SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 09/46494

In the matter between:

GARY LEVITAN Applicant

and

MOPANA PROPERTIES 69 (PTY) LTD First Respondent

COLIN STEINBERG Second Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG Third Respondent

MEYER, J

[1] The applicant seeks an order setting aside or staying the winding-up of the first respondent in terms of s 354 of the Companies Act 61 of 1973.

[2] The circumstances giving rise to the application are essentially undisputed. The first respondent was registered on 6 December 2004 under the name Panamo Properties 96 (Pty) Ltd ('the company'). On 4 May 2006, the applicant, the company, and the second respondent concluded a written

shareholders' agreement. The shareholders' agreement records that the company had purchased an immovable property with the intention of developing clusters thereon for the purpose of resale. It was a term of the shareholders' agreement that the second respondent would transfer 50% of his 100% shareholding in the company to the applicant. It records the loan amounts which the applicant and the second respondent had advanced to the company as part payment of the purchase consideration for the immovable property. It was a term of the shareholders' agreement that additional funding would *inter alia* be obtained from them.

[3] On 17 June 2008, the applicant instituted motion proceedings against the second respondent and the company in this division under case no. 08/18136. The present second respondent was the first respondent in those proceedings and the company the second respondent. The matter was settled on 5 November 2008 and the settlement agreement concluded between the parties was made an order of this court on 6 November 2008. The preamble to the written settlement agreement summarizes the applicant's claims against the second respondent and the second's respondent's answer thereto. It reads as follows:

> 'WHEREAS the Applicant has claimed from the First Respondent *inter alia* an amount of R340 000.00 (Three Hundred and Forty Thosusand Rand) plus interest and for an order directing him to take such steps and sign all such documents as are required in order to affect transfer to the Applicant of 50% of the ordinary shares in the Second Respondent.

> AND WHEREAS in the Answering Affidavit the First Respondent alleged *inter alia* a subsequent oral Agreement on the 19th of June 2008 in terms whereof the First Respondent was to pay to the Applicant an amount or R1 600 000.00 (One Million Six Hundred Thousand Rand) (par. 5.1.3) and that the said R1.6 million could be paid by the 31st of July 2008 (par 5.2) and that for payment of the said R1.6 million the Sale of Shares Agreement and the Shareholders Agreement would be cancelled (par. 5.1).

[4] The matter appears to have been settled in accordance with the second respondent's version as summarized in the second paragraph of the preamble which I have quoted above. Clause 5 of the settlement agreement provides that the second respondent acknowledged himself indebted to the applicant for the amount of R1,6 milion plus interest, which amount was due for payment on the 31st of July 2008 as contended by the second respondent in his answering affidavit. The second respondent in his answering affidavit in the present proceedings admits that he owed the applicant the amount of R340, 000.00 arising from an unrelated transaction. It is also common cause that the applicant and the second respondent made further loans to the company. The second respondent avers that the applicant was a creditor of the company in an amount of approximately R1,2 at the time. The second respondent assumed personal liability for payment of this amount, which formed part of his R1,6 million indebtedness referred to in the settlement agreement.

[5] In terms of clause 3.1 of the settlement agreement the applicant was '… specifically, irrevocably and unconditionally authorised, empowered and instructed to proceed to sell…' the company's immovable property, namely 203,

Tweedale Road, Hyde Park, Gauteng ('the property') '… upon terms and conditions determined by…' the applicant. Clause 3.2 provides that the proceeds accruing from such sale were to be utilised and paid as follows: the balance outstanding on the mortgage bond registered over the property, and it is common cause that such bond is registered in favour of Standard Bank which is the secured creditor; the applicant would receive an amount of R1,6 million plus interest thereon at the rate of 15,5% per annum from 31 July 2008 to date of payment; and any resultant balance would be paid to the second respondent. Clause 3.4 provides that the parties would do all things within their power and sign all documents which might be necessary to give effect to the aforementioned and in particular to enable the property to be transferred into the name of the purchaser thereof, and if the first and/or second respondent refusing or failing to sign, on demand, any conveyancing or other document necessary to transfer the property into the name of the purchaser thereof, then the applicant '…is hereby specifically, irrevocably and unconditionally nominated, constituted and appointed as his/their Attorney and Agent to sign such document. Clause 3.3 provides that if the applicant did not receive the sum of R1,6 million plus interest, the second respondent would remain liable to the applicant for any such shortfall. By way of security for the obligations thus undertaken in favour of the applicant, the second respondent, in terms of clause 4, pledged the shares in the company to the applicant.

[6] The second respondent did not sign the share transfer forms to give effect to the pledge and he failed to make payment of the amount of R1,6 million plus interest thereon to the applicant. The second respondent was indebted to the applicant in the sum of R1, 724, 000.00 as at the date of the institution of this application.

[7] The applicant engaged an estate agent to find a purchaser for the property. A written offer to purchase the property for a purchase consideration of R10 million was submitted on 30 September 2009. It is undisputed that this offer is a most favourable one and it was accepted by the applicant on 1 October 2009. During the conveyancing process it emerged that the second respondent had caused the name of the company to be changed and had further caused the company to be wound up voluntarily by way of special resolution dated 20 August 2009.

[8] The second respondent seeks to justify his unilateral conduct in causing the company to be wound-up voluntarily by contending that the first respondent was commercially insolvent and unable to pay its debts. He contends that his intention was to ensure equality of treatment amongst the creditors of the first respondent. He contends that had the first respondent not been liquidated, only the applicant and Standard Bank, which is the secured creditor in terms of the mortgage bond for the sum of about R8,8 million, would have benefited, and he and the concurrent creditors would have been left without any benefit.

