Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO 1630/2009

In the matter between:

DOROTHY JEAN GRIFFIN Applicant

and

EDWAFIN INVESTMENT HOLDINGS LTD Respondent

AND

CASE NO. 3606/2009

In the matter between:

THERESA DIANE CHAPLIN Intervening Applicant

and

DOROTHY JEAN GRIFFIN First Respondent

EDWAFIN INVESTMENT HOLDINGS LTD Second Respondent

In re: DOROTHY JEAN GRIFFIN Applicant

and

EDWAFIN INVESTMENT HOLDINGS LTD Respondent

AND

CASE NO. 3656/2009

In the matter between:

PATRICK ROY STAPLETON	First Applicant
MARIA JOHANNA STAPLETON	Second Applicant
DONALD GRAHAM HUTCHINSON	Third Applicant
LOUIS ROBERT KLYNSMITH	Fourth Applicant

and

EDWAFIN INVESTMENT HOLDINGS LIMITED	First Respondent
TERESA DIANE CHAPLIN	Second Respondent
DOROTHY JEAN GRIFFIN	Third Respondent

JUDGMENT

Delivered on 22 May 2009

SKINNER, AJ:

1

An application was brought in matter number 3656/2009 to place the first respondent in that matter (Edwafin Investment Holdings Limited, hereinafter referred to for the sake of convenience as “the company”) under judicial management in terms of Section 428 of the Companies

Act No. 61 of 1973. This application had been preceded by an application under case number 1630/2009 for the liquidation of the company as well as an application under case number 3606/2009 for leave to be granted for a party to intervene as a second applicant in the liquidation proceedings. This last mentioned application was brought as a matter of caution because there was a challenge in the liquidation proceedings to the status of the Applicant in such proceedings as being shown to be a creditor of the company entitled to bring liquidation proceedings.

2

The principles governing an application for judicial management are set out in Section 427 of the Companies Act, namely:

> **"(a) The relevant company must be unable to pay its debts or probably unable to meet its obligations; and**
>
> **(b) The company has not become or is prevented from becoming a successful concern;**
>
> **(c) There is a reasonable probability that if placed under judicial management, such company will be enabled to pay its**

debts or meet its obligations and become a successful concern;

(d) **It must appear just and equitable to the court to grant a judicial management order."**

3

Once the court is satisfied that all these requirements have been met, there is nevertheless a discretion to be exercised judicially by the court as to whether a judicial management order should be granted or not (**Ben-Tovim v Ben-Tovim and Others** 2000 (3) SA 325 (C) at 330 – 331)

4

It is trite that an unpaid creditor of a company is entitled *ex debito justitiae* to a winding up order (provided of course he can establish the requirements for such order) (**Tenowitz v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments** 1979(2) SA 680 (E) at 683 A). Accordingly, where a creditor insists that a company be wound up, such insistence can only be overridden if it can be shown that a judicial management order is in the interests of all the members and creditors. (**De Jager v Karoo Koeldranke & Roomys (Edms) Bpk**

1956 3 SA 594 (C) at 602). For that reason, since it is an encroachment on the right of the creditor to demand his money, judicial management cannot be used an experiment to determine whether the company can extricate itself from its difficulties. (**Kotze v Tulryk Bpk en Andere 1973** SA 118 (T) at 122 H)

5.

The present circumstance is an unusual one. The applicants for the judicial management order do not contend there has been any maladministration that the grant of such order will serve to eradicate. Accordingly if a judicial manager is appointed his appointment will not assist the transforming of the company into a successful concern by removing any existing conflict or maladministration. Further, since the company (as appears hereafter) is unlikely to attract any further investments, its success is entirely dependent on receiving the interest and ultimate repayment of its investments. Thus the success of the company is not reliant on the endeavours and skills of the judicial manager but rather on the success of other entities or companies, the day to day running of which would not fall under his or her control. For that reason I was urged by Mr. Potgieter SC on behalf of the applicants for the winding up of the company to find that judicial management is not appropriate where the profitability of the company is dependent on the success (or lack thereof) of other entities. It seems to me however

that in the circumstances of the present case judicial management can be considered because the fate of the company rests (as appears hereafter) on the endeavours of two identified entities. The situation may well be different if the company were dependent on a multiplicity of other entities where it would become almost impossible to assess the prospects of all those entities.

6.

The business of the company, as emerges from the judicial management application, was "to procure venture capital, to invest and manage such venture capital and to provide related strategic, planning, company and secretarial services to companies/entities, inclusive of its subsidiaries". It procured venture capital for investment in other companies by way of selling debentures to members of the public. Each debenture was repayable after the expiration of a period of five years. During that period the debentures would bear interest at a specified rate.

7.

