REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 13249/12

In the matter between:

STEPHEN MALCOLM GORE N.O. **First Applicant**

RYNO ENGELBRECHT N.O. **Second Applicant**

TIRHANI SITOS DE SITOS MATHEBULA N.O. **Third Applicant**

[In their capacities as the duly appointed joint provisional liquidators of DYNMAR TWAALF (PTY) LTD (IN LIQUIDATION)]

and

HENDRIK JOHANNES BASSON N.O. in his capacity as trustee of the HANDRE BASSON TRUST (IT2216/1997) **First Respondent**

KARIN BASSON N.O. in her capacity as trustee of the HANDRE BASSON TRUST (IT2216/1997) **Second Respondent**

WILHELM JOHANNES BASSON N.O. in his capacity as trustee of the HANDRE BASSON TRUST (IT2216/1997) **Third Respondent**

ELIZABETH MARLENE BASSON N.O. in her capacity as trustee of the HANDRE BASSON TRUST (IT2216/1997) **Fourth Respondent**

FREDERICK HENDRIK BASSON N.O. in his capacity as trustee of the HANDRE BASSON TRUST (IT2216/1997) **Fifth Respondent**

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application for the granting of certain powers to the provisional liquidators of Dynmar Twaalf (Pty) Ltd (in liquidation) brought in terms of section 386(5) of the Companies Act 61 of 1973 ("the Act"), as read with item 9 of schedule 5 of the Act.

[2] The applicants seek to be authorised to exercise the following powers:

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

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 Dynmar and to conclude written

agreements with attorneys and/or counsel in the form contemplated in section 73(2) of the Insolvency Act 24 of 1936, as amended, as read with section 339 of the 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 if Dynmar as and when such services are rendered and the disbursements are made;

2.4 To exercise the power to bring or defend any action or other legal proceeding of a civil nature in terms of section 386(4)(a) of the Act (as read with item 9 of Schedule 5 of the Act);

2.5 To exercise the power in terms of section 386(4)(f) of the Act (as read with item 9 of Schedule 5 of the Act) to continue any part of the business of Dynmar which may be necessary for its beneficial winding-up; and

2.6 To be granted leave to borrow an amount of up to R2 million and to pay interest thereon.

[3] In addition, the applicants seek an order ratifying and confirming, in accordance with section 386(5) of the Act, the actions of the applicants to date.

[4] The application was initially brought *ex parte*. However, by agreement, the respondents intervened in the proceedings and the matter was postponed to allow for opposing papers to be filed.

[5] The respondents claim that the launching of the application *ex parte* was not *bona fide* in that the purported agreement of the second applicant to

launch these proceedings was not present. The challenge to the *fides* of the first applicant was argued to be relevant to the issue of costs.

Preliminary issue

[6] The respondents disputed *in limine* that the applicants had acted jointly in launching the application and that the provisions of section 382(1) of the Act had not been complied with in doing so.

[7] Section 382(1) of the Act provides that:

> "*When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly*".

[8] All references to liquidator, in terms of section 1 of the Act, include references to the provisional liquidator and the applicants therefore fall within the ambit of the definition of liquidator.

[9] The deponent to the founding affidavit was the first applicant, Mr Gore. In his affidavit Mr Gore averred that the application was supported by the second and third applicants. However, a signed confirmatory affidavit deposed to by the second applicant, Mr Engelbrecht, was not attached to the founding papers and it was common cause that Mr Engelbrecht did not depose to this affidavit until 25 September 2012.

[10] I am satisfied that correspondence placed before the court indicated that at the time that the application was launched the second applicant had not expressly agreed that there existed a need to approach the court for relief. Such agreement existed later when Mr Engelbrecht deposed to his confirmatory affidavit.

[11] The respondents contend that the act of launching the application on 11 July 2012 was therefore not an act taken jointly by the applicants as

required by section 382(1) and that the matter was therefore improperly before the court.

[12]The applicants countered that the approval of the second applicant was not required on the authority of the unreported judgment of Selikowitz J in *Tjaart Andries Petrus Du Plessis N.O. and 9 Others v O M Powell N.O. and Group Five Construction* (case number 3089/94). In this matter one of two joint-liquidators sought an order compelling the co-liquidator, Mr Powell, to sign a deed of sale. The provisions of section 382(2), which provide that where there is disagreement between the liquidators on any matter relating to the company of which they are liquidators, one or more of them "*may refer the matter to the Master who may determine thereupon determine the question in issue matter or give directions...*", were held not to be peremptory and the decision to approach the court therefore not fatal to the application.[1]

[13]The objection raised by the respondents in the current application is however distinct to the issue raised in the unreported matter of Selikowitz J in that the application before me does not seek an order compelling the second applicant to authorise these proceedings.

