of the company on the just and equitable ground.[88] This means that the company could no longer be managed in accordance with the shareholders agreement (through majority votes) and was, no longer what the parties contemplated when they entered into agreement.

It has also been held that were there are fundamental disagreements regarding the management of the company, it will be just and equitable to wind up a solvent company.[89] If the persistent disagreements between directors hinders the company's ability to take decisions that are commercially necessary for the success of the company, it ought to be liquidated. The SCA in *Thunder Cats Investment 92 (Pty) Ltd*

[83] Ibid paras 13-14.
[84] *Thunder Cats* supra note 3 para 14.
[85] *Palmieri v AC Paving Co Ltd* 1999 48 BLR (2d) 130 (BCSC) para 28. Dosios AJ in *Rajay v Zwene Insurance Brokers (Pty) Ltd* 2019 JDR 1946 (GJ) para 34 accepted Levin J's approach. Vermeulen AJ in *Thunder Cats* supra note 3 para 2 stated that where there is a deadlock at directors level and there is absence of any other remedy to resolve such a deadlock, liquidation of such company on the basis of just and equitable ground is the only feasible order
[86] *Palmieri* supra note 85 para 28.
[87] Binns-Ward J in *Cilliers* supra note 40 para 5 stated that where because there is equal split of shareholding, the directors are unable to make decisions commercially that are necessary for success of the company, such justifies liquidation of the solvent company.
[88] *Robson v Wax Works (Pty) Ltd* 2001 (3) SA 1117 (C) at 1126.
[89] *Palmieri* supra note 85 para 28

concluded that serious and continuous disagreements had an impact on the normal operation of the company so as to weaken the attainment of its economic ends, it was just and equitable to liquidate or dissolve the company.[90] Finally, Levin J opined that where the deadlock seriously interferes with normal operations of the company, it will be just and equitable to liquidate such a company.[91] Levin's J characterisation of circumstances that give rise to solvent companies deadlocks appears to be exactly the same as the approach followed by South African courts in respect to liquidation of solvent companies under the just and equitable ground.[92]

It is trite that an applicant who applies for an order to liquidate a solvent company on the just and equitable basis, should approach the court with clean hands.[93] This means that an applicant should not be entirely responsible or having colluded to bring the undesired state of affairs of the solvent company that he or she asserts that it is just and equitable to be liquidated. The basis of the doctrine of clean hands is to preclude a party who is responsible for such state of affairs of the company from seeking an order to liquidate a company.[94] It appears as if unclean hands is not an absolute bar, particularly in cases where both parties contributed to state of affairs that is asserted to be just and equitable to liquidate a solvent company.[95] Fault on the part of any party does not necessarily preclude the court from exercising its discretion to liquidate a company.[96] Vermeulen AJ held that the blame in destruction of the relationship between parties could not be dispensed with totally accuracy.[97] However, the extent of the blameworthiness of the respondents is no way greater than that of appellants.[98] He further held that an equilibrium dispensation of blameworthiness might be somewhat generous to the appellant but, such is not entirely an injustice to the respondents.[99] In *Du Plessis v Bonnox Proprietary Limited and Another*, the full bench

[90] *Thunder Cats* supra note 3.
[91] *Palmieri supra* note 85 para 28.
[92] *Cilliers* supra note 40; *Rajay* supra note 85; *Thunder Cats* supra note 3 and *APCO* supra note 65. Botes AJ in *Du Plessis v Bennox Proprietary Limited and Another (A635/2016, 48111/2014) [2019] ZAGPPHC 515 (18 April 2019)* para 28 in determining types of circumstances that makes it just and equitable to liquidate a solvent company on the basis of deadlock endorsed Levin's J ruling in *Palmieri* supra note 85*.*
[93] *Zukiswa Jafta v Ilifu Trading 330 CC* [2013] JOL 30407 (ECG) and *Thunder Cats* supra note 3 and *Ebrahimi* supra note 59 at 374.
[94] *McMillan NO v Pott and Others* [2009] JOL 23772 (WCC), 2011 (1) SA 511 (WCC) para 41
[95] *Thunder Cats* supra note 3 para 27.
[96] Ibid para 28.
[97] Ibid para 29.
[98] Ibid.
[99] Ibid para 29.

