IN THE NORTH WEST HIGH COURT, MAFIKENG

Case numbers: M105/2014
M107/2014
M108/2014
M109/2014

In the matter between:-

HANS MARX EIENDOMME (PTY) LIMITED
VAW BELEGGINGS (PTY) LIMITED
NESTHAM TRADING CC
RE PORTION 108 WATERKLOOF Applicants

And

ABSA BANK LIMITED Respondent

DATE OF HEARING	:	13 MARCH 2015
DATE OF JUDGMENT	:	26 MARCH 2015
COUNSEL FOR THE APPLICANTS	:	ADV EDWARDS
COUNSEL FOR RESPONDENTS	:	ADV VORSTER

APPLICATION FOR LEAVE TO APPEAL

JUDGMENT

HENDRICKS J

[1] On 28th August 2014 the Respondent (Applicant in the main application) applied for and was granted provisional orders for the liquidation of the Applicant companies under the abovementioned case numbers. On 23rd October 2014 the provisional orders were made final by this Court. Applications for leave to appeal were filed with the Registrar of this Court on 05th February 2015 which applications were set down for hearing on 13th March 2015. The applications for leave to appeal are against the final orders for liquidation of the said Applicant companies.

[2] The applications for leave to appeal are premised on the following grounds of appeal:-

> *"[i] That the Court erred in not excepting that the Applicants commercial insolvency was due to the gross negligence of the Director of Public Prosecutions together with the Asset Forfeiture Unit and as a result of their conduct the Applicants were prevented from honouring their obligation towards the Plaintiff.*
>
> *[ii] That the Court erred in not finding that because the preservation order was rescinded on the 24th of October 2014, the commercial insolvency of the Applicants disappeared.*
>
> *[iii] That the Court erred in not granting the Applicants the opportunity to realize property to honour the debt, as they*

were now placed in the position, by reason of the rescission of the order to realize sufficient property to honour the debt."

[3] It is incumbent upon an Applicant to prove the existence of reasonable prospects of success on appeal or to show the existence of some other compelling reason why the appeal should be heard, including conflicting judgments on the same matter under consideration. The test in an application for leave to appeal has accordingly changed. The test has become more burdensome under the new Act. It is no longer open for an Applicant to argue that another Court may come to a different finding, it must be shown that the appeal has a reasonable prospect of success.

See:- Section 17 (1) of the Superior Court Act 10 of 2013 (which came into operation on 23 August 2013).

[4] As far as the first ground of appeal is concerned, it is alleged that the Director of Public Prosecutions and the Asset Forfeiture Unit caused the Applicant's commercial insolvency. Firstly, the ground incorporates a concession that the Applicants are indeed commercially insolvent. This in itself entitled the Respondent to seek a final liquidation order. Secondly, the Applicants may have a claim for damages against Government. Such a claim however does not disentitle the Respondent from seeking final liquidation orders.

[5] As for the second ground of appeal, it is alleged that the Applicant's commercial insolvency fell away when the preservation order was rescinded. This allegation seems to be based on confusion between

the concepts of commercial insolvency and factual insolvency. The difference between these two concepts is best summarized by Willis JA, in **Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd** 2014 (2) SA 518 (SCA) in paragraphs [16] and [17] on page 523, where the following appears:-

> *"[16] For decades our law has recognized two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, Johnson v Hirotec (Pty) Ltd[4]; Ex parte De Villiers and Another NNO; In re Carbon Developments (Pty) Ltd (in Liquidation)[5]; Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd[6].*
>
> *[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is as notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not,*

---

[4] *Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA) para 6.*

[5] *Ex Parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in liquidation) 1993 (1) SA 493 (A at 502C-D.*

[6] *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 596F-597H.*

creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets[7]*. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7 (1) thereof."*

[6] Even if the Applicants could sell their immovable properties, it does not mean they are commercially solvent in the sense of being able to pay their debts from ordinary business activities and cash flow. By selling their assets the Applicants are disposing of their **substratum**.

[7] The third ground of appeal is that the Court erred by not affording the Applicants an opportunity to sell their assets so as to pay the Respondent. This is the only of the three grounds of appeal that was expressly raised in the Answering Affidavit. At paragraph 5.6.4 of the Answering Affidavits the following is stated on behalf of the Applicants:-

"I submit that if I am given an opportunity of at least 12 (twelve) months, from the date of the setting aside of the restraint order,

[7] See, for example, the observation of the court in First Rand Bank Ltd v Lodhi 5 Properties Investment CC 2013 (3) 212 (GNP) para 34.

to realize my assets in terms of "HM5", I will be in the position to pay the amount, including interest, claimed by the Applicant."

[8] The Applicants approach in this regard loses sight of the fact that where a creditor seeks a winding-up order and his application is not opposed by other creditors, the Court's discretion is very narrow. For an unpaid creditor who cannot obtain payment and who brings his claim within the Act is, against the company, entitled ***ex debito justitiae*** to a winding-up order. The creditor is not bound to give the company time.

See:- **Coughlan v Ward & Sons (Pty) Ltd** 1931 NPD 153 at 154;

Sammel v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662;

[9] In **ABSA Bank Ltd v Rhebokskloof (Pty) Ltd** 1993 (4) SA 436 (C) at page 440-441, the following is stated:-

"Turning to the merits of the matter, Mr Gauntlett contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercially insolvent'. The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realizable assets available to meet its liabilities as they fall due to be met in the ordinary

course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilitie: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345 (1)(c) as read with s 344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597 E-F:

> *'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realizable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'*

Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)."

[10] In my view, there is no reasonable prospect of success on appeal and these applications should therefore be dismissed. In my view, insofar as the costs of this appeal is concerned, it should be costs in the liquidation.

Order:-

[11] Consequently, the following order is made:-

[i] The applications for leave to appeal the final orders of liquidation in matters numbers M105/14; M107/14; M108/14 and M109/14 are dismissed.

[ii] The costs of the applications for leave to appeal are to be costs in the liquidations of the Respondent companies.

R D HENDRICKS
JUDGE OF THE HIGH COURT