IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2824/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

In the application of:

VAAL BRICKS (PTY) LIMITED (INLIQUIDATION)	First Applicant
THEODOR WILHELM VAN DEN HEEVER N.O.	Second Applicant
COLLIN VELAPHI CHAKE N.O.	Third Applicant
MARNIC DEVELOPMENTS (PTY LIMITED (IN LIQIUDATION)	Fourth Applicant
THEODOR WILHELM VAN DER HEEVER N.O.	Fifth Respondent
RICHARD CASSIM N.O.	Sixth Respondent
MARNIC CONSTRUCTION (PTY) LIMITED (IN LIQUIDATION)	Seventh Respondent
CORNE VAN DER HEEVER N.O.	Eighth Respondent
SIYASANGA BATANDWA WOTSHELA N.O.	Ninth Respondent

and

RUI MIGUEL ABRANTES RAIMUNDO NUNES N.O. First Respondent

NICOLE CHANTAL FREITAS N.O. Second Respondent

MARCIO ALEXANDRE FREITAS N.O. Third Respondent

Coram: WEPENER J

Heard: 8 February 2017

Delivered: 16 February 2017

JUDGMENT

WEPENER J:

[1] This is the return day of a provisional sequestration order. After the provisional order was granted on 26 November 2015 both parties filed extensive further affidavits from time to time and as a result of the fact that, despite the non-compliance with the rules of court, neither party objected to the further filing, I allowed same. However, sometime after commencing the respondents' argument, leave was sought to hand in a further affidavit by the respondents. No proper explanation was forthcoming why the affidavit was produced at such a late stage and, as a result also of the objection by the applicants to further evidence, I refused to receive the additional affidavit.[1]

[2] The applicants are three liquidated entities (Vaal Bricks) (Proprietary) Limited ('Vaal Bricks'), Marnic Developments (Proprietary) Limited ('Marnic Developments') and Marnic Construction (Proprietary) Limited ('Marnic Construction') and their liquidators. The first respondent ('Nunes'), second respondent ('Nicole') and third respondent

[1] *Hano Trading v JR209 Investments* 2013 (1) SA 161 (SCA) at 164G-H.

('Marcio') are the trustees of the Flor Trust. The respondents were so appointed on 10 December 2013.

[3] Shortly before the hearing, the respondents caused the debt claimed by the first applicant in the sum R27 833,75 to be paid into trust with their attorney. The respondents tendered the payment of the sum of R27 833,75. The respondent further submitted that the remaining debt has not been proved nor that it has been shown that the Flor Trust is insolvent. The applicants refused to accept the tender and should I find that the applicants established their claim, the tender is of no consequence. It is common cause that the funds for the tender is to be made available by a family member. A tender is of no value as it has been held that conditional tenders could not avoid a liquidation.[2] In addition, there is no explanation as to the relationship of the family member and the Trust and it is not possible to determine whether the Trust has incurred or will incur an additional debt by virtue of the family member's monetary assistance to it. The tender is, in my view, consequently of no assistance to the respondents.

[4] In *Express Model Trading 289 CC*, Ponnan JA held:[3]

> 'To the extent that the full court held that the mere fact that a debt is paid by a third party did not per se justify the inference that a debtor is unable to pay the debt — that may as a general proposition be unobjectionable. But, the last sentence of the quoted passage appears to me to state the position rather too widely. An enquiry of this kind, I do believe, is fact-based. Thus, as important as the fact of payment, may well be the source of

[2] *See Body Corporate of Fish Eagle v Group 12 Investments* 2003 (5) SA 414 (W) at 426H-427B, where Malan J (as he then was) held:
'The tender to pay the aforesaid amount of R77 755,04 is clearly on the papers, not an unconditional tender of payment, but is tendered in full and final settlement of the indebtedness of the respondent towards the applicant. Should the applicant accept this tender, the applicant will buy doing so, waive its right to claim any other amounts from the respondent. Since the tender by the respondent to pay that amount is conditional the tender by the respondent does not amount in law to a payment of the aforesaid sum of R77 755,04 and that sum accordingly remains due and payable by the respondent to the applicant.
A tender subject to a condition does not constitute payment. The law distinguishes between a payment and a conditional tender (*Reilly v Seligson and Claire Limited* 1976 (2) SA 847 (W) at 849H-851C). Section 345(1) and 344f of the Companies Act intend that an unconditional payment must be mad by a company in order to avoid liquidation, not that conditional tenders may be made and liquidation in that way avoided'.