held that since both parties are equally at fault, the doctrine of clean hands and its policies are unapplicable, the best interests of the company will be assessed to determine whether the company should be liquidated on the just and equitable ground to liquidate a solvent company.[100]

## IV LIQUIDATIONS DUE TO DEADLOCKS

South African courts have been called upon to determine whether solvent companies should be liquidated based on the deadlock between directors. In *Thunder Cats Investment*, Bosasa Operations (Pty) Ltd and Bosasa Youth Development Centres (Pty) Ltd (hereafter applicants shareholders) applied for the liquidation of Nkonjane Economic Prospecting and Investment (Pty) Ltd (hereafter the company) based on the deadlock of directors and shareholders.[101] The applicants shareholders argued that as a consequence of the deadlock, it became difficult for the board of the company to function and pass resolutions that would lead to its economic success.[102] They also contended that directors were deadlocked in relation to the management of the company and that shareholders failed to unlock the deadlock.[103] The effect of the deadlock was that the business of the company had become unmanageable and its assets could no longer be managed to the advantage of shareholders generally.[104] They also argued that the relationship between shareholders of the company had irretrievably breakdown down.[105] Hence it would be just and equitable to liquidate the company.[106]

Vermeulen AJ found that it was just and equitable to liquidate the company because of the deadlock at both levels,[107] relying on the general destruction of the relationship between the shareholders of the company.[108] It appeared to him that the company was in substance a partnership in the guise of a company.[109] He also considered the structure of the company which only had four members with equal shareholding of,

[100] *Du Plessis* supra note 92 para 38.
[101] *Thunder Cats* supra note 3 para 1-2.
[102] Ibid para 6.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid para 2.
[108] Ibid.
[109] Ibid.

twenty five percent of the issued shares per shareholder.[110] Each of these shareholders had the right to appoint directors.[111] The chairperson of the company had no casting vote and the body of shareholders could not be distinguished from that of its directors.[112] Each of these shareholders where entitled to participate in the management of the company.[113] The shareholders were barred from disposing of their shares without knowledge and consent of other shareholders.[114] The irretrievable destruction of the relationship between the applicants and respondents shareholders was so gross to an extent that it went further than impossibility to either meet or pass resolutions that are commercially necessary for the success of the company.[115] Regardless of whether the abovementioned circumstances resulted in a deadlock at directors level, Vermeulen AJ held that liquidation of the company based on the strength of lack of appropriate remedy to unlock the deadlock was an inevitable possibility.[116] He further held that the presence of the deadlock was of such a nature that it could not be precluded on the basis of unclean hands principle because all the shareholders were responsible for the management paralysis of the company.[117]

Unhappy with the High Court's order, Thunder Cats Investment and Turqouise Moon Trading 8 (Pty) Ltd noted an appeal at SCA.[118] The appellants shareholders argued that the liquidation application lodged by the respondents shareholders was based on the deadlock at both levels.[119] However, clause 8.2 of the shareholders agreement expressly excluded deadlock from constituting grounds to winding up of the company.[120] They also argued that there was no evidence to support the allegation of a destruction of relationship between shareholders of the company.[121] They further argued that the court *a quo* erred in granting the liquidation order because such order is untenable to a party responsible for events that gave rise to the application.[122] The SCA had to determine whether Vermeulen AJ correctly relied on the just and equitable

110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid.
116 Ibid.
117 Ibid.
118 Ibid para 6.
119 Ibid.
120 Ibid.
121 Ibid.
122 Ibid.

remedy with respect to a deadlock. The SCA also had to determine whether the respondent's shareholders who caused the management paralysis had the legal standing to apply for the liquidation of the company.