The company seems to have been successful for some years and as appears from the audited financial statements for the year ending 28 February 2007, it returned a profit after taxation in excess of R5 million. According to the applicants for the judicial management order however,

the global economic crisis adversely affected the company's ability to attract capital with the result that the down-turn in the global economy caused an accumulated investment opportunity loss of approximately R25 million. In addition the company invested R27 million in one of its wholly owned subsidiaries which was to develop and manufacture two types of vehicles. There was however a lengthy delay in such subsidiary being able to obtain the necessary approval from the South African Bureau of Standards and the Department of Transport. It was estimated that this delay cost the subsidiary some R37 million rand which naturally meant that the subsidiary was not able to sell vehicles or repay the company. The company's trading accounts for the period ending February 2009 reflect a loss of some R124 000.00. While this is not in itself substantial, the difference in comparison to the company's previous financial position is marked. In the liquidation application it was acknowledged that the company was "going through a cash flow crisis".

8.

Although as I have indicated, the company purported to invest capital in other entities, it would appear that for present purposes the investments were all in wholly owned subsidiaries. Several of these were either sold or rendered dormant once the company found that it was no longer

attracting investments with the result that the company had only two wholly owned subsidiaries which were still active, namely Edwabond (Pty) Ltd trading as Edwabond Capital Options (hereinafter referred to as “Edwabond”) and Dynamic Motor Company (hereinafter referred to as “DMC”).

9.

In the judicial management application the deponent to the following affidavit stated that:

> “Edwabond is a registered private equity and securities venture capital company. Until recently its primary business was to market the debentures issued by the respondent [the company] and manage the debenture investment portfolio of the respondent. Since the global economic downturn, the business activities of Edwabond have been directed towards the development of a new range of products, such as debt consolidation, the sale of equity in DMC, the marketing of DMC loan share offers and the sale of DMC back-end products.”

10.

DMC, as its name implies, manufactures vehicles and in particular “an all terrain utility vehicle for use in the agricultural, general utility, leisure and mining markets” known by the brand name of Damara and a sub-surface mine vehicle. A document was furnished indicating that there was an order for 11 Damaras, four of which were to be delivered during May 2009 to the purchase, the total order value being in the vicinity of R857 000.00. It was further submitted that “currently, DMC is actively engaging and exploiting 300 enquiries/leads for the purchase of Damara vehicles”. Regarding the sub-surface mine vehicle it was submitted that:

> “DMC has been actively engaged for a period of about one year in the development and negotiations for the purchase of the mine vehicle with Anglo-Platinum Mines in the Rustenburg area. The first prototype of the mine vehicle will be available by the end of June 2009. An arrangement has been reached with the mines in question that they will purchase the mine vehicle from July 2009 and that in respect of such purchases a deposit of 50% will be payable on the placing of an order. The said deposit will enable DMC to purchase all the required raw materials and substantially manufacture the mine vehicle, without utilising its own financial resources”.

I have described the activities of the two subsidiaries in some detail because Mr Lotz SC who appeared on behalf of the applicants in the judicial management application very fairly and properly conceded that the prospects of the company itself attracting further capital were "probably zero". I agree with this as it is very unlikely that large numbers of creditors would be prepared in the current economic downturn to invest substantial sums in a company under judicial management with the risk that the funds may well be lost if the company ultimately goes into liquidation. In the circumstances, the only prospect for the company is that the two subsidiaries will be successful to such an extent that they will be able to generate sufficient funds to make large payments to the company in such manner that it will in turn be able to meet its debts and settle its obligations.

12

To this end, the applicants for the judicial management order furnished a profit and loss projection for Edwabond for the period April 2009 to March 2010 and a profit and loss projection in respect of DMC for the same period. These were apparently prepared by the third applicant in the judicial management application, Donald Graham Hutchinson who was described as a "research and development specialist with the appropriate management, engineering and project development skills". From the projections it was submitted that Edwabond would be able to

pay to the company from May 2009 the nett monthly profit before tax, increasing over the period from May 2009 to March 2010 from R62 810.00 to R284 310.00 per month. The projection in respect of DMC was that it would operate at a loss of between R231 991.00 and R156 993.00 per month until October 2009 when it would generate a profit of some R140 121.00 which within two months would increase to R2 714 966.00 per month and by March 2010 an amount of R3 078 988.00 per month. The dramatic increase from October 2009 to December 2009 was attributed to the fact that "realistically sales of the Damara should commence during September/October 2009" and further that by such period the sales of the mine vehicle would also increase from 20 vehicles a month to 30 vehicles a month.

13.

