IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 7562/2014

Date: 8 September 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES/NO~~
(3) REVISED

8/9/2014 Pretoria
DATE SIGNATURE

In the matter between:

ARTIO INVESTMENTS (PTY) LIMITED	Applicant
and	
ABSA BANK LIMITED	First Respondent
WILLEM CHRISTOPHEL ESTERHUIZEN N.O	Second Respondent
WILLEM CHRISTOPHEL ESTERHUIZEN	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY	Fourth Respondent

JUDGMENT

PRETORIUS J,

[1] The applicant is a company, who built and developed the Brits Platinum Mall, and entered into a mortgage loan agreement for R107

million with the first respondent (ABSA). The plaintiff defaulted on the repayments of the mortgage loan. The plaintiff commenced and started business rescue proceedings during November 2012.

[2] The applicant launched an application in terms of section 153(1)(a)(ii) of the Companies Act, 71 of 2008 (the "Act") in terms of which the applicant applied for the vote of the first respondent, disapproving the final business rescue plan published, to be set aside and for the approval of the business rescue plan dated 10 December 2013, to be granted by the court.

[3] This resulted in ABSA, the first respondent, to launch an urgent counter application during April 2014 requesting the following relief:

> *"1. That the resolution to commence business rescue proceedings had lapsed and as result thereof the appointment of the business rescue practitioner had lapsed and is void;*
>
> *2. A declaration that the business rescue proceedings had come to an end in terms of Section 132(2)(c)(i) of the Act;*
>
> *3. That the resolution taken by the Board of Directors of Artio to be set aside in terms of Section 130(1)(a) and 130(5)(a) of the Act and declaring that the business rescue proceedings in respect of Artio came to an end: and*
>
> *4. An order for the winding-up of Artio."*

[4] The urgent application was removed from the roll and costs were reserved. This court will have to deal with the costs of the urgent application as well. At the hearing of the application the applicant withdrew its application launched on 30 January 2014. Furthermore the applicant indicated that the applicant opposed the liquidation application only on the basis that the liquidation application should be refused in the exercise of the court's discretion.

[5] The applicant developed a shopping centre in Brits, the Brits Platinum Mall, which opened in June 2008. The applicant trades as the retail landlord of the Mall. A loan agreement was entered into by the applicant and ABSA, whereby ABSA granted a mortgage loan in favour of Artio, the applicant, with a total facility amount of R107 million. Payment of this loan was secured by means of a mortgage bond registered over the property in favour of ABSA. The shareholders of the applicant signed surety ships in favour of ABSA to secure payment of the monies loaned and advanced.

[6] The new Brits Mall opened in 2010 as competition, which resulted in the applicant losing the core tenant, Checkers, to the new mall. Checkers moved and closed its' doors in the centre on 13 May 2012. This caused the applicant to lose a substantial part of the rental income which caused the applicant's current financial problems. A new tenant replaced Checkers in December 2012. The tone of the Mall had

changed, whereas it had initially catered for the upper income market, it was now forced to change by targeting the lower and middle income market.

[7] On 26 November 2012 the applicant started business rescue proceedings. The first respondent is the applicant's largest creditor. The applicant's shopping centre was valued at R71 million on the open market with a forced sale value of R45 million. On 23 January 2014 a meeting of the creditors and employees was convened to vote on the final rescue plan. ABSA voted against the plan and it was rejected. ABSA had 98% of the votes and due to ABSA's vote against the business rescue plan it could not proceed.

[8] Thereafter the present application by the applicant followed on 30 January 2014, which resulted in the urgent application brought by the respondent for the winding-up of the applicant in April 2014. The urgent application was removed from the roll and costs were reserved.

[9] On the first day of this hearing of the application the applicant withdrew its application, whilst the first respondent persisted in the counterclaim to have the company placed in final liquidation.

[10] On 4 August 2014 the applicant made an offer to ABSA, which was rejected. A revised offer was made to ABSA on 11 August 2014.

The applicant set out four possible scenarios but in the end made an offer in terms of the fourth scenario on the day the application was set down to be heard by this court. This offer was immediately rejected by ABSA.

[11] The calculation by the applicant for the offer is based on the following statement in the affidavit on behalf of the first respondent, ABSA:

> *"... the first respondent would rather receive 20 cents in the rand, being the liquidation dividends suggested by the practitioner, than to allow the application to limp along in business rescue"*

[12] Mr Blou, for the first respondent, argued that the first respondent did not rely on this statement when deciding not to accept the applicant's offer. According to the first respondent this averment in the affidavit was not a stated fact, but a manner in which to indicate that it would not accede to business rescue proceedings at all under the circumstances. The mention of 20 cents in the rand was purely an example to show how vehemently opposed the first respondent was against business rescue at the time.

[13] This offer of R24 million was made by the son-in-law of one of the shareholders in the applicant, who is not a party to the original application or the winding-up application.