Malan JA accepted Vermeulen AJ ruling that in the absence of any effective remedy to resolve the deadlock at both level, liquidation of the company on the just and equitable ground was the only route to follow.[123] In addition, the actual destruction of the relationship between the parties with no hope of recovery had strengthened the court's conclusion to liquidate the company. The result of the impasse and the justifiable lack of trust between the parties has made the board to be unable to function and the company moribund strengthened the courts conclusion to liquidate the company.[124] He also accepted Vermeulen AJ finding that both appellants and respondents shareholders were responsible for the management paralysis and thereof the deadlock could not be precluded on the basis of unclean hands.[125] Malan JA further held that the shareholders had equal voting power and control concerning management of the company and without cooperation and trust, the company should be liquidated as soon as possible.[126] He therefore, concluded that it was just and equitable to liquidate the company based on these circumstances. The appeal was accordingly dismissed.

The circumstances that gave rise to the deadlock between the four shareholders of the company involve among others: lack of appropriate remedies to unlock the deadlock between them; failure of the company shareholders to resolve deadlock between the directors; the warring shareholders had equal split of shares at both board and management level;  failure of the board of the company to agree on the course of the company to function; and fundamental disagreements concerning management of the company, which included the impossibility to meet and convey meetings that were necessary for the survival of the company. Furthermore, the respondents' shareholders wished to sell their shares, convey meetings to discuss their disengagement from their respective company as well as their reasonable basis for leaving, but appellants shareholders were unwilling to meet them. The company could no longer be managed in accordance with the terms of the shareholders agreement

[123] Ibid para 2.
[124] Ibid para 7.
[125] Ibid paras 27 and 28.
[126] Ibid para 33.

as without co-operation a company that holds equal voting power and control cannot function properly. These circumstances had seriously interfered with normal business operations of the company and thereof, it ought to be liquidated.

In *Apco Africa (Pty) Ltd v Apco Worldwide Inc*, Apco Worldwide Incorporated-applicant shareholder applied to the High Court for an order to liquidate Apco Africa (Pty) Ltd (hereafter the company) based on the deadlock between the company's directors.[127] In this case, the applicant shareholder was incorporated and registered as a company in terms of laws of the State of Delaware.[128] It is one of the leading international group of companies and comprises of twenty four separate companies operating across the globe.[129] It has been in the business of public affairs and strategic communication for a period exceeding twenty years.[130] The nature of the applicant shareholder business dictates that it should secure expertise and services in different parts of the world.[131] The applicant shareholder entered into the so-called 'joint venture-partnership type of arrangement' with Arcay Communications Holdings (Pty) Ltd.[132] The respondent shareholder is registered as a private company and situated in Johannesburg.[133] Applicant and respondent shareholders agreed that their relationship was to be referred to as strategic partnership with each party conferred the right to refer itself as a 'strategic partner of another'.[134] Respondent shareholders could also describe itself as 'an Apco affiliated company'.

On 16 May 2000, the respondent and applicant shareholders formalised their working arrangement by concluding a shareholders agreement. This was done by incorporating the company as a private company with a share capital.[135] The provision of the shareholders agreement provided among others, that shareholders collectively hold all the shares issued in the company with, each shareholder holding fifty percent of the shares issued in the company.[136] The chairman of the board of directors of the company could neither have second nor casting vote.[137] The body of shareholders

[127] *APCO* supra note 65 para 1.
[128] Ibid para 2.
[129] Ibid.
[130] Ibid.
[131] Ibid para 3.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid para 4.
[136] Ibid.
[137] Ibid.

could not be separated from that of directors. Each of these shareholders were entitled to participate in the management of the company.[138] The shareholders were barred from disposing of their shares without knowledge and consent of each other.[139] They agreed to co-operate and consult each other in relation to the business of the company in good faith.[140] Further that the business of the company should be conducted with the highest degree of professionalism between the shareholders.[141]

The company was in a state of dormancy at the time the winding up application was made. It appears that since the incorporation of the company, the applicant and respondent shareholders had fundamental disagreements regarding important corporate decisions and aspects related to both performance and accountability.[142] There were many complaints from dissatisfied clients concerning the service provided by the respondent shareholder which accumulated ninety percent of the revenue generated by the company instead of sharing the profit on an equal footing with the applicant shareholder.[143] One of the directors, who was seconded by the applicant shareholder to assist in addressing the strained business relationship was antagonised by local directors of the company.[144] This director was forced to perform her duties from a separate location until the dispute between shareholders could be resolved.[145] There were several court applications brought against this director which further strained relationship of the company directors and shareholders.[146] It also emerged that applicant shareholder attempted in numerous occasions to convene a shareholder meeting but respondent shareholder failed to attend.[147] Due to the deadlock, the company could not function and directors could not take commercial decisions. The management of the company became paralysed. There was interference with the normal operations of the company which justified the court to exercise its discretion to order winding up of the company on the just and equitable ground.