A further projection was also furnished in respect of the company itself which indicated that the company would have an accumulated loss by June 2009 of R1.1 million but would then receive an amount of approximately R7.779 million during July 2009 – this was from an off shore investment in Paragon derivatives which although it had a current value of some R12.965 million was only anticipated to realise the lower figure due to the early redemption of the derivatives. It was submitted that such would effectively tide the company over until November 2009 when, with the income derived from Edwabond and DMC, it would be

able to recommence payment to the debenture holders in the amount of R2.3 million per month. It would also be able to commence repayment to creditors from August 2009 in the amount of R548 095.00 per month.

14.

Mr Potgieter SC severely criticised these projections. He submitted that financial statements of the two entities relied upon should have been furnished to show that they have some track record sufficient to have confidence in the projections. He pointed out that a specific "invitation" to furnish these documents has been extended but that the response was that "the disclosure of and the making available of the financial records of all the subsidiaries will not contribute to the determination of the issues in this application". (Mr Lotz SC submitted that DMC was only commencing its trading operations while Edwabond was also in effect a new entity due to its change in operations).

15.

Mr Potgieter SC further submitted that there would be an accumulated arrears debenture interest (since such had not been paid since October 2008) in excess of R30 million by November 2009 and emphasised that the projections were merely that the company would pay R2.3 million per month to service the current debenture interest repayments. He

submitted that the projections took no account of the fact that R30 million would have to be found from somewhere to repay the arrears. He further pointed out that the debentures enduring for a period of five years from March 2005 would mature from March 2010 and that on the projections before the court no provision had been made for this with the result that the debenture holders could not possibly receive their capital within a reasonable time. He pointed out that the applicants for the judicial management order had themselves indicated that "the respondent's road to recovery is not a miracle road. It is a slow process and will depend on sound management and financial principles being applied in view of the current economic recession".

16.

In my view, there is a great deal of weight to be attached to his criticisms. While it is correct as Mr Lotz SC pointed out, that the opposition to the judicial management was not based on furnishing any figures or projections to dispute those furnished in support of the application for judicial management, in the nature of things, that would hardly have been possible since only the company and its two subsidiaries would have knowledge of the anticipated financial figures and returns. While I must accept (in the absence of any challenge) the expertise of Mr Hutchinson and his *bona fides* in furnishing the projections, in my view they are entirely too optimistic. As I have

indicated, it is common cause between the parties that there is a general global economic downturn. I cannot accept (without any supporting facts or basis for such proposition) that there will be sufficient purchases for the vehicles manufactured by DMC to bring to fruition the projected results. Since DMC will only be commencing sales of the Damara during September/October 2009, there is no "track record" to justify why this particular motor vehicle manufacturing company will be successful against the current worldwide trend. As was pointed out in **Weinberg and Another v Modern Motors (Cape Town)(Pty) Limited** 1954(3) SA 998 (C) at 1001 A-B "A mere confident hope expressed in affidavits and not sufficiently supported by concrete evidence is not enough."

17.

In my view without any supporting evidence I cannot accept that the projections are realistic and not over-optimistic. The onus rests on the applicants in the judicial management application to satisfy the court that there is a reasonable probability that the grant of such order will enable the company to pay its debts, meet its obligations and become a successful concern. Where reliance is based on projections of anticipated future trade coupled with proof of an order for 11 vehicles only, I cannot be so satisfied. It may well be that because both

subsidiaries are only commencing trade, there is no adequate supporting evidence that could be furnished but such detracts from the applicants for the judicial management order being able to discharge the onus. "An applicant basing his case for a judicial management order, which after all is a special concession and only granted in exceptional circumstances …. on scanty information and generalisations does so at his own peril." **Ladybrand Hotel (Pty) Ltd v Segal and Another** 1975(2) SA 357 (O) at 359 A – B).

18.

The funds to be derived from DMC are fundamental to the submission that the company will become successful in due course. The income from Edwabond would not on its own be sufficient. I agree with the submission by Mr Potgieter SC that it should have been possible for the applicants for the judicial management order to have furnished at the least schedules of the creditors of such company in order to justify the projections of the income which Edwabond will allegedly be receiving but for the reasons I have indicated this in itself would not suffice.

19.

Mr Lotz SC submitted that applicants for the winding up of the company constitute a minute proportion of the debenture holders. There were

contradictory averments from each side as to whether the majority of the debenture holders support or oppose the winding up application but since that has not been satisfactorily established, I do not take it into account.

20.

It is undoubtedly so that the liquidating creditors are only a small fraction of the total debenture holders. There has however been a relatively lengthy delay of several months before the papers in all the applications were ripe for hearing and it is common cause that various meetings of the debenture holders have been held Accordingly if indeed the “silent majority” opposed the liquidation of the company, they have had ample opportunity to breach their silence and place their views before the court in an acceptable form.

21.