[3] *Express Model Trading 289 CC v Dolphin Ridge* 2015 (6) SA 224 (SCA) at 234.

payment. A debtor's ability to raise a loan from a third party may indeed be a demonstration of its creditworthiness. On the other hand, it could conceivably demonstrate the exact opposite, where (as here) it amounts to no more than borrowing from Peter to pay Paul. Unlike in Helderberg, where the funds appear to have been borrowed pursuant to an arm's-length transaction from an unrelated entity, here Express Model's benefactor initially remained undisclosed. It subsequently emerged that assistance was obtained from corporate entities, namely Billmont and Class A Trading, who as part of Mr Hassan's stable of corporate entities enjoyed a fraternal relationship with Express Model. Mr Bester explains:

"The Corporation is surety for the debts of Billmont No 104 CC to Rand Merchant Bank (RMB). Billmont is a subsidiary of the corporation. RMB registered surety bonds over the remaining units of the corporation in liquidation, which surety bonds were registered in the capital amount of R18 000 000 (excluding the additional amounts). The current outstanding amount owing by Billmont to RMB amounts to R25 300 000 (see A3). The full suretyship obligation forms a contingent liability in the books of the corporation and must be taken into consideration in its liability statement. RMB has submitted two requisitions in the provisional liquidation of the corporation (see K1 and K2), and I have established that Billmont is currently in arrears with its payments to RMB."

It follows that no inferences favourable to Express Model's creditworthiness or its ability to raise arm's-length funding can accordingly be drawn.'

[5] The issues before Masipa J were the same as to those in the matter before me: firstly, whether the Flor Trust is indebted to the applicants and secondly, whether the Flor Trust is insolvent. Masipa J concluded that on the evidence before her, the applicants indeed had the necessary locus standi to bring the application due to the existence of a debt by the Flor Trust to the applicants. She further found that on the evidence placed before her, the Flor Trust was indeed insolvent and that would be an advantage to creditors for the Flor Trust to be sequestrated.

[6] In my view, despite the filing of further affidavits, the difficulties encountered by the respondents in the matter when the provisional order was issued have not been overcome.

[7] One of the main reasons for this is the fact that the estate of the controlling mind of the Flor Trust, a Mr Freitas (father of two of the current trustees), was, together with his wife's estate, sequestrated on 9 December 2013. His children and Nunes, the current trustees, had no knowledge of the business of the Flor Trust and were appointed as trustees in the stead of the sequestrated father and mother a day later on 10 December 2013. But the father and mother who could furnish the required evidence remained uncannily silent.

[8] It appears from the documentation that the three trustees acted as mere fronts for the parents as they knew very little about the affairs of the Flor Trust. The fact that they so lacked knowledge was candidly admitted during an enquiry in terms of ss 417 and 418 of the Companies Act.[4] Despite this, and despite the challenge of the applicants that the trustees had no knowledge of the affairs of the Flor Trust, they did little to counter these allegations. Indeed the respondents' entire case is based on information which they could never have had any knowledge of and they failed to obtain supporting evidence for their say-so. Everything they said and everything they purportedly passed on to others to compile financial statements are unconfirmed evidence. These financial statements constitute a conclusion based on information provided to the compiler thereof by the respondents and are not factually based. The respondents having failed to put up any credible version, the only question is whether the applicants showed that the Flor Trust was indebted to them in the amounts claimed.