[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid para 8.
[143] Ibid para 5.
[144] Ibid para 6.
[145] Ibid para 7.
[146] Ibid para 28.
[147] Ibid para 27.

The applicant shareholder alleged that there was a serious breakdown in relationship between itself and the respondent shareholder.[148] There was a strained relationship between its appointed director and the respondent shareholder's representatives.[149] They also asserted that the fact that they referred clients to the company but received virtually no benefit while the respondent shareholder appropriated all the revenue of the company for itself amounted to the irretrievable breakdown in relationship between them.[150] They argued that degeneracy in focus and interest in the business of the company by company's local director swayed in the irretrievable breakdown of the relationship between itself and the respondent shareholder's.[151] They argued that the specific reason for which the company was formed had ceased to exist. Applicant shareholder's argued that these circumstances resulted in the deadlock between the company's directors.

In High Court, Boruchowitz J accepted that the respondent directors had no intention of attending board meetings, thus frustrated the applicant directors.[152] He held that directors reluctance to attend board meetings, demonstrated that the company could not be managed according to the provisions of the shareholders agreement.[153] The obstructionist behaviour by the respondent directors related to calling of the directors meetings, clearly demonstrated that the applicant directors were barred from participating in the management of the company.[154] He was also of the view that this demonstrated a complete deadlock which could not be resolved and was not in any way affected by the clean hands principle relied upon by the respondent shareholder's.[155] Boruchowitz J ordered that the liquidation of the company be based on the just and equitable principle because of the corporate stalemate between company's directors.

Unhappy with the High Court order, Arcay Communications Holdings (Pty) Ltd noted an appeal at SCA. The main issue that the SCA had to determine was whether Boruchowitz J correctly ordered liquidation on the ground that it was just and equitable

[148] Ibid para 8.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid para 27.
[153] Ibid.
[154] Ibid.
[155] Ibid.

because of the deadlock between company directors.[156] The appellant shareholder alleged that there was a well calculated strategy devised by the respondent shareholder to wreck the company. They also submitted that the respondent shareholder's application to wind up the company was an abuse of the court's process, frivolous, vexatious and in bad faith. They further alleged that there was a systematic plan devised to hijack and take over the company and respondent's shareholder's appointed director created a springboard to configure a business in direct competition with the company. The appellant shareholder created an impression that the applicant shareholder was responsible for events that gave rise to the winding up application of the company. Further that, they did not have right to institute the application to wind up the company because of their unclean hands.

In deciding the matter, Ponnan JA accepted Boruchowitz J's findings that there was a complete deadlock as company's directors were deadlocked in the management of the company.[157] Shareholders had failed to unlock the deadlock between directors of the company.[158] He also agreed with the High Court decision that the deadlock between directors was entirely not affected by the clean hands principle relied upon by the appellants shareholder's.[159] Ponnan AJ held that there was no 'carefully planned strategy' by the respondent shareholders to wreck the company.[160] Respondent shareholder did not act in bad faith by seconding its appointed director to the company.[161] He also opined that the relationship of trust and integrity between the two shareholders was wrecked when one of the shareholders made a threat to launch criminal or civil actions and this includes prosecution for fraud.[162] He further held that the company was formed to provide client service but internal disputes, lack of trust and confidence and the consequent destruction of company's shareholders relationship has wrecked the company.[163] The company was in a state of dormancy since the respondent shareholder had ceased to refer any work to the company,

156 Ibid para 1.
157 Ibid para 27.
158 Ibid.
159 Ibid.
160 Ibid paras 23 and 25.
161 Ibid para 24.
162 Ibid para 29.
163 Ibid para 20.

thereof its substratum had disappeared.[164] These events justified winding up of the company and appeal was dismissed.

