

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3357/2008 & 4149/2008

In the application of:

5 ABSA BANK LIMITED 4th Intervening Creditor

In the matter between:

CARELINE PRODUCTS (PTY) LIMITED Applicant

and

10 GOAL-POST INVESTMENTS 1 (PTY) LTD Respondent

THE TRUSTEES FOR THE TIME

BEING OF THE KENYON

FAMILY TRUST

1st Intervening Creditor

15 MARK ANDREW KENYON

2nd Intervening Creditor

FUTURE INDEFINITE

INVESTMENTS 140 (PTY) LTD

3rd Intervening Creditor

J U D G M E N T

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LOUW, J:

[1] These are three inter-related matters which I heard yesterday afternoon in the fast lane of the motion court.

25 I have prepared a short judgment which I will now read.

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[2] There are two applications. The first is the application by Careline Products (Pty) Ltd under case number 3357/2008 wherein the applicant seeks the provisional winding up of the company Goal-Post Investments 1 (Pty) Ltd (to which I shall refer as "Goal-Post"). Goal-Post is the owner of nine erven in the central business district of Cape Town which has variously been valued at amounts between R60 million and R80 million.

10 [3] The second application is an application by Absa Bank under case number 4149/2008 wherein the bank seeks, first to intervene as a creditor in the Careline application and then seeks an order for the provisional winding up of Goal-Post of its own accord. Three creditors have come forward to intervene and oppose the Careline application. They dispute the *locus standi* of Careline to apply as a creditor for the winding up of Goal-Post.

15 [4] It appears from the application to intervene and the papers in another pending application before this Court under case number 2271/2008, that the members and controlling entities of Goal-Post who are the parties in that application, are embroiled in a bitter dispute regarding the question to whom and at what price the properties owned by Goal-Post should be sold. The one

faction supports the sale of the properties to a company controlled by one Bunch, for R48 million, while the others claim to have an offer from a buyer, one Cohen, for R60 million. This dispute is, amongst others, the subject of the application under case number 2271/2008 and of an envisaged action. Pending the outcome of those proceedings, the transfer of the properties pursuant to the Bunch sale for R48 million have in effect be stayed. It is in this context that Absa Bank applied on 7 March 2008 to intervene yesterday as the major creditor of Goal-Post in the Careline application and to seek the winding up of Goal-Post.

[5] Mr Bergh, who appeared on behalf of the intervening creditors in the Careline application, sought a postponement of both the Careline and ABSA Bank applications to allow the intervening creditors in Careline to file papers to oppose Absa Bank's application to intervene and wind up Goal-Post. It is common cause that Goal-Post owes Absa some R35 million plus interest on mortgage loans and bank overdrafts. These amounts, it is common cause, are due and payable.

[6] The Absa case is set out in the launching affidavit. It is brought under section 346(1)(b) read with sections 345

and 344(f) of the Companies Act on the basis that Goal-Post is unable to pay its debts and is commercially insolvent. The case is set out as follows by the deponent, a bank official:

5 “The shareholders and corporate controllers of the respondent are locked in various legal battles and they have been unable to resolve their disputes.

10 Absa, being respondent’s major creditor, is not prepared to sit back and wait for these disputes to be determined whilst it is not being paid the monthly instalments to which it is entitled. The transfer of respondent’s immovable properties have been stayed due to the inability of the shareholders and corporate controllers to arrive at an agreement in this regard.

15 It is submitted that under the circumstances the only practical solution is for an independent liquidator to be appointed to take charge of the assets and affairs of the respondent to the advantage of the general body of creditors”.

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It is further stated at paragraph 11 that:

“Absa has no desire to become embroiled in the dispute between the applicant and first to third intervening creditors. The dispute clearly illustrates that there is an irretrievable breakdown

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of the relationship between the parties. There is no reason why external creditors should be prejudiced by these disputes. Respondent's assets should, with respect, be liquidated and external creditors paid where after the various parties would be at liberty to litigate to their hearts' content at their expense and cost for as long as they see fit. Respondent is a property-owning company and developer, has no source of income and is reliant on external funding.

I respectfully submit that respondent is currently commercially insolvent and unable to pay its debts in the normal course of business".

15 [7] These allegations are not disputed. I asked Mr Bergh to indicate what defences to the Absa case will be raised in the papers should the intervening creditors be granted a postponement. He mentioned two; first the Absa application is fatally defective for failure to file and serve the Master's report and certificate of security together with the application. There is nothing in this point. The position has been made clear insofar as this Division is concerned in the case First National Bank v E U Civils (Pty) Ltd 1996(1) SA 924 (C) at 931D-F where the decision of the then Appellate Division in Court v

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Standard Bank SA Ltd 1995(3) SA 123 (A) at 130H-131G was applied to section 346(3) of the Companies Act. In this case the bond of security and the Master's reports certifying that security had been found accompanied the notice of set-down of the Absa application. The ABSA Bank application is therefore procedurally in order.

[8] The second point raised was that the Court has a discretion under section 346 read with section 344(f) not to wind up a company which is not in fact insolvent and that the intervening creditors wish to consider their position and to put facts before the Court to show why the Court should refuse to exercise its discretion to wind up. What these facts could be I was not told.

[9] An application for a postponement is an indulgence which is sought by the party and that party must show good cause. Here this has not been done. The intervening creditors were not taken by surprise. The papers in the ABSA Bank application were served on them on 6 March 2008. They have not filed a notice of opposition nor have they filed any affidavits setting out their position. In any event, Absa's case is, in my view, unavailable. Berman, J in Absa Bank v Rheeboekskloof (Pty) Ltd & Others 1993(4) SA 436 (C) at 440F-441A sets out the



LOUW, J