LOM Business Solutions t/a Set LK Transcribers/

IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 8572/09

DATE: 16/09/2009

(1) NOT REPORTABLE.
(2) NOT OF INTEREST TO OTHER JUDGES.
(3) REVISED.

pp FHD VAN OOSTEN

26 October 2009

In the matter between

G C GAINFORD NO **1st Plaintiff**

T R NDEBELE NO **2nd Plaintiff**

and

DAVID MICHAEL DRENNON **Defendant**

J U D G M E N T

VAN OOSTEN J: This is an application by the defendant for the plaintiffs to furnish security for costs in a pending action between the parties.

The background facts relating to the matter are the following. SFS Financial Services (Pty) Ltd (in liquidation) (SFS), it is common cause, carried on business in providing financial services as a

franchisee of the Liberty Holdings Group. It *inter alia* attracted loans from members of the public for short periods of time at exorbitantly high and unrealistic interest rates. It conducted what has become known as an unlawful pyramid scheme (as to which see *Fourie NO v Edeling NO and Others* 2005 (4) All SA 393 (SCA)). As almost invariably is the case, the scheme eventually collapsed resulting in the liquidation of SFS and the loss of millions of Rands by investors in the scheme.

One of the investors in SFS was the defendant. He however was, so he says, unaware of the illegality of the scheme. The defendant invested substantial amounts in SFS. Some of the investments, or loans as he prefered to call it, were repaid by SFS together with the agreed interest. This snowballed into further investments again at an agreed interest rate.

As at the date of the liquidation of SFS the defendant had paid SFS some R7,1 million more than he had received from SFS, excluding interest on a loan of R3 million. The defendant's total alleged loss is some R7,1 million. In October 2008 the defendant proved a claim of some R5,2 million against the insolvent company and he has expressed his intention to institute a claim against the insolvent company for the balance of R1,85 million.

The present action was instituted by the joint liquidators of SFS against the defendant in April 2009. The plaintiffs' claim is for repayment by the defendant of the sum of R13,1 million, being all amounts paid by SFS to the defendant of all investments or loans made by him, based on

the provisions of s 26, alternatively s 29 and 30 of the Insolvency Act 24 of 1936, further alternatively on the grounds of unjust enrichment.

The defendant has filed a notice of intention to defend the action but no plea has as yet been delivered. The defendant now in this application seeks security for costs based on the allegation that the plaintiffs will not be able to pay the costs of the defendant, should he be successful in his defence to the claim. A request for the furnishing of security for costs was delivered but the plaintiffs refuse to put up security, hence the present application.

An aspect that upfront caused me much concern is the way in which the defendant has dealt with the facts of this matter in the founding papers. He labelled the investments made to SFS as “loans” instead of investments as they truly were. One forms the impression on reading the founding papers that the defendant was nothing more than an investor in SFS. In the answering affidavit much more came to light and it then emerged *inter alia* that the defendant was listed on the payroll of SFS as an employee when in fact he was not an employee of SFS and that he received a monthly salary from SFS without having earned a salary. He moreover was in possession of and utilized a credit card on the account of SFS and certain of his medical aid costs, as well as the costs of acquisition of computer equipment were paid for by SFS. He further admittedly had a close relationship with the directors of SFS.

Having carefully considered all the facts of this matter and for reasons that will become apparent I have come to the conclusion that the aspects I have mentioned should not be held against the defendant

in the exercise of my discretion whether or not to order the furnishing of security for costs.

Of importance is the fact that the defendant was an investor of large sums of money. He is a major creditor of SFS. I am unable to find that he in any way was aware of the illegality of SFS's operations. The defendant convincingly stated that his trust in the operations of SFS was confirmed by their affiliation to the Liberty Group.

Next, it is necessary to consider the evidence relied upon to show that the plaintiffs will be unable to pay the costs of the defendant if he is successful in his defence to the claim.

It is common cause that only a free residue of R296 925.15 was available in the insolvent company as at 30 April 2009. The amount quite clearly is wholly insufficient to cover the costs of the litigation the insolvent company is involved in and intends to become involved in. Some 42 High Court actions are looming, to which must be added the costs of the enquiry in terms of Section 417 of the Companies Act 61 of 1973, which has already commenced and is bound to proceed at some stage, and then of course the costs of this action. The liquidators however heavily rely on their "expectations" to claim repayment from other investors monies paid to them by SFS. Their expectations seemingly rest on shaky grounds of speculation. No details of these investors have been furnished and moreover, as correctly pointed out by counsel for the defendant, it can equally be expected that those investors will resist the claims made against them by the liquidators.

The applicable legal principles in considering security for costs are well established and need not be repeated here. Suffice to refer to Section 13 of the Companies Act and the leading case of *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) 1044D-E, 1045I -1046D; as well as *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) [16]. In the exercise of my discretion I propose to take into account all the circumstances of this case (*B&W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W)) without adopting a predisposition either in favour of or against the granting of security *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)*1997 (4) SA 908 (W)).

I am satisfied that the defendant has shown that the plaintiffs at this stage will be unable to meet an adverse costs order. On the other hand it has not been shown that the ordering of security for costs would effectively deprive the plaintiffs of the opportunity to proceed with their claim against the defendant (see *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para [8]). As against this the potential injustice to the defendant, who successfully defends the claim having to pay all his own costs in the litigation tips the scales in the present matter in favour of ordering security.

The plaintiffs are authorised by the creditors to institute action against the other investors. They have expressed their optimism concerning the prospects of successful claims against those investors. It should therefore be relatively easy for them in due course to furnish security (see *Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA

752 (T) 756). On the other hand, should their expectations prove to have been too optimistic this action will remain suspended, in which event the defendant will not be prejudiced.

In the result an order is granted in terms of prayers 1, 2, 3 and 4 of the notice of motion.

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