The circumstances that gave rise to the deadlock between the two company directors involve among others, lack of appropriate or effective resolutions to resolve deadlock between them. The company shareholders agreement could not provide a resolution to the corporate stalemate between the two directors. There was fifty percent equal split of shares and control between them but, the board could not agree on the course of action to allow the company to function. There were fundamental disagreements concerning management of the company. The disagreements included the impossibility to meet and convey meetings that were necessary for the survival of the company. The respondent's shareholders wished to sell their shares, convey meetings to discuss their disengagement from their respective company as well as their reasonable basis for leaving, but appellants directors were unwilling to meet them. The company could no longer be managed in accordance with the terms of the shareholders agreement. Without co-operation a company that holds equal voting power and control cannot function properly. These circumstances had seriously interfered with normal business operations of the company.

The common thread in both cases is that the respective companies were liquidated because of the deadlocks between directors and or shareholders even though they were solvent and flourishing companies. Some shareholders still wished to carry on with the businesses of the companies involved whereas others made it difficult for them to do so. The High Court and SCA were correct in ordering liquidation and dissolution of the companies in both cases.

It is submitted that the problem lies within the 2008 Act. This Act does not allow courts to craft remedies they consider appropriate to unlock deadlocks that can lead to liquidation of solvent companies once just and equitable considerations are established. The 2008 Act does not allow courts to deviate from statutory prescriptions to break the deadlocks between directors and shareholders once factual grounds for equitable considerations are proved.[165] If adequate statutory deadlock breaking

[164] Ibid paras 20, 21 and 30.
[165] Shandukani Muthugulu-Ugoda 'Identifying the missing link in section 81(1)(d)(iii) of the Companies Act 71 of the 2008: A case for innovative approach to handling solvent companies overwhelmed by deadlock' (2018) 5(1) *Journal of Comparative law in Africa* 110 at 110.

procedures were available, courts would not have ordered liquidation and dissolution of companies but made any order it considers appropriate. Section 81(1)*(d)* of the 2008 Act only offers liquidation of solvent companies as a mechanism to break deadlocks. This provision does not enable shareholders to break deadlocks that may lead to the liquidation of solvent companies.

The 2008 Act must be amended to allow company shareholders or directors to apply for relief from the deadlock when directors are deadlocked in the management or functioning of the company and shareholders cannot unlock deadlock in terms of section 81(1)*(d)*(i) and (ii) of the 2008 Act. In considering applications made by the shareholders or directors for relief from deadlocks, courts must be allowed to make interim or final orders they deem appropriate. This includes directing the purchase by any shareholder of the shares of any other provided that it is a just and equitable to do so. This will allow shareholders who wishes to carry on with the business of the company to continue. Allowing courts to have the power to remove problematic directors and shareholders should only be entertained if it is in the best interest of the company, employees and the country's economy.

## V COMPANIES TRIBUNAL

Part C of the 2008 Act deals with voluntary resolution of dispute. Section 166 of the 2008 Act deals with alternative dispute resolution (hereafter ADR). This section provides that instead of approaching a court for relief or filing a complaint, any person (hereafter a shareholder or a director) or a company entitled to seek relief or file a complaint with a commission or panel in terms of this Act can apply to the companies tribunal (hereafter the tribunal) to have such complaint or application resolved by mediation, arbitration and or conciliation.[166] Section 166 of the 2008 Act establishes the tribunal as an ADR body.[167] Matters that a shareholder or director and or a company may be entitled to apply for resolution by ADR to the tribunal are those contemplated in Part B of the 2008 Act.[168] Part B of the 2008 Act confers rights to shareholders and directors of solvent company to seek specific remedies. For example, section 163 in Part B of the 2008 Act indicates that a shareholder or a director

[166] Section 166(1) of the 2008 Act.
[167] Section 166(1)*(a)* of the 2008 Act.
[168] Part B of the 2008 Act deals with rights to seek specific remedies.

