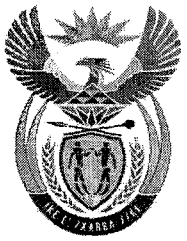

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NOS: 12689/2009
1604/2010

In the matters between:

INVESTEC BANK LIMITED Applicant
(Registration no.: 1969/004763/06

and

QUICKVEST 229 (PTY) LIMITED Respondent
(Registration no.: 2004/020585/07) (in case number 12689/2009)

and between:

STEPHEN MALCOLM GORE N.O. First Applicant
SIVALUTCHMEE MOODLIAR N.O. Second Applicant
BANTUBONKE NDUNA N.O. Third Applicant
(in their capacities as the duly appointed joint provisional liquidators of Quickvest 229 (Pty) Ltd (in provisional liquidation)

and

PAUL ETIENNE JEAN MARIE GODELIEVE GORREMANS Intervening Party

---

REASONS FOR JUDGMENT : 14 APRIL 2010

Riley, AJ:

[1] On the 9th of March 2010 after having heard counsel for the applicants in both matters and Mr. Paul Etienne Jean Marie Godelieve Gorremans ("Gorremans") and his attorney Mr. Scheepers and after having read the papers I made the following orders:

In regard to case no.: 12689/2009:

(1) That the provisional order of winding-up of the respondent granted on 27 November 2009 and extended on 3 February 2010 is hereby made final.

(2) That the costs of the application shall be costs in the winding up.

In regard to case no. 1604/2010:

(1) The applicants are authorised to bring this application in terms of section 386(5) of the Companies Act, No. 61 of 1973 (as amended) ("the Companies Act");

(2) The applicants are authorised to exercise the following powers in relation to the administration of Quickvest (Pty) Limited (in provisional liquidation) ("Quickvest") in terms of section 386(5) of the Companies Act:

2.1 to obtain legal advice on any question of law affecting the administration of Quickvest and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs of Quickvest;

2.2 to agree with such attorneys and/or counsel on the tariff or scale of fees to be charged by and paid to such attorneys and/or counsel for the rendering of services to Quickvest and to conclude written agreements with attorneys and/or counsel in the form contemplated in section 73(2) of the Insolvency Act, No. 24 of 1936 (as amended) ("the Insolvency Act"), as read with section 339 of the Companies Act;

2.3 to pay the attorneys and/or counsel the agreed costs and the disbursements made by the attorneys and/or counsel out of the assets of Quickvest as and when such services are rendered and the disbursements are made;

2.4 to exercise the power in terms of section 386(4)(a) of the Companies Act to bring or defend any action or other legal proceedings as may be necessary;

2.5 to exercise the power in terms of section 386(4)(h) of the Companies Act to sell any immovable property of Quickvest by public auction, public tender or private treaty and to give transfer thereof;

2.6 to borrow up to the amount of R2 000 000,00 as a cost of administration and to pay interest thereon;

3. The actions of the applicants to date hereof in respect of the engagement of the services of attorneys and counsel are hereby ratified and confirmed;

4. The costs occasioned by the opposition to this application shall be paid by the Intervening Party;

5. The remaining costs of this application shall be treated as costs in the winding-up of Quickvest.

Background

[3] On 27 November 2009, Blignault J granted a provisional winding-up order in respect of the respondent following an opposed application which was heard on the 18th November 2009.

[4] In terms of te *rule nisi* issued, respondent was called upon to show cause if any, on 3 February 2010 why a final winding-up order should not be granted. On 3 February 2010 it was agreed between the parties that the application for a final order is postponed for hearing on the semi-urgent roll on 9 March 2010 and that the return day be extended to that date to be heard together with the application under case number 1604/2010.

[5] It was further agreed that –

(1) Respondent shall deliver any further supplementary affidavits by Wednesday, 10 February 2010;

(2) Applicant shall deliver supplementary affidavits by 19 February 2010;

(3) Applicant shall deliver heads of argument by 22 February 2010;

(4) Respondent shall deliver heads of argument by 1 March 2010.

[6] On 3 February 2010 respondent was represented by Mr. Albertus SC on the instructions of attorneys Johan Scheepers Inc.

[7] By 3 February 2010 respondent had failed to file further answering affidavits but it was nevertheless indicated on behalf of the respondent that it opposed the granting of the final winding-up order.

[8] At the time of the hearing of the application for final winding-up order, respondent had still not filed any supplementary affidavits.