[14]The matter of *Lynn NO and Another v Coreejes and Another*[2] in my view however disposes of the respondents' objection. The court held in that matter, in relation to the institution of an action, that the act of two or three liquidators to instruct attorneys to act was not a nullity and that it was capable of ratification. The court referred to the case of *Powell and Another v Leech and Another; Leech and Others v Powell and Others*[3] in which

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[1] At page 5, lines 7 - 12 of the judgment

[2] 2011 (6) SA 441 (SCA)

[3] [1997] 4 All SA 106 (W)

Sutherland AJ found that the provisions of section 382(1) are peremptory and that subsequent ratification of the act was legally untenable. The SCA however, distinguished *Powell* on the facts in that *Powell* dealt with a situation in which ratification was no longer possible since the warrant applied for had since been issued and executed. In *Lynn* the court found that the second part of the section 382(1) relates to joint liability and that this was decisive in that the section "*does not visit acts of the liquidators who did not act jointly with nullity*"[4] and that this permitted ratification of such acts.

[15] It was contended by counsel for the respondents that the *Lynn* matter concerned action proceedings and that the decision in *Lynn* was therefore not applicable to application proceedings. There exists no basis to warrant such a distinction and I am satisfied that the decision in *Lynn* finds application in action and application proceedings alike. In the circumstances, the act of two of the provisional liquidators in launching this application is capable of ratification by the remaining provisional liquidator after the application had been launched but prior to the matter having been concluded.

[16] The confirmatory affidavit deposed to by Mr Engelbrecht subsequent to the application having been launched amounted to a ratification of the act of the first and third applicants. In the circumstances, I am satisfied that the provisions of section 382(1) have been complied with.

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[4] At 512D

Powers sought to be authorised by the provisional liquidators

[17] A liquidator may only exercise the powers set out in section 386(4) of the Act if granted the authority to do so. This authority is obtained in the case of a winding-up by the Court from a meeting of creditors and members or contributories, or on the directions of the Master under section 387. While it is not disputed that the first meeting of creditors has occurred, it is not known when a second meeting of creditors and members will take place at which such authority may be granted.

[18] The applicants have approached the court to grant to them the powers set out in the notice of motion on the basis of their uncertainty as to when the necessary meeting of creditors and members will take place, but also given the provisions of section 386 which do not enable creditors and members to authorise the raising of a loan by liquidators.

[19] In terms of section 386(5):

> "*In a winding-up by the Court, the 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 winding up the affairs of the company and distributing its assets.*"

[20] While the court holds an unrestricted discretion, it must be satisfied that the acts for which its sanction are sought, are necessary for winding-up the affairs of the company and distributing its assets.[5] In *Moodliar NO and Others v Hendricks NO and Others*,[6] Davis J stated that:

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[5] Meskin in Henochsberg on the Companies Act

[6] [2009] JOL 24459 (WCC) at para 51

"*What the Court is required to determine is whether on the probabilities, based on the evidence...the powers sought are ultimately necessary for the liquidators to perform their fiduciary mandate.*"

[21] The basis on which the applicants seek leave to borrow an amount of up to R2 million is that certain costs will be incurred in the administration of the company which will require the applicants to "*pay certain rates and taxes, security costs, cleaning and maintenance services as well as insurance premiums on behalf of Dynmar until such time as the Vineyard Centre has been sold and transferred*".[7] These costs are then quantified as:

21.1 R285 000 plus VAT per annum in respect of a bond of security premium;

21.2 Monthly disbursements of the company in respect of rates, taxes, security costs, cleaning and maintenance services of R97 735, less rental income (initially pleased as R60 000 but argued be nil).

[22] Since the launch of this application, the one asset of the company, being the Vineyard Centre property has been sold, although transfer has not as yet been affected.

[23] The question is whether the authorisation sought in respect of the loan can be justified on the factual matrix of this case. I am satisfied that the applicant has made out a case that the costs in respect of a bond of security premium and disbursements in respect of rates, taxes, security costs, cleaning and maintenance services of R97 735 warrant leave to be granted to the applicants to borrow an amount of no more than R750 000 for the purposes stated in order for the provisional liquidators to fulfil their fiduciary mandate.