[14] The applicant relied on the scenario which is set out as:

"The fourth scenario is also based on the forced sale value of the subject matter to be R45 000 000.00 but in this instance, assuming it is not sold as an income generating running concern and the liquidator's fee is calculated at 3% instead of 10%.

Icon's forced sale value as determined with effective date of 24 October 2013 R45 000 000.00

The deductions from the anticipated proceeds of a forced sale are calculated as follows for purposes of the revised offer:

Liquidator's fee at 3% (on the basis that the asset in not sold as a going concern) R1 350 000.00

VAT @ 14% R189 000.00

Auctioneer's fee at 6% R2 700 000.00

VAT@ 14% R378 000.00

Master's fee R 20 500.00

Total fees to be deducted R4 637 500.00

Less clearance figures obtained from Madibeng R16 042 146.00

Amount available for distribution to ABSA R24 320 354.00"

[15] It is clear that the applicant owes ABSA at least R107 million. Should ABSA accept the offer of R24 million, it would be less than 25%

of the amount owed. At least 75% of the amount owed would have to be written off by ABSA. A further complication is that ABSA disputes the clearance figures of R16 042 146.00 which has apparently been obtained from the Madibeng Municipality. The applicant failed to set out the circumstances which resulted in this debt to the Madibeng Municipality. The applicant failed to indicate of what the debt consists. It will mean that all the other creditors are paid in full, but ABSA will be out of pocket as only less than 25% of the amount owing will be available to ABSA.

[16] It is clear from the documents that unlimited suretyships by D Papadopoulas and I Theodorou were entered into, whilst The Papa's Trust and The Sami Family Trust entered into joint and several limited suretyships of R15 million respectively in regard to this mortgage loan agreement. No mention is made that these suretyships will continue, once the principal debt has been extinguished, once Absa accepts the offer from the applicant.

[17] As soon as such an offer, as is presented by the applicant, is accepted the suretyships will no longer apply and will fall away. See **Turning Fork v Greeff 2014 (4) SA 521 WCC** where Rogers J held at paragraph 79:

> ***"The plan contains no provisions preserving the creditors' rights against sureties and at this stage there is no basis for implying such a preservation.*** *Mr Subel did not argue that*

the plan contained such a preservation nor did he contend that, if the defendants were liable, they retained their rights of recourse against the company. His argument was simply that the release of the company from its debts did not affect the sureties, and that is an argument which, for the reasons I have given, I cannot accept." (Court's emphasis)

[18] The court has to decide whether, if in accepting the scheme, as set out by the applicant, the creditors' rights against sureties would be retained. Mr Voster, for the applicant, argued that these rights would not be affected, as they would remain *in esse*. He had no further argument to persuade the court that if the court does not grant the winding-up of the applicant, the suretyships will still be in place, in spite of ABSA accepting the offer of less than 25% of the amount owing in terms of the mortgage loan agreement. I cannot find that these rights would remain.

[19] The court was referred to **Absa Bank v Newcity Group (Pty) Ltd** unreported Case No. 45670/2011 SGHC dated 13 August 2012. Sutherland J declared that even if a court does not grant business recue, the court must have a different mind set when considering whether a winding-up order should be granted, having the ethos of business rescue in mind.

[20] The New City matter differs hugely from the present case, as in that case the whole debt would be paid to ABSA in the end. In this case, at the most, 25% will be repaid to ABSA. It is quite clear that in the New City case ABSA was protected by the orders granted, to such an extent that ABSA could approach the court on the same papers, should the applicants not comply and extinguish the debt in full. A substantial portion of the debt would have been paid immediately in the New City case.

[21] In **SAA Distributers (Pty) Ltd v Sport and Spel (Edms) Bpk 1973 (3) SA 371 (C)** van Zijl J held at p 375:

> *"The* ***wishes of creditors cannot fetter the Court's discretion, but they must be given great weight and should be followed unless there are special circumstances to which greater weight should be attached.*** *"* (Court's emphasis)

[22] In **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA)** Willis JA dealt with commercial insolvency in paragraph 17:

> *"[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 a 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, 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. 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(l) thereof."

[23] In paragraph 25 the learned judge declared:

"[25] Subject to the consideration of business rescue proceedings in terms of parts A to D of ch 6 of the new Act, ***it is indeed 'business as usual' when it comes to a decision as to whether a commercially insolvent company should be placed in liquidation.***" (Court's emphasis)

[24] The applicant could not indicate any special circumstances which would justify this court from using its discretion in favour of the applicant.

[25] It is common cause that the applicant is factually and commercially insolvent. Applicant cannot pay its debts and its assets are much less than its liabilities. It is common cause that the valuation of the Mall is at the most R45 million if a forced sale should take place, whilst the debt of the applicant to the respondent is at the least R107 million and a further R16 million plus is owed to the Madibeng Municipality. It is further common cause that the applicant had been repaying the mortgage loan at R50 000.00 per month, far less than the agreed amount.