[9] Respondent had further failed to serve and file its heads or argument as agreed and notwithstanding a request for an extension and an undertaking by Scheepers, failed and neglected to file its heads of argument by 3 March 2010.

[10] At the time of argument no heads of argument were filed on behalf of the respondent.

[11] As provided for in the order granted by Thring J on 3 February 2010 it was agreed between the parties that the application for the final winding-up order would be heard together with the application brought by the provisional liquidators of the respondent under case number 1604/2010 for an order granting to them certain powers in terms of section 386(5) of the Companies Act. In the latter application, the sole director of respondent, Gorremans brought an application for intervention and he filed an affidavit in opposition to the relief sought.

[12] It is necessary to highlight the following events since the granting of the provisional winding-up order on 27 November 2009:

(1) On 8 December 2009 the Master appointed the joint provisional liquidators of Quickvest (the applicants in the section 386(5) of the Companies Act 61 of 1973 (as amended);

(2) On 9 December 2009 the first and second applicants in the section 386(5) application met with Gorremans and his attorney Mr. Scheepers;

(3) At the meeting on 9 December 2009 Gorremans was referred to various options in relation to the sale of respondent's immovable assets;

(4) On 16 December 2009 the provisional liquidators sent an email to attorney Scheepers containing a list of requirements and calling upon the director to provide the statutory statement of affairs.

I was advised that as at the date of the hearing of this application there has been no response to the request;

(5) On 20 January 2010 an offer was made by Midnight Masquerade Properties 272 (Pty) Limited to purchase the respondent's four immovable properties at a purchase price of R112 870 000.00;

(6) During mid January 2010 the provisional liquidators instructed Appraisal Corporation to value four properties owned by Quickvest;

(7) On 27 January 2010 the application in terms of section 386(5) of the Companies Act 61 of 1973 was served on Johan Scheepers Inc;

(8) On 3 February 2010, the date of the hearing of the return day of the respondent's winding-up application, both applications were postponed in view of the fact that Gorremans opposed both applications;

On the same day attorney Katz representing applicants received an email from attorney Shaer who represented a potential purchaser in regard to an offer to purchase properties of respondent;

(9) On the 10th of February 2010 the second applicant sent an email to attorney Shaer requesting his client to submit an offer for the properties should he so wish;

(10) On the 10th of February 2010 Gorremans delivered his opposing affidavit to the section 386(5) application;

(11) On the 18th of February 2010 attorneys Marais Muller Yekiso Inc sent a letter to applicant's attorney on the instructions of Absa Bank Ltd., from which it is clear that Absa Bank Limited supported the liquidation of Quickvest and that its assets be realised for the benefit of the creditors;

(12) On the 19th of February 2010 the provisional liquidators filed their replying affidavits.

[13] When the matter was heard on the 9th of March 2010 the respondent in the winding-up application was represented in person by Paul Etienne Jean Marie Godelieve Gorremans ("Gorremans") who also represented himself in the application in terms of section 386(5) the Companies Act 61 of 1973 (as amended) ("the Act"). His attorney of record Mr. Scheepers was also present during the proceedings. Eventhough he had no right of appearance in this court; I also allowed him to address me in regard to the two applications before me.

[14] I was advised that the reason why Mr. Albertus did not appear for respondent or

Gorremans was due to the fact that his last account, for services rendered, had not been paid. Gorremans elected to represent the respondent and himself as intervening party in person.

[15] In allowing Gorremans to conduct the case on behalf of the respondent I was mindful of the rule laid down in Yates Investments (Pty) Ltd v Commissioner for Inland Revenue 1956 (1) SA 364 (A) where it was held that a company cannot conduct a case in this court except by the appearance of counsel on its behalf.

[16] In allowing Gorremans the right of audience I took into account that Gorremans was the sole director, had intimate knowledge of the respondent's business and its financial affairs. I was also of the view that the circumstances of the matter was such that the administration of justice required some relaxation of the general rule set out above.

[17] I was further guided by the *dictum* of Ponnan JA in Manong and Associates v Minister of Public Works 2010 (2) SA 167 SCA where on page 172 at para 10 he held that:

> *"It follows that cases will arise where the administration of justice may require some relaxation of the general rule. Their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. I thus consider that our superior courts have a residual power to regulate their own proceedings. After all, it seems to me that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative, is of necessity an integral part of the rule itself."*

[18] I am satisfied that both Gorremans and his attorney of record were well aware of the nature and the consequences of the proceedings.