[9] The second respondent's allegation of the existence of other concurrent creditors of the company is in conflict with the content of the statutory statement of affairs of the company which he made or caused to be made wherein reference is only made to his unsecured claim in the amount of R1,85 m, that of the applicant in the amount of R1,6 m, and the secured claim of Standard Bank in the amount of R8,6 million. The allegation relating to such other concurrent creditors is unsubstantiated and the primary facts on which it depends are omitted [see: *Radebe and others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at p 793D; *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (TPD) at p 324F].

[10] I have mentioned that it is undisputed that the sale of the company's property for a purchase consideration of R10 million is a most favourable one. The secured claim of Standard Bank is in excess of approximately R8,8 million. The excess would therefore be small and it can hardly be suggested that the second respondent intended benefiting the general body of creditors. The effect of the settlement agreement was a subordination of the second respondent's loan account. Furthermore, the effect of the winding-up is to delay the realization and transfer of the property with the result that the liability to Standard Bank as a secured creditor is growing significantly on a daily basis and the residue available for concurrent creditors, in turn, is reducing accordingly.

[11] The second respondent contends that the settlement agreement is invalid and of no force or effect *vis-à-vis* the company since it amounts to the giving of financial assistance in connection with the purchase or acquisition of its own shares and therefore a contravention of s 38 of the Companies Act. With reference to the settlement agreement the second respondent states the following in his answering affidavit:

> 'Prior to us signing the settlement agreement, the Applicant was a creditor of the First Respondent in an amount of approximately R1 200 000,00. In terms of the settlement agreement, I assumed personal liability for payment of this debt against transfer of the Applicants' claim for 50% of the First Respondent's issued share capital. On the proper interpretation thereof, the purpose of the settlement agreement was to vest in me the entire share capital of the First Respondent, as well as to effect the cession of the Applicant's loan account against the First Respondent. The sale of the shares and cession of the loan account was however always regarded as one indivisible transaction on which a single value was placed, namely R1 600 000.00, which amount further included the amount of R340 000.00 I owed to the Applicant, arising from an unrelated transaction and which was the amount he claimed by virtue of the 2008 proceedings.'

[12] S 38 is only concerned with a purchase of or a subscription for shares. If the financial assistance relates to any other transaction, s 38 is not contravened. The second respondent in the quoted paragraph of his answering affidavit is merely giving his interpretation of the settlement agreement that had been arrived it. The company's financial assistance clearly relates to the cancellation of the sale of shares agreement and the shareholders agreement or, as Adv. A Subel SC submitted on behalf of the applicant, to the assumption by the second respondent of the company's indebtedness owed to the applicant. There was no resale of the shares. No price was fixed as the purchase price. The company

was indebted to the applicant in an amount of approximately R1,2 million, which represented the applicant's loan account. The second respondent assumed liability for this indebtedness under the settlement agreement. A contract cancelling the sale and repaying the applicant what he had paid under and pursuant to the shareholders' agreement was concluded. This form of financial assistance does not contravene s 38. See: *Pires and Another v American Fruit Market (Pty) Ltd* 1952 (2) SA 337 (TPD), at p 341H. The financial assistance also relates to the second respondent's indebtedness to the applicant in the sum of R340, 000.00 plus interest thereon, but this indebtedness undisputedly relates to an unrelated transaction and cannot be said to have contravened s 38. Finally on this point, the settlement agreement was made an order of court.

[13] The second respondent contends that there is an impeachable 'disposition' constituted by the settlement agreement. This contention, as was correctly in my view pointed out by Adv. Subel SC, overlooks the fact that the definition of 'disposition' within the meaning of the Insolvency Act, 1936 excludes dispositions made pursuant to an order of court.

[14] The second respondent also contends that there is a material non-joinder in that the joint liquidators of the company have not been cited as co-respondents in the application. There is no merit in this contention. The company has been correctly cited as being in liquidation. See: *Ex parte Liquidator Vautid Wear Parts (Pty) Ltd (in liquidation)* 2000 (3) SA 96 (W), at p103. A copy of the

application was served upon the joint liquidators and their receipt thereof appears from the notice of motion.

[15] The applicant is supported in this application by the major creditor of the company, which is The Standard Bank of South Africa Limited. The applicant and Standard Bank consider the winding-up to have been a stratagem by the second respondent to defeat the applicant's security enjoyed under the settlement agreement and further to be prejudicial to both the applicant and Standard Bank. The second respondent's conduct in causing the voluntary winding-up of the company is, in my view, inexplicable. It is irreconcilable with the provisions of the settlement agreement that was made an order of court.

[16] I am in all the circumstances satisfied that the applicant has discharged the onus of establishing that the winding-up ought to be set aside in terms of s 354 of the Companies Act.

[17] A conditional counter application is made on behalf of the first and the second respondents to interdict the applicant from taking any further steps to procure the transfer of the property into the name of the purchaser pending the outcome of an application to be instituted for the rescission and setting aside of the settlement agreement and court order in terms whereof it was made an order of court. I need not dwell on the counter application. The first and second

respondents have dismally failed to establish the requisites for the right to claim such an interdict.

[18] The applicant seeks a costs order against the second respondent on the scale as between attorney and client. I am of the view that a punitive costs order against him is warranted in the circumstances of this case.

[19] In the result the following order is made:

1. All proceedings in relation to the winding-up of the company Mopana Properties 69 (Pty) Ltd (Registration No. 2004/034772/07) are hereby set aside in terms of section 354(1) of the Companies Act 61 of 1973.
2. The counter application is dismissed with costs.
3. The second respondent is ordered to pay the applicant's costs of the application and of the counter application on the scale as between attorney and client, which costs include the costs attendant upon the engagement of the services of senior counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

10 December 2009