REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 38591/2019

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

10/09/2021 .....

In the matter between:

BANK OF BARODA **Applicant**
(Registration No: 1997/012717/10

and

ANNEX DISTRIBUTION (PTY) LIMITED **Respondent**
(2002/023324//07

JUDGMENT

SUMMARY

[1] This is an application for an order for the final liquidation of the respondent due to a continued inability to pay its debt to the applicant. A provisional liquidation order was granted on the 14 May 2020 with a return date of 1 September 2020.

[2] Subsequent to the granting of the order, the parties engaged in negotiations aimed at resolving settlement of the debt. The returned date was extended several times as a result. On the 7 July 2020 the parties entered into a written agreement in terms of which the debts of the respondent and those of two of its sister companies, namely, Sahara Computers (Pty) Limited and Confident Concepts (Pty) Limited, owing to the applicant were to be consolidated and paid to the applicant from the proceeds of the sale of the assets of Islandsite Investments 180 (Pty) Limited, in business rescue; another sister company of the respondent. The consolidated debt was in the order of R123m.

[3] Among the settlement terms of the agreement were conditions precedent the respondent had to satisfy to validate the agreement. The salient conditions precedent were that;

3.1. The respondent and its aforementioned sister- companies were to conclude a written inter-company agreement giving effect to the consolidation and repayment of the debts owing to the applicant. A copy of the agreement was to be given to the applicant immediately upon the conclusion thereof.

3.2. The authorised business rescue practitioners of Islandsite were to furnish the applicant with an amended rescue plan of Islandsite incorporating the terms of the settlement agreement immediately after the amended plan had been approved by all parties having an interest in the rescue process of Islandsite.

3.3. The sale of the assets of Islandsite was to be completed by no later than the 28 February 2021.

3.4. The respondent was to pay to the applicant all legal costs already incurred in these proceedings and ordered in favour of the applicant.

3.5 A failure by the respondent to satisfy any of the above pre-conditions would render the agreement void *ab initio* and of no force and effect.

CONTENTIOUS TERMS OF THE CONDITIONS

[4] There are two mutually destructive versions with regard to the effect of the conclusion of the settlement agreement. On the face of the signed agreement, the applicant is obliged to withdraw the liquidation proceedings against the respondent immediately upon the signing of the settlement agreement. The respondent relies on this version in opposing the granting of the relief sought by the applicant in the present hearing. The applicant contends, on the other hand, that the respondent had not satisfied the conditions precedent resulting in the settlement agreement being void ab initio. The applicant further argued that the clause, clause 4 of the agreement obligating it to withdraw these liquidation proceedings against the respondent, was inserted by the then business rescue practitioner of Islandsite, Naidoo, without the knowledge and consent of the applicant.

[5] The applicant, which had drawn the initial version of the settlement agreement, states that the original version it had sent to the BRP of Islandsite contained clauses 4 and 5 the terms whereof were that; 5(i) the applicant would keep the liquidation proceedings against the respondent in abeyance pending payment of the debt owed to it (clause 4), and 5(ii) the applicant shall re-instate the liquidation proceedings should the respondent fail to satisfy the conditions precedent in the settlement agreement.

[6] It is not in dispute that, save for payment of the legal costs by the respondent in terms of the settlement agreement, none of the other conditions precedent have been satisfied. The applicant, in the present pursuit of the order for the final liquidation of the respondent, relies on the invalidity of the settlement agreement as the negation of Islandsite as the substitute debtor.

THE AFFIDAVIT RESISTING THE GRANTING OF THE FINAL ORDER

[7] The respondent has filed a supplementary affidavit resting the granting of the order for its final liquidation. The respondent alleges that it is no longer indebted to the applicant on the strength of the agreement of the 7 July 2020 and that the applicant's acceptance of the substitution of debtor disentitled it to the relief sought. On this ground, the respondent contended, the applicant was in the present hearing seeking relief against the wrong party. The respondent consequently prayed for the discharge of the rule nisi with costs.

ANALYSIS AND FINDINGS

[8] It is trite that an agreement that contains conditions precedent becomes valid and legally binding upon the satisfaction of the stipulated conditions [see *Africast (Pty) Limited v Pangbourne Properties Limited* [2014] ZASCA - SAFLII]. The respondent does not allege nor rely on the fulfilment or the waiver, by the applicant, of the conditions precedent. By the operation of the law, the absence of fulfilment of the conditions precedent rendered the settlement agreement of the 7 July 2020 null and void ab initio. A void agreement cannot bring about an innovation to the

situation it was purported to innovate. I find, therefore, that there was no valid substitution of the respondent as a debtor of the applicant.