[9] The new statements provided by the respondents are not factually based and are as worthless as those which they provided before Masipa J and which she did not accept to be correct. According to the financial statements for the Flor Trust which were prepared by chartered accountants for the Trust and issued on 13 September 2013, the liabilities of the Trust exceeded its assets by R2,6 million. The Trust did not generate any income and had operating expenses and finance costs in excess of R500 000. The respondents attempted to create what the applicants' counsel referred to as a 'paper income' in their second answering affidavit by referring to and annexing new found lease agreements. These lease agreements were never mentioned at the enquiry; they

[4] Act 61 of 1973.

never featured in the first answering affidavit; the agreements are contradicted by the erstwhile auditor of the Flor Trust who testified that the Flor Trust did not generate any income; the evidence of the auditor is borne out by the financial statements which he prepared. The mastermind, Freitas, never once made mention of the alleged lease agreement. They are indeed a figment of the respondents' imaginations as all evidence prior to their production refutes their existence. If this so-called evidence is discarded, as it should be, there is no doubt that the Flor Trust is insolvent and that its liabilities exceed its assets. The only question that remains is whether the applicants are owed a debt by the Flor Trust. In the absence of credible evidence, the finding of Masipa J must be followed. She found:

> '[10] The applicants place reliance on a schedule prepared by Zeelie de Kock Auditors ("Zeelie"). From this schedule it appears that the Flor Trust is indebted to Vaal Bricks, Marnic Developments and Marnic Construction in the amounts referred to in the letter of 134 August 2014 respectively.
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> [11] Counsel for the respondents submitted that no reliance could be placed on the schedule relied upon by the applicants as the schedule is disputed by the trustees of the Flor Trust and the schedule was not accompanied by the relevant source documents. In the absence of source documents the schedule prepared by Zeelie was nothing but inadmissible evidence, it was argued. There is no merit in this submission.
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> [12] Firstly, it is common cause that the respondents furnished the applicants with the relevant documents contained in 72 lever arch files. The applicants can, therefore, not be blamed for not having source documents in their possession. Secondly, the method used to prepare the schedule was transparent. Because of the practice relating to the writing off of inter-company loans at each financial year Zeelie had to reconstruct the loan accounts of the various entities. He did this by using the loan account balance from the last available audited statements and added and subtracted the transactions obtained from the Pastel accounting system of the Marnic Group. No one from the Flor Trust objected to the method used.
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> [13] Counsel for the respondents sought to argue that the Flor Trust was not indebted to the applicants as the loans were written off. He submitted that the liquidators do not have the power or authority to revive the loans unled there was a legal basis for such a

> decision. The submission loses sight of the fact that fraud was perpetrated in the conduct of the affairs of the Marnic Group and that all the companies in the group were inextricably linked and therefore all tainted. It can, therefore, not be said that the "writing off" of the loan accounts was genuine. In any event the schedule was provided to the Flor Trust on 26 April 2014, and although its correctness was disputed by Freitas he failed to provide reasons or raise alternative calculations. The evidence shows that the companies in liquidation are creditors of the Flor Trust. The liquidators were properly appointed and granted powers to litigate on behalf of the companies in liquidation. The applicants, therefore, have the required locus standi.'

[10] I respectfully agree with the findings of the learned judge. The import hereof is that due to the inconsistencies in the evidence of Marcio, which evidence Masipa J said 'can safely be rejected'[5], there is no bona fide dispute of the Trust's indebtedness to the applicants or at least those applicants whose claims have not been paid or tendered to be paid.

[11] The question of advantage for creditors was not seriously put in issue and I adopt the findings of Masipa J in this regard as to the existence of an advantage.

[12] Having regard to the aforegoing, I issue the following order:

1. The rule nisi dated 26 November 2015 in confirmed.

2. The estate of the Flor Trust is placed under final sequestration.

3. The applicants' costs of the application shall be costs in the administration of the insolvent estate, including all reserved costs.

4. The costs of opposition shall not form part of the costs in the administration of the insolvent estate.

[5] See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

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Wepener J

Counsel for Applicants: J.E. Smit

Attorneys for Applicant: Werksmans Attorneys

Counsel for Respondents: L.Hollander

Attorneys for Respondent: Afzal Lahree Attorneys