[19] In their address in respect of both applications both Gorremans and Mr. Scheepers requested that I postpone both applications for a period of 50 (fifty) days, since a new offer to purchase had been received by Gorremans in respect of the properties:

Erf 15759 Somerset West
In the City of Cape Town
Division Stellenbosch, Western Cape Province
Extent: 67,4926 H A

and

Erf 15758 Somerset West
In the City of Cape Town
Division Stellenbosch, Western Cape Province
Extent: 12219 HA

[20] In support of his argument for the postponement of the applications Gorremans handed the following documents to me:

(1) a letter dated 7 August 2009 (faxed on 1 March 2010) addressed by Scheepers to applicant's attorneys;

(2) a copy of an email dated 9 March 2010 from Gorremans to <sec709@law.co.za, sent at 09:11 am;

(3) a letter dated 9 March 2010 addressed by Unipalm Investment Holdings Ltd to Gorremans;

(4) an unsigned agreement of sale between respondent and Unipalm Investment Holdings Ltd.;

(5) a valuation from I-Val Consultants (Pty) Ltd dated 11 November 2009;

(6) an offer to purchase between respondent and Platinum Orange CC;

(7) A loan agreement between New Eurasia Impex Limited and Quickvest 326 (Pty) Ltd, Global Master Securities;

(8) Lending and Borrowing Agreement between New Eurasia Impex Limited and Quickvest 326 (Pty) Ltd,;

(9) a letter dated 8 March 2010 from Sonnenberg Associates addressed to: To whom it may concern.

[21] Goremans relied on the above documents in his attempt to persuade me that I

should postpone the hearing of the applications before me for a period of 50 (fifty) days so that the proposed sale, in particular to Platinum Orange CC could come to fruition.

[22] Mr. Goodman SC who appeared on behalf of the applicant and the provisional liquidators objected vehemently to the postponement of the applications and was adamant that I should proceed to hear both applications.

[23] He contended that the documents referred to above which was placed before me was not properly before the court and that it could not be regarded as evidence. He further contended that all that Gorremans was once again doing was to seek a delay of the inevitable and that what was occurring was merely a repetition of what took place in November 2009 when the application for provisional winding-up application was heard. Since Gorremans was desperate and clearly wanted me to have sight of the documents I allowed a relaxation of the rules and allowed him to argue for the postponement with reference to the documents referred to by him.

[24] In considering the request by Gorremans for a postponement of the applications, I place strong reliance on what was said by Blignault J in his judgment relating to the application for the postponement of the provisional winding-up proceedings of the respondent. I agree fully with the principles set out in his judgment relating to postponements of applications of this nature and accordingly regard them as being equally applicable in the present applications.

[25] What makes matters worse for respondent and Gorremans in the present

applications is that since the judgment of 27 November 2009 and, eventhough Gorremans has allegedly been vigorously involved in trying to sell the properties he has failed, refused and neglected to either keep in touch with the provisional liquidators and or to keep them abreast of developments i.e. his attempts to sell. It is not unreasonable to conclude that his conduct illustrates a failure and refusal to co-operate or work with the provisional liquidators.

[26] When I questioned both Gorremans and attorney Scheepers about this they could give no reasonable explanation for their failure, refusal and or neglect to liase with the provisional liquidators. Gorremans seemed adamant that the liquidators were not acting in good faith and or that they were not acting in the best interest of the respondent and or himself.

[27] I can find no basis for this allegation by Gorremans and accordingly reject it out of hand.

[28] I was therefore of the view that no good grounds existed why I should grant Gorremans and or the respondent a postponement of the present proceedings.

[29] I accordingly refused to grant a postponement.

[30] In considering the application for the final winding-up order I take into account that respondent has failed to file any supplementary answering affidavits eventhough it had the opportunity to do so since 18 November 2009. Neither Gorremans or Mr. Scheepers could

give a reasonable explanation for this.

[32] I also take into account the following facts and circumstances which are relevant to the application for the final winding-up order. These facts and circumstances are succinctly summarised in the applicant's heads of argument as follows:

(1) Gorremans accepts that the respondent "is commercially insolvent" inasmuch as it is unable to pay its current liabilities;

(2) That he wishes to emphasize that he was in no way seeking to frustrate the winding-up process;

(3) in criticising the provisional liquidators for not having explored the market for a fair price for the properties owned by the respondent he raises "the interests of all" parties in the winding-up process;

(4) he suggests that the provisional liquidators should obtain consent at the meetings of creditors and members or from the Master under section 387 of the Act.

