

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 62678/12


In the matter between:

30/4/2014

COASTAL JOY INVESTMENTS CC (IN LIQUIDATION)	1 st APPLICANT
ECHO CANYON TRADING 3 CC (IN LIQUIDATION)	2 nd APPLICANT
ENVIROCAP TRADING CC (IN LIQUIDATION)	3 rd APPLICANT
TWO SHIPS TRADING 412 CC (IN LIQUIDATION)	4 th APPLICANT

and

ICARYS AIR SERVICES

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
<i>30 April 2014</i> <small>DATE</small>	 <small>SIGNATURE</small>

RESPONDENT

JUDGMENT

TLHAPI J

[1] The Applicants in Liquidation and represented herein by their duly appointed liquidators apply for the final winding up of the Respondent on grounds that it is unable to pay its debts and that it would be just and equitable for such order to be granted. For convenience the parties shall be referred to by name.

[2] A brief summary of the inter-relationship between the applicants in liquidation and the respondent is necessary:

- 2.1 Coastal Joy with Salinga Trust ('Salinga') as sole member was placed in final liquidation, pursuant to an application by the second applicant Echo Canyon on 12 March 2012. Prior to such liquidation, Environ-Concept Trust with John Cussons ('Cussons') as representative trustee was sole member of Coastal Joy. EnvironConcept Trust resigned as a member and was replaced by Salinga with Cussons remaining as representative trustee till his replacement by his spouse Maria Cussons as representative trustee of Salinga on 7 January 2011.
- 2.2 Prior to its conversion to a closed corporation Echo Canyon existed as a private company with Cussons as sole director. As a closed corporation EnvironConcept Trust was appointed sole member with Cussons as representative trustee, till final winding up on 31 May 2011.
- 2.3 Prior to its conversion to a closed corporation Environcap Trading existed as a private company with Cussons as sole director. As a closed corporation Cussons was appointed sole member till replaced by Environcap Trust as sole member and Cussons as representative trustee on 29 March 2010. It was finally wound up on 27 July 2011.
- 2.4 Prior to its conversion to a closed corporation Two Ships Trading existed as a private company with Cussons as sole director. As a closed corporation at liquidation EnviroConcept Trust was appointed as sole member with Cussons as representative trustee. It was finally wound up on 9 March 2011.
- 2.5 Prior to its conversion to a closed corporation on 17 August 2008 the

Respondent Icarys Air Services CC existed as a private company known as Twin Cities Trading 281 CC. EnviroConcept Trust was sole member with Cussons as representative trustee as at conversion. On 14 April 2010 the membership was transferred to Salinga whose representative trustees were Cussons and his spouse Maria Cussons. Cussons remained representative trustee till about 19 September 2011. Presently the respondent was a closed corporation whose sole member was the Umhlothi Trust with Eugene Christofell Cussons ('Eugene Senior') appointed as representative trustee from 19 September 2011. Eugene Senior is the father of Cussons.

[3] The Industrial Development Corporation of South Africa ('the IDC') advanced monies to Echo Canyon in the sum of R19 233 293.69 and R11 451 000.00 for the erection of a tented lodge ('Nkambeni').

It was averred that an amount of R 200 000.00 was then advanced by Echo Canyon to the respondent and that this amount was used as a deposit by the respondent to purchase an aeroplane. The applicants made further payments to Nedbank as instalments for the airplane so purchased. As security for its indebtedness Echo Canyon had registered a general notarial bond in favour of IDC and had ceded its rights in the lease agreement entered into with the Nkambeni Tribe to IDC. An attempt by Nedbank to take possession of the assets of Echo Canyon by issuing an application of perfection of the general notarial bond was opposed by Cussons. In his affidavit Cussons had confirmed that all the assets situated at the lodge belonged to Echo Canyon. On 23 November 2010 IDC obtained judgment against Echo Canyon and its sureties among whom were Cussons, Envirocap Trading, EnviroConcept Trust and others. This was followed by Echo Canyon being wound up finally on 31 May 2011. An application by its liquidators to

take possession of its assets was opposed by Maria Cussons citing an operating agreement concluded on or about 1 November 2009 between Echo Canyon, the Nkambeni Tribe and Coastal Joy, in terms of which Coastal Joy was to operate the lodge on behalf of Echo Canyon.

[4] Prior to Coastal Joy coming into the picture Tau Safari Destination Administration CC ('Tau Safari') with Cussons as its sole member operated the lodge. Tau Safari's employee contracts were transferred to Coastal Joy on 28 February 2010 before the former was wound up on 3 March 2010. The liquidators were not aware of the operating agreement with Coastal Joy prior to the launch of the application to take possession of the assets of Echo Canyon. The liquidators terminated the operating agreement by communicating this to Coastal Joy and an interim order was granted to take possession of the assets of Echo Canyon. The liquidators of Echo Canyon discovered that Cussons had concealed certain assets when the sheriff called pursuant to the order, to prepare an inventory of the assets. The liquidators of Echo Canyon took possession of the lodge on 16 August 2011 and are currently conducting its business. Cussons was finally sequestered on 13 October 2011.