Mr Lotz SC pointed out, and it was not disputed, that on a liquidation of the company the creditors would only receive an amount of approximately six cents in the Rand and he submitted that in the circumstances, it was not just and equitable for a small proportion of the creditors to force the company into a liquidation which will have the result that the creditors would receive a minimal return for their investments. He further submitted that it was in the interests of the

general body of creditors that a judicial management order be granted because that would afford the opportunity for the financial position of the company (and the two relevant subsidiaries) to be assessed by an independent expert and that further, the body of creditors would have an opportunity at the statutory meeting to have their attitude to the winding up clearly established – if the independent assessment by the judicial manager was that the company could not become successful within a reasonable time or if the general body of creditors was overwhelmingly against the judicial management order being confirmed, then there would merely have been a delay of a short period which would not have prejudiced the creditors in any way.

22.

That may well be, although of course it is equally possible that the delay may merely have served to cause a further deterioration in the financial position of the company with the expenses of the judicial manager adding to the company's predicament. In my view however and having due regard to the fact that this a public company with some R200 million worth of investor's funds, the judicial management order cannot be in the nature of an experiment to see whether the company may well become successful. (**Tenowitz and Another v Tenny Investments supra** 1979(2) SA 680 (E) at 685F). My determination of

the prospects must be based on the facts presented in the papers before me and on those I cannot be satisfied that there is a reasonable probability that the company will in a reasonable time become successful. The fact that any judicial management order would on the face of it have to last at least a number of years before the company could hope to repay all the debenture holder their capital and interest also suggests that the company is not capable of becoming a successful concern within a reasonable time (**Tenowitz and Another v Tenny Investments supra** at 685G). Accordingly, exercising my discretion, I must refuse the judicial management order.

23.

Mr de Wet, on behalf of the company, had a very limited role to play in the proceedings in the light of the fact that it had to be accepted, for the judicial management application to be brought in the first place, that the company was unable to pay its debts. He accordingly aligned himself with the submissions of Mr Lotz SC. He conceded very properly that if the judicial management order was not granted then it followed that the company should be wound up. He pointed out that since the applicants in the winding up had launched the proceedings in February 2009 and more than three months had elapsed since then, a further delay of 60 days for the return day (if the judicial management order were granted) would not make any difference. While section

432(1) of the Companies Act 61 of 1973 stipulates that the return day of a judicial management order is to be 60 days after the grant of the order, this can however be extended on good cause. On the present facts little will have changed in 60 days as such period would still be too soon to assess whether the motor vehicle sales are actually materialising or at least the probability of the projections being correct is being demonstrated.

24.

He also submitted that there had been no sudden change of stance (as contended by Mr Potgieter SC) with regard to the position of the company – the winding up proceedings had been opposed on the basis that the company was not insolvent but merely in a cash flow crisis of a temporary nature and that it was accordingly consistent with this position for the applicants in the judicial management application to contend that, as matters presently stood, the company could not pay its debts because of the cash flow problems. I have some difficulty with this if the accepted “dividend” on liquidation is likely to be only six cents in the rand - this shows the company is insolvent. In the light however of the conclusion I have reached, it is not necessary to consider this aspect further.

25.

For the reasons already set out I am not persuaded that the judicial management order should be granted. As far as the application to intervene was concerned, that was not opposed and accordingly the intervening applicant should be given leave to intervene.

26.

I am satisfied that a case has been made out for a provisional winding up order and in the light of the concessions by Mr Lotz SC and Mr de Wet as to the course of conduct if the judicial management application is dismissed, I do not propose to analyse the papers in the winding up application in any detail. Suffice it to say that all the relevant requirements have been met in such application.

27.

I accordingly grant the following order:

(a) The intervening applicant in matter number 3606/2009 is granted leave to intervene as a second applicant in the application between Dorothy Jean Griffin and Edwafin Investment Holding (Pty) Ltd under case number 1630/2009;

(b) The application under case number 3656/2009 for Edwafin Investment Holdings Limited to be placed under judicial management is dismissed and the applicants in such application are directed to pay the costs of the second and third respondents in opposing the application.

(c) In case number 1630/2009 a provisional winding up order is granted in terms of paragraphs 1 to 3 inclusive of the notice of motion with the return date of such application to be 2 July 2009 and with the date in paragraph 3 of such order to be 26 June 2009.

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SKINNER, AJ

Acting Judge of the High Court

KwaZulu-Natal, Pietermaritzburg

Date of hearing	:	18 May 2009
Date of Judgment	:	22 May 2009
Counsel for the Applicants in Case No. 3656-09 (the judicial management application)	::	Mr. E. Lotz S.C.

Counsel for Teresa Diane Chaplin and Dorothy Jean Griffin	:	Mr. A. Potgieter S.C.
Counsel for Edwafin Investment Holdings Limited	:	Mr. A. de Wet