[33] The factual background to this application was dealt with comprehensively by Blignault J in his judgment relating to the provisional winding-up order.

[34] I do not intend repeating it.

[35] It is common cause that respondent's major creditors are the applicant whose claim now stands at R108 000 000. Interest accrues on this account at the rate of ± R1 million per month. Absa Bank has a claim of over R25 million. Both applicant and Absa Bank are secured creditors and both are in favour of a winding-up order.

[36] In my view the facts referred to above, the failure on the part of Gorremans and or the respondent to file further replying answering affidavits and the desperate last attempt to obtain a postponement of these proceedings are all indicative of the fact that Gorremans and the respondent have accepted that respondent will be wound up.

[37] It is common cause that Gorremans on his own admission has been desperately attempting to sell some of the respondent's properties since June 2009 in an attempt to settle its huge indebtedness to the applicant. As at date of the hearing of this application he was still unsuccessful in his attempt to sell the properties.

[38] It is unnecessary to deal with Gorremans previous attempts to sell the properties referred to above since Blignault J dealt fully with the Katoto deal and the serious questions raised of and about it. What is clear at this stage is that the Katoto deal which in November 2009 was on the brink of being finalised, has not been finalised at all. The guarantees which, according to attorney Scheepers, would be available early in January 2010 has not materialised at all.

[39] In my view there is in any event no certainty in regard to the further proposed sales

which Gorremans and Scheepers referred to in the present application for postponement and the inevitable conclusion I must come to is that the reference to the "new" offers to purchase is just but further "pie in the sky" promises in an attempt to stave off the inevitable.

[40] In his judgment on the provisional winding-up of the respondent Blignault J held at para 43-45 that:

> "...The test is whether applicant has established a *prima facie* case in the sense of a balance of probabilities on all the affidavits. See Kali v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD) at 978J – 979 B.
>
> [44] The only real defence raised by respondent is that applicant breached the loan agreements which gave rise to the judgment taken by CSV. Apart from the fact that the alleged breach has been denied by Ms Folpini it was superseded by the agreement whereby the debt was restricted. This refutes the allegation that the respondent still had a claim for damages against the applicant.
>
> [45] I am satisfied that applicant has made out a proper case for the provisional winding-up of respondent."

[41] I concur with the aforesaid reasoning of Blignault J.

[42] There are no further affidavits before me to oppose a final winding-up order. In this

matter the applicant has been more than patient with the respondent and has allowed respondent much indulgences. Based on the history of the matter I find that respondent and or Gorremans have abused the process and have not acted in good faith.

[43] As was held by the court in Terblanche and Others v Offshore Design Co. (Pty) Limited 2001 (1) SA 824 (C):

> *"...In my view the need to show good cause for a postponement is even more acute, where; as in the instant case, an unpaid creditor, in the absence of opposition on the part of other creditors, is entitled to seek an order of winding-up ex debito justitiae because he or she has brought himself or herself within the winding-up provisions of the Companies Act and accordingly is justified in refusing to allow a respondent any further indulgences..."*

[44] It is trite law that the Court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which the order is sought. I am mindful of the fact that the discretion must be exercised on judicial grounds and that I should have regard to the grounds and reasons for the proposed winding-up.
See: Henochsberg on the Companies Act – Meskin Vol. 1 at page 344.

[45] In my view no *bona fide* and or reasonable grounds has been presented to me why a final winding-up order should not be granted in respect of the respondent.

[46] I am accordingly satisfied that it is just and equitable that respondent should be

wound up.

The application in terms of section 386(5) of the Companies Act 61 of 1973 (as amended) ("the Companies Act").

[47] Section 386(5) of the Companies Act provides that -

> *"a Court may if it deems fit grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for the winding-up of the affairs of the company and distribution of its assets."*

[48] The applicants have essentially asked the court to grant them the following powers:

(1) to engage attorneys and counsel;

(2) to sell the immovable property of Quickvest by public auction, public tender or private treaty and to give transfer thereof;

(3) to borrow an amount of up to R2 million.

[49] Applicants aver that it is necessary to *inter alia* investigate the amounts of R24,8 million and R22 million which, according to the financial statements of Quickvest are allegedly owing to shareholders. The reason the investigation is required is due to the fact

that such indebtedness appears to have been sub-ordinated and Gorremans has not enlightened the court about the status of the sub-ordination agreements.