[5] The applicants averred that the indebtedness by the respondents to them in the following amounts was established during investigations into the affairs of the applicants and from various books and records of the applicants:

Coastal Joy:

- 5.1 Advanced to the respondent totalling R117 479.00 (R81 709.00 and R35 770.00) reflected in the 2011 and 2012 ledger accounts;

- 5.2 Bank transfers to the bank account of the respondent totalling R166 609.00
- 5.3 An amount of R11 600.00 of 18 March 2011 of R14 609.00 of 02 July 2010 not reflected in the ledger or loan accounts but are reflected on the bank statements.
- 5.4 The bookkeeper at the lodge, Christine Vorster confirmed that the reference to 'Twin Cities Training' in Coastal Joy's loan account was reference to the respondent and that extracts from the ledger account of 2011 and 2012 reflect advances to the respondent;

Echo Canyon:

- 5.5 Bank transfers to the respondent amounting to R41 500.00 and an amount of R200 000.00 paid as deposit for the acquisition of an aeroplane;

Envirocap Trading:

- 5.6 Bank transfers to the respondent amounting to R64 900.00

Two Ships Trading:

- 5.7 Bank transfers to the respondent amounting to R103 300.00

[6] The aeroplane was registered in the name of the respondent with Cussons reflected as director during April 2008. During August 2012 an application for the amendment of the certificate of registration was done reflecting 'Icarys Air Services

CC' as 'applicant/registered owner' and Eugene Senior was reflected as the member. The amendment was to be effected from 'Twin Cities Trading 281CC' to 'Icarys Air Services CC'. The applicants contended that the purchase of the aeroplane was paid for by them. It was established that all the payments referred to in paragraph 5 above were received into the bank account of the respondent. Furthermore other entities controlled by Cussons also made payments into the respondents bank account. The monthly instalments for the aeroplane were therefore funded by the applicants and other entities.

[7] The applicants addressed letters of demand which were duly served on the respondent, in respect of each of the claims plus interest at 15.5%, calculated from 17 September 2012 to date of payment, in terms of section 69 of the Close Corporation Act read with the New Companies Act. The said demand stated that 'if for 21 days after the letter of demand was served on the respondent, the respondent neglected to pay the aforesaid amount demanded' to the applicants respectively, 'or to secure or compound it to the satisfaction of the' respective applicant, 'then the respondent would be deemed unable to pay its debts'.

[8] According to the respondent the monies advanced by the respondent were in respect of services rendered by the respondent and with regard to the R200 000.00 paid as deposit for the aeroplane it denied indebtedness and contended that the claim had prescribed. The applicants contended that Cussons and Eugene Senior had engaged in a unlawful stratagem to dispute the claims by the applicants. They attempted to conceal the R200 000.00 deposit paid by Echo Canyon, by reflecting same as a loan by Eugene Senior to the respondent in the amount of R199 900.00 in the respondents financial statements for the year ending 28 February for the years 2009, 2010 and 2011. The financial statements were signed by Cussons on 12

December 2011. The remaining R100.00 was allocated for the acquisition of membership in the respondent by Eugene Senior. No proof of payment was provided by Eugene Senior. Furthermore it was contended that the invoices for services rendered and sent to the applicants by the respondent were not authentic in that there was no evidence 'supporting the allegation of the services rendered and that the statements did not correspond with the actual amounts paid by the Applicants. Cussons had in enquiry by the Magistrate requesting such invoices responded that none were made out. An IT Forensic Specialist called in to investigate the invoices discovered that they were produced by Eugene Senior from his excel programme and backdated.

[9] Eugene Senior deposed to the answering affidavit as representative trustee of the sole member of the respondent. He disputed the grounds upon which the winding up application was brought and contended that it was brought to put pressure on the respondent to obtain payment for monies to which the applicants were not entitled to. This he said constituted an abuse of the process of court.

[10] According to Eugene Senior the respondent had bona fide defences to the claims of the Applicants:

- 10.1 payments to the respondent by the applicants were for the use of the Aeroplane and in return the applicants had agreed to pay the instalments in respect of respondent's credit agreement with Nedbank and a flight folio clocking approximately 230 flight hours was attached.
- 10.2 He contented that the respondent was able to pay its debts and was not insolvent.
- 10.3 the R200 000.00 allegedly paid as deposit constituted repayment for a loan received from Eugene Senior being the value for the erection of a

reed bed purification plant and that he borrowed the money to the respondent for the deposit on the aeroplane;

10.5 he queried the veracity of amounts and payments in annexures JE25 and JE35; he contend that certain purported claims of 2008 and 2009 had prescribed;

10.6 that the amounts paid by the third applicant were for use of the Aeroplane;

[11] Eugene Senior acknowledged that payments made by the applicants went towards payment of instalments on the aeroplane. He denied that Mr Du Toit was the general manager of the lodge since inception. He averred that Mr Du Toit came after Mr G Kemp and Mr P Lubbe. He contended that the registration of the aeroplane into his name was effected on advise of the CAA.

