

January 2013

"When I hear somebody sigh "Life is hard" I'm always tempted to ask "Compared to what?"

A DISPUTE AMONGST SHAREHOLDERS MAY RESULT IN LIQUIDATION OF A PERFECTLY SOLVENT COMPANY

The Companies Act (Sec 81) provides for the winding up of a solvent company by way of a court order if such a winding up is deemed to be "just and equitable". In such a case, the winding up of the company can take place if the company itself, one or more of the company's directors or one or more of the shareholders of the company have applied to the court for an order in that respect.

In a recent High Court judgment the burden of proof was highlighted and placed on a disgruntled shareholder applying for the winding up of a company in which he held a substantial portion of the shares (33%) and also acted as a director. A dispute arose between the applicant and a second shareholder relating to the acquisition of further shares which would see his shareholding exceed the 50% mark.

Unable to resolve the dispute, the applicant approached the Court for an order to liquidate the company arguing that it was "just and equitable" to do so on the basis of a breakdown of trust between the shareholders.

The Court held that to warrant the granting of the order sought, the applicant would have to prove that the breakdown was firstly, a result of the other shareholders' conduct and not his own, and secondly, due to the other shareholders acting contrary to his wishes. Accordingly, the applicant would have to prove that it was not simply a matter of the majority binding the minority.

In its judgment the court held that before it will grant the winding up of a solvent company, the party seeking such an order must, apart from it being - "just and equitable", also prove that all alternative means to resolve the dispute had been investigated and failed.

In this matter the court went on to dismiss the application on the grounds that the applicant failed to discharge the onus of proof.

Law & Laughter

ATTORNEY: The youngest son, the 20-year-old, how old is he?
WITNESS: He's 20, much like your IQ.

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THE CONSUMER PROTECTION ACT: HOW TO STOP DIRECT MARKETING

The Consumer Protection Act (“the Act”) defines the concept of “direct marketing” as approaching a person either face to face, by mail or electronic communication including by fax, telephone or SMS, for the direct or indirect purpose of promoting or offering to supply any goods or services or requesting the person to make a donation of any kind. Included in this list are catalogue marketing, coupons and customer loyalty programs.

This form of marketing is generally seen as an aggressive way of bullying consumers into buying products they don't necessarily want. The Act essentially questions whether or not a transaction was “unconscionable”. Whether a transaction is “unconscionable” will depend on whether any behavior can be seen by consumers as forcing or manipulating them into a sale and purposefully taking advantage of them.

Although the Act provides to curb unlawful direct marketing practices, many consumers are under the impression that the Act changed the way marketers may communicate to them and that they first have to “opt-in” before they can be marketed to. This is not the case. Consumers must “opt-out” by taking such step on their own. The right to privacy (section 11) takes the form of requiring a marketer to discontinue any approach or communication that is primarily for the purpose of direct marketing.

In practice, the easiest way for a consumer to exercise this right to privacy can be done in one of two ways, either:

- demand during the communication or shortly afterwards that the marketer stop initiating communication and stop contacting him/her altogether, or
- register a pre-emptive block on a registry that can be applicable to all direct marketing or only for specific purposes (e.g. the “Opt Out-Out Register” used by the Direct Marketing Association of South Africa).

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