




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

**CASE NO: 38591/2019**

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>30/12/2021</u>	<u></u>
DATE	SIGNATURE

**In the matter between:**

**ANNEX DISTRIBUTION (Pty) LTD**

**(Registration No: 2002/023324/07)**

**Applicant**

**and**

**BANK OF BARODA**

**(Registration No: 1997/012717/10)**

**Respondent**

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**JUDGMENT**

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**MBONGWE J:**

**INTRODUCTION.**

- [1] This is an application for leave to appeal against the judgment this Court handed down on the 10 September 2021 granting an order for the final liquidation and placing of the Applicant in the hands of the Master in terms of the provisions of section 345(1)(a) of the Companies Act of 1973.
- [2] After hearing the application for leave to appeal on 2 December 2021, I granted an order dismissing the application with costs. It soon came to mind that I had inadvertently omitted to address the issues raised by the Applicant by furnishing reasons for the order given. I caused a letter to be sent to the parties informing them that written reasons will be provided by not later than the 21 January 2022. I now cover the vacuum that was inadvertently created at the hearing.

#### **APPLICANT'S MAIN GROUND FOR SEEKING LEAVE TO APPEAL**

- [3] The Applicant's main ground for seeking leave to appeal is not different from the argument that was during the opposition to the granting of the order for the final liquidation of the Respondent (the present applicant). Two issues were to be determined, namely;
- 3.1 Whether there was a valid substitution of the debtor which obliged the Applicant (Bank of Baroda) to withdraw the liquidation proceedings against the Respondent (Annex);
- 3.2 Whether the Applicant had proved that the agreement of substitution of debtor had lapse as a result of the non –fulfilment of conditions precedent by the purported substitute debtor. The important point to make here is that the failure to fulfil the conditions precedent rendered the agreement a nullity and the position of the original debtor (Annex) to the creditor remained unchanged.

## SYNOPSIS

- [4] The Applicant herein is indebted to the Respondent who, as a result, obtained a provisional liquidation order against the Applicant on 14 May 2020. Subsequent to the granting of that order and after lengthy period of engagements to settle the matter, which resulted in a number of the extensions of the rule nisi, the parties agreed on concluding an agreement in terms of which the Applicant would be substituted by its sister company, Concise Concepts (PTY) Ltd, as the debtor of the Respondent. The agreement was concluded on 7 July 2020.
- [5] There are other two sister companies of the Applicant also indebted to the Respondent, namely Sahara Computers (Pty) Ltd and Confident Concepts (Pty) Ltd. It was envisaged that the debts of these three sister companies, owned by the Gupta family, would be consolidated in the agreement of substitution of debtor and paid by Confident Concepts (Pty) Ltd from the proceeds of the sale of another sister company, Islandsite 180 (Pty) Ltd, in liquidation. Included in the conditions precedent was that the sale of the assets of Islandsite was to be completed by 28 February 2021. The consolidated debt owed to the Respondent was in the order of R123m, of which R88 million was owed by the Applicant.

## THE AGREEMENT OF 7 JULY 2020

- [6] It is necessary to state that on the face of it, the gist of the terms of the written agreement pertains to the payment of the debt owed and not legal costs. To this end I deem it necessary to quote the relevant portion of the agreement on which the Applicant grounded its argument in the application for leave to appeal. The agreement reads thus:

*"The following terms and conditions are to be complied with by CC:*

- 1. The BPR, having been duly authorised and representing CC, will draw up an amendment to the Business Rescue Plan of CC, which will include the*



*aforesaid agreement between CC, Annex, Sahara, Islandsite and the Bank, and provide a copy of the amended Business Rescue Plan to the Bank and ensure that it is duly approved at the next general meeting of the affected persons of CC. If the Business Rescue Plan, as envisaged aforesaid is not approved by the affected persons within three months from this settlement agreement date, then this settlement agreement is of no force or effect.*

- 2. A copy of the intercompany agreement between Confident Concept (Pty) Ltd and Islandsite Investment 180 (Pty) Ltd is to be provided to the Bank immediately. If no such agreement exists then this settlement agreement is of no force or effect.*
- 3. The amount of ZAR 19.66 Mn currently held by South African Reserve Bank in the account of Sahara Computers (Pty) Ltd as and when released shall be paid to the Bank directly by SARB. If the same is refunded by the SARB to the buyer of the aircraft then CC will be indebted to the Bank for the aforesaid amount it shall be liable to pay the aforesaid amount to the Bank.*
- 4. Subsequent to all parties agreeing to the above, which includes both Annex and Sahara, the legal proceedings against Annex Distribution (Pty) Ltd and Sahara Computers (Pty) Ltd shall be withdrawn with immediate effect.*
- 5. The legal action by the Bank shall be immediately re-instated should the amounts due not be paid according to the settlement agreement."*

## **FINDINGS IN THE FINAL LIQUIDATION HEARING**

- [7] It was common cause at the hearing of the application for the final liquidation of the Applicant, on 14 June 2021, that none of the conditions precedent set out in clauses 1, 2 and 3 of the agreement were fulfilled by the purported substitute debtor, Concise Concepts. It was also common cause that the legal fees due by the Applicant had already been paid.