[26] Mr Vorster, for the applicant, argued that the court has a wider discretion in the present circumstances when the ethos of business rescue is taken into consideration.

[27] In **Newcity *(supra)*** Sutherland J found at paragraph 33:

"Upon an application of this approach, it must therefore be asked if liquidation in this particular case can reasonably be avoided, a question that is independent of the prospect of a business rescue option, as addressed earlier. In my view, despite some wrinkles in the substance of what Newcity advances, there is a sufficient body of fact and ***rationality in what is on offer to result in a reasonable pragmatic programme of payments that could avoid the extinction of Newcity.*** *"* (Court's emphasis)

[28] If the same question is posed in the present matter the answer has to be a resounding no if all the facts are considered and weighed as there is no guarantee that ABSA would be able to make up the 75% loss by claiming from the applicant's sureties, once the offer of R24 million plus is accepted from the applicant.

[29] Although the court has a discretion not to grant a winding-up order, there has to be facts on which a court can exercise such a discretion. In the present case I cannot find any facts to militate against winding up the applicant, apart from an offer of R 24 230 354.00 million which is on the table. This court can not order ABSA to accept the offer, thereby realising that ABSA will relinquish 75% of their claim, as well as, possibly the claims ABSA has against the respective sureties.

[30] Mr Blou, for the respondent, argued that ABSA may decide not to sell the Mall and therefor the court cannot sanction the offer. I must agree that the court cannot bind ABSA in this way, as ABSA may choose not to sell the property and then the valuation for a forced sale is immaterial. The court cannot prescribe to ABSA and force ABSA to take an offer which is detrimental to ABSA in the extreme.

[31] This court cannot find any exceptional circumstances which would justify a decision to use my discretion not to wind up the applicant.

[32] I find that the only solution in these circumstances, where the applicant is commercially insolvent, is to wind up the company.

[33] This court has to deal with the issue of costs. It is common cause that the applicant had been in business rescue proceedings for close to 19 months, since 26 November 2012 until the meeting on 23 January 2014. It is further common cause that there is no prospect of the applicant settling its debts and that it is commercially and factually insolvent.

[34] This court has to take cognisance of the fact that the first respondent is adamant that a winding up of the applicant should be granted, as it had voted against business rescue. In **Oakdene Sqaure Properties (Pty) Ltd & Others vs Farm Bothasfontein (Kyalami) (Pty) Ltd & Others 2013 (4) SCA 539** paragraph 38 Brand JA held:

> *"[38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company.* ***If***

the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. *By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs.* ***Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants.***" (Court's emphasis)

[35] Business rescue proceedings should only last for a period of three months, unless extended by the court. Since December 2012 ABSA had actively participated in the business rescue proceedings, without raising any difficulties that the applicant had not complied with the regulations. ABSA was a party to the business rescue proceedings until 23 January 2014. I cannot find that ABSA was *mala fide* ot unreasonable in not voting for the business plan.

[36] In the present matter the first respondent voted against the business rescue plan on 23 January 2014. Up to 23 January 2014 the first respondent did partake of the business rescue in that they did not lodge any complaints regarding the non-compliance with the regulations by the applicant, until the applicant launched its application. ABSA actively tried to assist the applicant, but on 23 January 2014 decided that the applicant was commercially insolvent and incapable of being rescued. The costs after 23 January 2014 should be borne by the applicant.

[37] I have considered all the arguments as to whether the business rescue was a nullity or to determine a date at which the business rescue would lapse. In these circumstances I find that the business rescue came to an end on 23 January 2014 when ABSA voted against the business rescue plan. Therefor the applicant will be liable for all costs incurred after 23 January 2014, which will include the costs of the business rescue practitioner.

[38] The reserved costs of the urgent application must also be considered and decided by this court. On 15 April 2014 ABSA launched an urgent application for the winding up of the applicant, which was removed from the roll at the time. However, ABSA has been successful in this application for the winding up of the applicant and the costs should follow the result.

[39] The following order is made:

1. The business rescue proceedings in respect of the applicant had come to an end in terms of section 132(2)(c)(i) of the Companies Act, 2008 on 23 January 2014;
2. The applicant is placed under final winding-up in the hands of the Master of the High Court;
3. The costs of the counter-application by ABSA and the reserved costs of 15 April 2014 are costs in the winding-up of the applicant including the costs of two counsel;

Judge C Pretorius

Case number	: 7562/2014
Heard on	: 14 August 2014
For the Applicant	: Adv JP Vorster SC
	Adv CA Kriel
Instructed by	: Machobane Kriel
For the Respondent	: Adv J Blou SC

Adv BM Gilbert

Instructed by : Webber Wentzel

Date of Judgment : 8 September 2014