[50] Applicants aver further in their founding affidavit that there are a number of legal issues which require investigation namely:

(1) the fact that the financial statements reflect that Quickvest has significant assets in and claims against its subsidiaries;

(2) that certain assets of a subsidiary, Quickvest Supplies and Services (Pty) Ltd appear to be in the process of dissapation in circumstances where Quickvest Supplies and Services (Pty) Ltd owes Quickvest approximately R49 million.

[51] According to the applicants they will be required to pay large amounts in the administration of Quickvest. They will also require costs for security, insurance, the bond of security and rates.

[52] For the above reasons they seek the relief as set out in the notice of motion.

[53] In his opposing affidavit Gorremans avers that there is no other pressing need which would warrant the borrowing of R2 million. He does however concede that there may be amounts payable for insurance on the Brick Factory.

[54] Gorremans further averred that the liquidation proceedings "are being used for

purposes for which they were never intended" and that eventhough Quickvest is possessed of substantial assets that "the applicants are seeking permission from the court to sell four properties valued at R306 400 000 for the paltry sum of R112 870 000.00." He also criticised an attempt to sell the said properties otherwise than by way of public auction and alleged that the applicants have failed in any way to obtain a fair price for the properties.

[55] In my view there is no factual basis for the allegations that the applicants are not acting in good faith. On the contrary I hold the view that the applicants have been indulgent with Gorremans and the respondent. Gorremans and the respondent had since June 2009 to dispose of some of the respondent's assets. He has failed to do so.

[56] It is regrettable that Gorremans has failed and refused to co-operate with the applicants but rather continuous to treat their actions with suspicion. He could not give a reasonable explanation why he did not keep the applicants abreast of his further attempts to secure a purchaser for the property. Instead he once again sought to obtain a postponement at the hearing by producing documents and "offers to purchase". He must have known that applicants would not agree to the request for the postponement.

[57] I am not persuaded that the conduct of the applicants thus far have been designed to cause prejudice and or unfairness to the members of Quickvest.

[58] What is particularly telling is that eventhough attorney Shaer's client showed an interest in purchasing the respondent's properties and eventhough first applicant invited him to contact him, neither Shaer or his client has been in contact with the liquidators or

first applicant to pursue the proposed purchase.

[59] I accordingly agree with the first applicant that in view of "Gorreman's previous promises regarding the sale of properties, none of which has ever come to fruition, the applicants and the secured creditors were not prepared to risk postponing the liquidation application once again based on an uncertain sale".

[60] The approach of the applicants in the circumstances are prudent.

[61] I have no reason to doubt first applicant where he states that:

> *"The applicants have a duty to maintain an even and impartial hand between all the individuals (which include both creditors and members) whose interests are involved in the winding-up of Quickvest."*

[62] In the circumstances the applicants are obliged by law to take not only the interest of creditors but also most of the members into account in the administration of Quickvest. See record pages 265-266.

[63] Gorremans does not dispute but in fact accepts that the immovable properties need to be realised in order to discharge the claims of creditors. His chief concern seems to be "the mode of realisation thereof."

[64] All the evidence before me point to the fact that –

"should the applicants be granted the power to sell the properties, all possible methods of realisation of such properties, including a sale by public auction, will be considered (taking into account the interest risks involved in such method of sale) in order to achieve the outcome most beneficial to the creditors (and ultimately also the members) of Quickvest."

See record at page 267.

[65] I have concerns that based on the conduct of Gorremans, thus far, that either he or the members of Quickvest will attempt to frustrate the sale of the respondent's assets and will in all likelihood not adopt the requisite resolutions.

[66] Accordingly I find that in the interest of Investec and Absa and the members of the respondent that the properties be realised as urgently as possible.

[67] In coming to my conclusion I am guided by the following:

(1) That the law requires the creditors of the company as the best judges of their own interests.

(2) That the creditors have the right to determine the manner and conditions upon which assets of an insolvent estate are to be realised.

(3) The court has a complete discretion when a liquidator applies to the court for

leave to sell property in the estate of a company.

(4) That a most important consideration in favour of granting the application was the fact that the creditors represent approximately 86% in value of the companies' liabilities and have agreed that the provisional liquidator should be granted the power to sell.

See in this regard Kanderssen (Pty) Limited v Bowman N.O. 1980 (3) SA 1142 (T) at 1146-1148.

[68] I find that Gorremans has advanced no proper or valid basis for opposing the granting of any of the other powers sought by the applicant.

[69] In the result I granted the applicants relief as set out above.

RILEY, AJ