- [8] In the judgment that followed, I found that there was no valid substitution of the Applicant as a debtor of the Respondent flowing from the agreement had lapsed due to none fulfilment of conditions precedent. Satisfied that the Respondent (Bank) had proved that the Applicant remained incapable of paying its debt in the amount in the order of R88 824 232.42, I granted an order for the final liquidation of the Applicant in terms of section 344(f) read with section 345(1)(a) of the Companies Act, 1973.

## **APPLICATION FOR LEAVE TO APPEAL**

### **APPLICANT'S ARGUMENT**

- [9] At the hearing of the application for leave to appeal, counsel for the Applicant argued at length that the agreement of substitution of the Applicant as a debtor of the Respondent was valid. He further argued that payment of the Applicant's legal costs obliged the Respondent to immediately withdraw the liquidation proceedings in terms of clause 4 of the written agreement of 7 July 2020. Counsel disputed that the conditions in clauses 1, 2 and 3 of the agreement constituted conditions precedent to the validity of the agreement.
- [10] A further point argued by counsel for the Applicant was that the Court was enjoined, in light of the dispute regarding the validity of the agreement, to grant leave to appeal. He submitted, in support of his argument, that the Plascon Evans principle found application in this regard.

### **ARGUMENT BY THE RESPONDENT**

- [11] Counsel for the Respondent was emphatic in her argument that the conditions in clauses 1, 2 and 3 were by their nature conditions precedent and that the agreement was explicit that a none fulfilment thereof would render the agreement a nullity and of no force or effect. She argued that none of the conditions precedent were fulfilled and that the agreement had accordingly lapsed on its own terms.



- [12] It was further argued on behalf of the Respondent that payment of the Applicant's legal costs fell in a separate agreement and was not part of the agreement pertaining to the Applicant's principal debt to the Respondent.

## **ANALYSIS AND FINDINGS**

### **THE LAPSING OF THE AGREEMENT**

- [13] In terms of clause 1 of the agreement, a maximum period of three months from the date of the agreement was stipulated for the approval of the amended Business Rescue Plan of Concise Concepts (Pty) Ltd, to have occurred, failing which '....this settlement agreement is of no force or effect.' [own emphasis]. The underlined statement is repeated in clause 2 in relation to the immediate furnishing to the Respondent of the intercompany agreement between Concise Concepts (Pty) Ltd, Annex Distribution (Pty) Ltd, Sahara Computers and Islandsite Investment 180 (Pty) Ltd. These conditions required to be met before the agreement could become binding. It is not in dispute that these conditions were fulfilled resulting in the agreement lapsing. I found that a lapsed agreement could not beget a valid substitution of debtor and that the Applicant remained indebted to the Respondent in the circumstances.

### **PAYMENT OF LEGAL COSTS**

- [14] It is apparent from the agreement of 7 July 2020 that no reference is made therein regarding the payment of the Applicant's legal costs. The Applicant's contention that payment of legal costs triggered the operation of clause 4 of the agreement is clearly untenable.

### **THE PLASCON EVANS RULE**

- [15] It is trite that where a particular fact in the Applicant's case is placed in dispute in motion proceedings, the version of the Respondent prevails. This principle, in my view, does not find application where the disputed fact is determinable on the papers before Court. The issue and contention of the Applicant regarding

the validity of the agreement does not constitute a dispute triggering the application of the Plascon Evans principle in this case. The Applicant's contention otherwise ought to be rejected.

## THE LAW

- [16] Whether the Court ought to grant leave to appeal is dependent on whether the grounds for leave to appeal meet the requirements set out in section 17 of the Superior Courts Act 10 of 2013 in relation to the prospect of the success of the Applicant on appeal. The relevant provisions read thus:

### Section 17

*"Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that --*

*1. the appeal would have a reasonable prospect of success;*

*or*

*2. there is some or other compelling reasons why the appeal should be heard, including the conflicting judgments on the matter under consideration."*

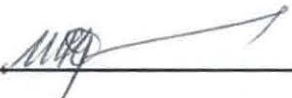
## CONCLUSION

- [17] I find, in the present matter, that the appeal has no reasonable prospect of success; that there are no compelling circumstances for the appeal to be heard and, finally, that there are no conflicting judgments with regard to the finding that an agreement containing conditions precedent becomes void ab initio where there has been none fulfilment of conditions precedent and waiver of non-compliance has neither been alleged nor established. Leave to appeal is, consequently, refused.

## **ORDER**

[18] Following the findings in this judgment, the following order is made:

1. The application for leave to appeal is dismissed.
2. The Applicant is ordered to pay the costs on the opposed scale.

  
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**M. MBONGWE J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA.**

## **APPEARANCES**

For the Applicant: Advocate M.R. Hellens SC

With him: Advocate Van Gaas.

Instructed by: Van der Merwe & Van der Merwe Attorneys,

c/o JJR Inc.

308 Brooks Str.

Menlopark, PRETORIA.

For the Respondent: Advocate A. Kolloorri (Ms)

Absent: Advocate A. Bam SC.

Instructed by: Mervyn Taback Inc.

13 Eton Road, Johannesburg

c/o McIntosh Cross & Farquharson,



PRETORIA.

DATE OF HEARING 2 DECEMBER 2021.

**JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 30<sup>th</sup>  
DECEMBER 2021.**