of a solvent company can apply to a court for relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company. Section 166 read with section 163 of the 2008 Act entitles a shareholder or directors of a solvent company to apply for relief in the tribunal to have the dispute that emanated from oppressive or prejudicial conduct or abuse of separate juristic personality of accompany to be resolved by ADR. Under the 2008 Act, there is no specific rights conferred to shareholders or directors of a solvent company to seek relief from deadlocks.[169] This means that when there is failure to break the deadlock, the solvent and prosperous companies ought to be liquidated because directors and shareholders of such companies cannot seek relief from either the court or the tribunal. This creates a lacuna in law and such calls for amendment of Part B of the 2008 Act. This means that section 163 of the 2008 Act should be amended to include deadlocks situations referred to in section 81(1)*(d)* of the 2008 Act.[170] For this to be possible, section 163 must be amended to address the issue of deadlocks.[171] It is recommended that the following paragraph should be inserted into the 2008 Act as section 163(1)*(d)*: 'The directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock in terms of section 81(1)(i) *(aa)* and *(bb)*(ii)'.[172] The following should also be inserted as section 163(2)*(m)*: 'An order of purchase at fair value of the shares of any shareholders'.[173] These amendments will allow shareholders or directors of a solvent company to apply to court or the tribunal for relief from deadlocks instead of seeking liquidation and dissolution of flourishing companies based on egos or greed of those who manages them. This will give directors or shareholders of solvent companies an alternative remedy to unnecessary termination of a solvent and prosperous company. This alternative remedy will be effectual and beneficial to all stakeholders involved- employees, directors and shareholders who wishes to continue with the business of the company, and this will protect investments in the economy. Directors or shareholders of a solvent and prosperous companies affected by the deadlock can lodge an application to the tribunal to have the deadlocked resolved through ADR. If the tribunal succeed in

[169] Part B of the 2008 Act does not include deadlock situations referred to in section 81(1)*(d)* of the 2008 Act.
[170] Muthugulu-Ugoda op cit note 165 at 128.
[171] Ibid.
[172] Ibid at 129.
[173] Ibid.

resolving directors or shareholders deadlock, the tribunal will record the dispute consent in the form of an order. If there is no objection and parties consent to that order, the order will be submitted to a court to be confirmed as a consent order.[174] The court that will hear an application for a consent order can make the order as agreed and proposed by parties as a court order.[175] The court can also indicate that there must be some alterations to the draft order before it can be made an order of the court.[176] Finally, the court can also refuse to make such an order.[177]

## VI CANADIAN APPROACH

### *(a) Directors or shareholders deadlock in Canada*

In Canada, directors or shareholders of a company are entitled to a determination under section 324 of the Canadian Business Corporations Act, SBC 2002, c 57 (hereafter BCA) that it is just and equitable to liquidate the respondent company due to irreconcilable deadlock between shareholders. Alternatively, to the dissolution of the company, the shareholders may seek any just and equitable remedy under section 227(3) of BCA. This includes an order to compel a shareholder to purchase partly or wholly the shares of any other shareholder (hereafter shotgun buyout) to resolve the deadlock between them.[178]

### *(b) Shotgun sales*

Shotgun sale remedy can be described as a provision designed to offer a straightforward procedure that company shareholders can invoke to emerge from corporate paralysis or deadlocks.[179] A shotgun sale usually comes about through an agreement between the company's shareholders.[180] Agreements related to shotgun

[174] Section 167(1)(*a*) and *(b)* of the 2008 Act.
[175] Section 167(2)(*a*) of the 2008 Act.
[176] Section 167(2)*(b)* of the 2008 Act.
[177] Section 167(2)*(c)* of the 2008 Act.
[178] Section 227(3)*(h)* of the BCA.
[179] Muthugulu-Ugoda op cit note 165 at 123.
[180] *Blackmore Management Inc. v. Carmanah Management Corporation,* 2022 BCCA 117 paras 6 and 34, Article 5 of the shareholders agreement in this case indicates that each shareholder of the company is entitled to force a share sale at a price and on the terms stipulated in its offer.

sale remedy can easily be referred to as shotgun clauses.[181] These shotgun clauses specify a buy-sell agreement that exists between the company shareholders that compels a shareholder to sell their shares or buy out an offering shareholders in situations where there is irremediable deadlock between shareholders of the company.[182] Shotgun sale provisions can be triggered unilaterally by a shareholder whenever there is a deadlock and compel transfer of the company's assets.[183] These provisions in the shareholders agreement are enforceable by the court. In situations of deadlocks or an impasse where the parties shareholders agreement fails to include shotgun clauses or where there is no shareholders agreement at all, courts have intervened and ordered a shotgun buyout of either party's shares, liquidation and dissolution of companies.[184]