[12] He acknowledged that the letters of demand were delivered by the sheriff but contended that these were for debts that are not due and payable. The invoices he prepared had never been presented to the applicants because they were in draft form and were presented to Lottering on request. The fact that no invoices were presented did not mean that there were no records in existence of applicants use of the aeroplane. He denied that the issue of the invoices was a stratagem to prevent applicants from recovering their money. He disputed Mr Du Toit's version on the use of the aeroplane. The aeroplane was mainly used by Cusson's for businesses of the applicants

[14] The issue to be determined is articulated in the respondent's supplementary heads of argument dealing with the changes brought about by the Companies Act 71 of 2008, and the applicability of the Old Companies Act to the winding up of a

corporation by virtue of Item 9 of schedule 5 of the Companies Act and as to what the meaning of 'solvent'. The question posed on behalf of the respondent was whether the applicant could rely on a deemed provision that the respondent was insolvent by virtue of it being unable to pay its debts and if the court was satisfied that it was just and equitable to wind it up.

[15] The applicant found support for its submissions in the matter of *Firststrand Bank Ltd v Lodhi 5 Properties Investments CC and Another* 38326/2011 (20 March 2012)(GNP) which was cited with approval by *Scania Finance Southern Africa (Pty) Ltd v ThomiGee Carriers Cc* 4841/2012 (FSB) and *The Standard Bank of South Africa Limited v R-Bay Logistics CC* 4165/2012 (KZN). The submissions on behalf of the respondent were similar to those advanced on behalf of the respondents in *Lodhi5 supra*, Van der Byl AJ citing *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) S 436 (c) began his consideration at paragraph 25 and 26 by stating:

"[25] Our law has always, for the winding-up of a company (and, as provided in section 66(2) of the Close Corporation Act, 1984, a close corporation) relied, in addition to the concept of 'actually (or factually insolvent)', on the inability of a company(or close corporation) either because of the deeming provision or otherwise, to pay its debts.

[26] I find myself unable to agree with the contention that the Legislature intended to do away; and in fact did away with this well established and in the words of Berman J in the *Rhebokskloof* case *supra* "commercially sensible" approach which has been followed in our law for decades."

[16] In developing his interpretation of the present law Van der Byl AJ referred to the specific retention of s 345 of the Companies Act, 1973 and s 69 of the Close Corporation Act, 1984 where an entity was deemed to be unable to pay its debts and comes to the following conclusion at paragraph 30 of *Lodhi 5 supra*:

“[30] (a) that there is, in the absence of an express provision, no indication on the new Companies Act that the Legislature intended, particularly, in so far as it left section 345 of the Companies Act, 1973, in tact, to do away with the principle that a company(or a close corporation) may be liquidated on the grounds of its ‘*commercial insolvency*’

(b) that the expression ‘*solvent company*’ in item 9(2) of schedule 5 to the new Companies Act relates to solvent companies, being companies that are either not ‘*actually(or factually) insolvent or “commercially insolvent”*’, envisaged in Part G of Chapter 2 of the new Companies Act, in contrast to companies that are insolvent, being companies that are either ‘*commercially insolvent*’ or actually (or factually) insolvent which are to be dealt with in terms of Chapter x1v of the Companies Act, 1973.”

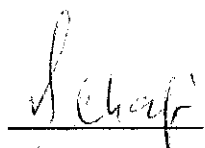
A creditor in these circumstances is enabled to rely on commercial insolvency, the inability to pay debts by proving a statutory demand. In this matter it was not disputed that a statutory demand had been properly served.

[17] It was submitted for the applicants that Eugene became member of the respondent only in September of 2011 and that the answering affidavit was silent on the role that he played in the Cussons entities prior to this date, nor does he state

how he gained knowledge of the averments in the answering affidavit, for example the use of the aeroplane by the Cussons entities. The flight folio was disputed on many grounds, further that Eugene Senior had failed to substantiate his defences and to advance facts to sustain his defence of prescription. The claim to solvency is not fully substantiated and it is contended that the respondent had failed to demonstrate solvency. I am in agreement with these submissions and am satisfied that the applicants have made out a case for winding up.

[18] In the circumstance I give the following order:

1. The respondent is placed under final winding up;
2. The costs of this application are costs in the winding up.



TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	20 MAY 2013
JUDGMENT RESERVED ON	:	23 MAY 2013
ATTORNEYS FOR THE APPLICANTS	:	EDWARD NATHAN SONNENBERGS c/o JACOBSON & LEVY INC
ATTORNEYS FOR THE RESPONDENTS	:	LOMBARD ATTORNEYS