

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO. 26312/2010

In the matter of:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

SOUTHERN STORM PROPERTIES 267CC

Respondent

JUDGMENT

WEINKOVE, AJ

- [1] This is the return day of a provisional order of winding up in respect of a close corporation. The respondent opposes the application and seeks an order discharging the *rule nisi*.
- [2] The Court's power to grant a winding-up order is discretionary and that discretion must be exercised on judicial grounds. Where the respondent company can show that the indebtedness is disputed on reasonable and *bona fide* grounds, the application must fail.
- [3] It is trite law that the fact that the respondent is otherwise unable to pay its debts, is not a ground for refusing a final order where the applicants debt is disputed on reasonable grounds.

- [4] In the present matter the applicant has already instituted proceedings against the members of the close corporation in terms of the suretyships allegedly signed by them. That action is pending before this court and an application for summary judgment was not pursued after the same defences were raised as in the present matter.
- [5] The respondent denies being indebted to applicant and that denial is based on the allegation that the registration of the bond over the immovable property is part of a fraudulent scheme which was perpetrated by one Rossouw. It is respondent's case that the scheme perpetrated by Rossouw was done with the knowledge and/or assistance of applicant who was allowed to register bonds on behalf of juristic entities without authority and based on inaccurate valuations. It is respondents case that applicant allowed Rossouw to execute the power of attorney to register this bond and to conclude the underlying loan agreement despite the fact that he had no authority to do so.
- [6] Respondent maintains that this conduct was negligent on the part of applicant and that that negligence renders applicant liable for any losses which the respondent may suffer or has suffered.
- [7] Respondent has also shown that a great number of similar cases (almost 93 separate cases) are before this court on identical facts involving many different banks.

- [8] The debt which applicant relies upon is also disputed in the action pending between applicant and the members of the respondent.
- [9] As previously indicated, a summary judgement application for payment of that debt was withdrawn by applicant.
- [10] Essentially this application is a continuation of the pending litigation and to entitle the applicant to execute against the immovable property which has been bonded would result in a determination of the action which is pending. The whole validity of the mortgage bond is part of the dispute in the pending action and the only basis to liquidate the respondent rests of the validity or otherwise of that mortgage bond.
- [11] Included in the record is a transcript of the judgment of this court delivered by H J Erasmus, J, in case no 8513/2008 *Nedbank v Knock-D Trade 34 BK and Another* (page 160 of the record) where the court dealing with a matter which was part of the same scheme by Rossouw, held that if on the material before it, there is a reasonable possibility that an injustice may be done if summary judgment was granted it should exercise its discretion in favour of the defendant and refuse summary judgment.
- [12] This matter is directly involved in the pending action between the same parties and the same defence is raised in this application as is raised in the main action. I consider that an injustice will be done if I allow the provisional

order of winding up to be made final, if regard is had to the affidavits filed on respondent's behalf.

- [13] Effectively I would then be granting judgment for the applicant in respect of an issue that is disputed in the pending action. There are so many matters which require explanation in this action that I cannot accept that the respondent does not have at least a bona fide an arguable defence. So for example, some explanation needs to be given as to why the property was valued for the purposes of granting a mortgage bond at a value almost double that which it had been paid for by the company (controlled by Rossouw) who onsold it to the respondent. As in other cases of this nature, Rossouw purchased the property in the name of a Pty Ltd company (controlled by him) and immediately thereafter sold it to the victim of the alleged fraud. In this sale the price was almost doubled.
- [14] How is it possible that applicant did not see that this was virtually an in house sale that took place in terms of a title deed which numerically followed the previous transfer.
- [15] Why was applicant ignorant of the fact that the registered address of the transferring company and the address of Rossouw was the same?
- [16] How can I ignore the allegation under oath by the respondent that he never "set foot" in the premises of the attorneys who witnessed the deed of

suretyship and the loan agreement. I assume these are the applicants attorneys.

- [17] How can I ignore the allegation that the process of taking transfer requires the transferee to sign documentation at the conveyancers office when respondent claims that he never entered those offices.
- [18] How did Rossouw obtain possession of applicant's blank surety documents and what is the connection between applicant and Rossouw?
- [19] How is it possible that documentation was signed by Rossouw on behalf of the respondent when he was never a member of the respondent and according to respondent was never authorised to act on its behalf (see page 125 para 13.10).
- [20] How can I ignore the allegation there are approximately 93 similar matters involving Rossouw and his fraudulent conduct involving a great number of commercial banks in this city. That fact seems to indicate that Rossouw had the means to purport to represent other commercial banks who may or may not have been negligent in allowing this to happen.
- [21] Respondent contends that Rossouw could not possibly have conducted his fraudulent schemes unless commercial banks including the applicant allowed him to register bonds on behalf of juristic entities without authority to do so

and unless the banks turned a blind-eye to what was happening in this respect (see para 20 at page 131).

[22] Finally in the judgment of Erasmus supra, he notes in para 9 that it seems that suretyships would never have been signed if the surety knew of the actual value of the property was half of the value which Rossouw was using.

[23] In the circumstances the application for a final winding-up order is refused and the question of costs is to stand over for determination by the trial court in the pending action between the parties. The issues raised by respondent in this matter will be determined in the pending action because it is part and parcel of the same defence raised by respondent in this application.

A handwritten signature in black ink, appearing to read 'A.J. Weinkove', written over a horizontal line.

WEINKOVE, AJ