To ensure that liquidation of solvent companies is a measure of last resort, section 227(3) of BCA confers discretionary powers on the courts to craft remedies that might have an effect of avoiding liquidation and dissolution of financially viable companies. This section states that based on an application made under section 324 of the BCA, the court may with the intent to resolve or bring to a conclusion complaint by shareholders make any interim or final order it deems fit and this includes buyout order. Section 227(3) of BCA subject to subsection 227(4) of the same Act, empowers courts to only grant such an order it deems fit if satisfied that the application was made timeously.

In *Sonderhoff v. Ellesmere Farm Corporation*, the Supreme Court of British Columbia accepted a shotgun buyout as a possibly appropriate resolution that adequately provides for the resolution of disputes between shareholders of a company overwhelmed by a deadlock.[185] The petitioner and the respondent shareholders were the only two shareholders who were also directors of their company with each holding fifty percent of shares in the company.[186] Both agreed that there is a deadlock in the management of the company which was irremediable.[187] They also agreed that the

[181] Ibid paras 7,8, 31 and 32.
[182] Ibid para 31.
[183] See: *Kang v Sachdev*, 2008 BCSC 1032; *Sonderhoff v. Ellesmere Farm Corporation,* 2021 BCSC 2311 and *Petersen v Hawley,* 2021 BCSC 2348.
[184] Ibid.
[185] *Sonderhoff* supra note 183.
[186] Ibid para 8.
[187] Ibid para 2.

court intervention was appropriate to determine whether they are entitled to seek liquidation and dissolution of the company under section 324 of the BCA and for the court, as permitted under section 324(1)*(b)* of the BCA, to grant a buyout order under section 227(3)*(h)* of the BCA.[188] The effect of section 227(3)*(h)* of the BCA is that one of the shareholder will sell their shares to the other shareholder who will become the sole owner of company and the selling shareholder would be discharged from further liabilities or claims against the company. In the original petition, the petitioner shareholder sought a dissolution and winding up order.[189] Alternatively, if the respondent shareholder does not wish for the company to be wound up, an order requiring the respondent shareholder to buyout her shares at a price and terms set by the court.[190] By consent, the petitioner shareholder alternatively sought an order which the respondent shareholder would be forced to deliver an offer to purchase her shares, if she reject that offer, she shall be compelled to purchase the respondent shareholder shares.[191] The hearing proceeded on the basis of this amendment.[192]

In deciding the matter, Saunders J opined that section 324 of the BCA entitled the petitioner and the respondent shareholders to an order liquidating and dissolving the company.[193] Alternatively, he made an order under section 227(3) of the BCA as he deemed it appropriate that the petitioner shareholder should make an offer to sell her shares wholly to the respondent shareholder in terms of section 227(3)*(h)* of the BCA.[194] If the respondent shareholder declines to purchase the shares of the company, the petitioner shareholder shall be entitled to purchase all shares of the company.[195] Saunders J held that shotgun buyout order was a just and equitable remedy because it would properly balance and protect the interests of both shareholders.[196] The shotgun buyout order successfully resolved the deadlock in the company.

In *Petersen v Hawley*, in the Supreme Court of British Columbia, the petitioner shareholder sought a liquidation and dissolution of company in terms of section 324

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188 Ibid.
189 Ibid para 4.
190 Ibid.
191 Ibid para 5.
192 Ibid.
193 Ibid para 42.
194 Ibid.
195 Ibid.
196 Ibid para 20.