[9] The fact that the purported substitute debtor, Islandsite, was already in business rescue at the time the purported settlement agreement was signed, justifies an expectation that the proceeds of the sale of some of its assets would be utilised in its own rescue. It is curious that the respondent would seek to add a financial burden to its already financially ailing sister company. Crucially, it is unlikely that the improbability of providing the applicant with both the inter-party agreement and the amended business rescue plan of Islandsite had been unknown to the respondent at the time of the conclusion of the settlement agreement, considering the respondent's proximity to its sister companies, including Islandsite.

[10] The grounding of the applicant's insistence that the respondent remains, as at the date of this hearing, unable to pay the debt found support in the respondent's argument that the applicant had been aware of the inability of the respondent to pay the debt and had taken "a viable commercial decision to accept Islandsite as its substitute debtor". In my view, the respondent's effort in the settlement negotiations was more a desperate attempt to delay the inevitable outcome of the present hearing than a genuine attempt at seeking to settle its debt to the applicant.

AFFIDAVIT RESISTING FINAL LIQUIDATION ORDER

[11] It is apparent that the respondent's affidavit resisting the granting of a final liquidation order was filed well out of time in terms of the rules. Despite this fact, the respondent made no effort to seek the indulgence of the court for the late filling and the acceptance of the affidavit in the present hearing. The applicant has also alluded to the glaring discrepancies regarding the

commissioning of the respondent's oath. A mere reading of the contents of both the certificate purporting to clarify the defect in the commissioning of the oath, and of earlier correspondence written by the Commissioner of Oaths also purporting to explain the discrepancies, suggests that the oath was commissioned three months prior to the presentation of the affidavit to the Commissioner of Oaths for commissioning. It is noted that the applicant elected not to rely on the unlawfulness of the affidavit in disputing the existence of a valid substitution of debtor. The applicant's gesture, however, does not in any way influence the court to accept a defective affidavit as compliant with the law. I find, therefore, that there is no lawful affidavit before me resisting the granting the order for the final liquidation of the respondent.

[12] A substantial period has lapsed since the granting of the provisional liquidation order. This includes the period of fruitless negotiations leading to the conclusion of the void agreement of substitution of debtor. The respondent's earlier engagements of the applicant in frivolous and costly interlocutory litigation cannot be overlooked either. The overall purpose of the steps the respondent had taken even prior to the granting of the provisional liquidation order has glaringly been to avert its final liquidation than to seek to establish its commercial solvency. The conduct of the respondent in these circumstances falls in all fours within the radar of the definition of an abuse of process. In *Beinash v Wixley* 1997(3) SA 721 (SCA) at 734 F – G, the court stated thus:

> *"What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case.*

There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

[13] The description of a commercially insolvent company was enunciated in *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) *as follows;*

> "The test whether the company is able to meet its current liabilities, including contingent and prospective liabilities as they come due. Put slightly differently, it whether the company 'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts existing as well as contingent and prospective and continue trading". The respondent's mere reliance, even if it was genuine and capable of execution, on the sale of the assets of Islandsite, in business rescue, for payment of the debt to the applicant is an indication that the respondent is commercially insolvent.

CONCLUSION

[14] I am satisfied that the applicant has complied with the earlier order of the court with regard to service of provisional liquidation order to all relevant stake holders in terms of the provisions of section 346 A of the Companies Act, 1973. I am equally satisfied that the applicant has successfully shown that the respondent is unable to pay its debt to the applicant. The amount involved is in the order of R88 824 232-42 (Eighty eight million eight hundred and twenty four thousand two hundred and thirty two rand and forty two cents). I find in consequence that the respondent ought to be liquidated in terms of the provisions of section 345(1)(a) of the Companies Act of 1973.

[15] **ORDER**

1. The respondent is placed in final liquidation in the hands of the Master of the High Court.

2. The costs of this application, including the costs consequent upon the employment of two counsel, shall be costs in the winding-up.

M. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES

For the Applicant:	Adv. A. Bham SC with him: Adv. A. Kalloori
Instructed by:	Mervyn Taback Inc.c/o McIntosh Cross & Farqurharson, Arcadia, Pretoria

For the Respondent:	Adv. M.R. Hellens SC With him: Adv. L. Van Gass
Instructed by:	Van der Merwe & Van der Merwe Attorneys, c/o 308 Brook Street, Menlo Park, Pretoria
DATE OF HEARING:	14 JUNE 2021

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON AUGUST 2021.