of the BCA while the respondent shareholder sought 'to convert the petition to a notice of civil claim and place it on trial list'.[197] The petitioner and the respondent shareholders were the only two shareholders who were also directors and each of them hold fifty percent of shares in the company.[198] As a result of deadlock, there were serious and persistent fundamental disagreements regarding the management of the company. Shareholders or directors of the company were also unable to call shareholders or directors meeting since the conflicts commenced.[199] Further, there was serious and continuous disagreement concerning the substantive core values of the business related to the establishment and collection of rents.[200] Branch J referred to section 324(1)*(b)* of BCA which provides that on the application made by the shareholder, the court has the discretionary power to order that the company be liquidated and dissolved on the basis that it is just and equitable to do so.[201] Section 324(3)*(b)* of BCA provides that, alternatively to ordering dissolution of the company, the court may make any order it deems appropriate under section 227(3) of BCA and this includes a shotgun buyout order.[202] Branch J opined that presence of the deadlock in the management of the company is a highly relevant element in the consideration of whether to liquidate the company.[203] He also referred *to S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods* where South J.A held that once the presence of deadlock is established, the court should properly order buyout of shares if it would be a just and equitable remedy.[204]

Branch J held that the court has various available remedies to make once it has determined that it is just and equitable to liquidate a company under section 324(1)*(b)* of the BCA.[205] Section 324(3) of the BCA empowers the court to make an order that the company should be liquidated or dissolved.[206] However, it can make any order it deems appropriate under section 227(3) of the BCA instead of ordering liquidation or dissolution of the company.[207] This section has a range of available remedies. He

[197] *Petersen* supra note 183 paras 30 and 31.
[198] Ibid para 2.
[199] Ibid para*s 63 and 64.*
[200] Ibid.
[201] Ibid para *35.*
[202] Ibid*.*
[203] Ibid para 37.
[204] *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods Inc. (1991), 56 B.C.L.R. (2d) 273 (B.C.C.A.)* at 280.
[205] *Petersen* supra note 183 para 83.
[206] Ibid.
[207] Ibid*.*

stated that neither party triggered a buyout order probably because none of them had the resources to buyout shares of the other at this time.[208] Branch J held that due to the presence of the deadlock and lack of resources to buyout one another to resolve the deadlock between them, it was just and equitable to order liquidation and dissolution of the company.[209] It appears that if one of the party had resources to trigger a buyout order, Branch J would have made any order he considers appropriate, instead of ordering dissolution of the company.

Unlike in South Africa, section 324(3) of the BCA, empowers the court once it has made a finding that it is just and equitable under section 324(1)*(b)* of the BCA to order that a company be liquidated or dissolved. Ultimately, it also empowers the court to make any order under section 227(3) of the BCA it considers appropriate instead of ordering dissolution of the company. Section 227(3) of the BCA subject to section 227(4) of the same Act, empowers the court to only grant an order it deems fit if satisfied that the application was made timeously. Among broad range of available remedies, courts can make pursuant to section 227(3) of the BCA is a shotgun buyout order in order to resolve the deadlock in the company.

In South Africa, the 2008 Act does not have a similar provision, and this leads to companies that ought not to be liquidated being wind-up. It is submitted that the discretionary approach of Canada is sound can lead to not only the saving of solvent companies, but the jobs that these companies have created. It is recommended that the Canadian model in this regard offers valuable lessons for South Africa, and the 2008 Act must be amended to incorporate the shotgun buyout provisions. This will prevent unnecessary termination of a solvent and flourishing companies based on the egos or greed of those who manage them.

## VII CONCLUSION

This research report demonstrated that the 2008 Act is not adequately placed to assist directors and shareholders to unlock deadlocks that can lead to the liquidation of their companies. It also demonstrated the importance of adopting efficacy remedies other than liquidation to save solvent companies in South Africa. An efficacy remedy to save

[208] Ibid para 84.
[209] Ibid para 93.

companies paralysed by deadlocks will preserve jobs and protect investments in the economy.[210] Allowing solvent and viable companies that should not be terminated to be liquidated will have serious social and economic consequences such as loss of revenue for the country, increased unemployment and lack of development. This report recommended that the 2008 Act must be amended to allow shotgun sale remedy to save financially viable companies overwhelmed by deadlocks between directors or shareholders. Allowing courts to make any interim or final order they consider appropriate will save thousands of companies affected by the deadlocks and will mitigate the adverse impacts of massive job losses in the country's economy.

[210] Muthugulu-Ugoda op cit note 165 at 121.

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