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[7] Para 86 of founding affidavit

[24]Mr Manca suggested that the R2 million figure was arrived at to avoid the applicants having to approach the court in respect of further loans that may be required by the applicants in winding up the estate. However, apart from the amounts set out above, the quantification of the amount of R2 million is not supported by the necessary facts placed before this court and in my view amounts to a somewhat generous estimate of the monies required for the purpose.

[25]In granting the court the power in section 386(5) to authorise a loan "if it deems fit" the court is required to consider on the basis of the evidence before it whether a case has been made out to warrant the grant of authorisation to borrow. This necessitates a consideration by the court of the amount required to be loaned and the purposes for which such loan is required, which information must be placed before the court in sufficient detail to allow the court to apply its mind to the matter. I am not satisfied that the authorisation to borrow should be granted where the purpose for which the amount of the loan is sought is not before the court in sufficient detail. This would, in my mind, undermine the purpose of the legislation which reserves the power for the court alone to apply its mind to any grant of the power to borrow. In these circumstances, the application for authorisation of a loan amount above R750 000 must fail.

[26]With regards to the remainder of the powers sought to be authorised by the applicants, I am satisfied that the grant of a power to the provisional liquidators to obtain legal advice on any question of law affecting the administration of Dynmar and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs

of Dynmar should be reserved for approval at the second meeting of creditors and members. The applicants have failed to provide sufficient information to the court to prove why this power should be granted and what legal advice is required, particularly given that the one asset of the company has been already sold and attorneys already instructed to pursue debtors of the company.

[27] It is appropriate that the applicants be authorised to exercise the power to bring or defend any action or other legal proceeding of a civil nature in terms of section 386(4)(a) relating to the property of the company, or retrospective authorisation where such action has already been taken. I am satisfied that there exists some urgency in pursuing debtors for unpaid and that attorneys have already been instructed to do so. It is appropriate that the grant of this power not await a meeting of creditors and members as pursuing the debts of the company is an immediate prerequisite in its winding up and in the exercise of the fiduciary mandate of the applicants.

[28] In addition, I am satisfied that it is necessary and appropriate that the applicants be authorised to exercise the power in terms of section 386(4)(f) to continue any part of the business of Dynmar which may be necessary for its winding-up, in the exercise of their fiduciary mandate, particularly given that transfer of the building sold has not as yet been affected.

[29] The respondents oppose authorisation being granted to the applicants to agree with such attorneys and/or counsel as the applicants' consider appropriate 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 Dynmar. The Master too has raised concerns of a similar nature stating that "*the services*

of expert lawyers/counsel" should not be required and that the assets of the company should be protected from "*being squandered in useless litigation*".

[30] Section 73(3) of the Insolvency Act 24 of 1936 provides that costs incurred in engaging the services of any attorney or counsel to perform legal work "*shall not be subject to taxation by the taxing master if the court if the trustee has entered into any written agreement in terms of which fees of any attorneys and counsel will be determined in accordance with a specific tariff: Provided that no contingency fees agreement…shall be entered into without the express authorisation of creditors*".

[31] Mr Manca for the applicants argued that any complaints that may arise regarding fee agreements reached would be subject to the right of creditors and contributories to object in terms of the Act. The respondents' concern in essence centres on whether this provides sufficient a check and balance against an agreement to charge and pay legal fees, in circumstances where such legal fee agreements may be excessive.

[32] I am satisfied that the respondents are entitled to lodge objections in terms of section 407 with the Master who may in turn direct the liquidator to amend the account of the liquidators, or give other directions as he deems fit and that this provides some measure of check and balance against any risk of excessive fees being charged. However, I can find there to exist no basis as to why the legal services performed for the applicants should be subject to fee agreements and not subject to taxation, particularly given the financial status of the company.

[33] Finally, in relation to the issue of costs, the respondent has sought an order of costs *de bonis propriis* against Mr Gore on the basis that Mr Gore

initiated these proceedings *ex parte* but failed to display the required *uberrima fides* insofar as he claimed that the application was supported by the second applicant when it was not. It is not in dispute that the *ex parte* application was sent via email to the respondents by the applicants' attorneys giving them notice of the application and was not brought in stealth. I find that whilst greater care should have been taken to ascertain whether the second applicant expressly consented to launching the application prior to deposing to the founding affidavit to this effect, there is not evidence before me that Mr Gore acted with an intention to mislead the court in this regard. Furthermore, the fact that the launching of the application was subject to ratification by Mr Engelbrecht and that Mr Engelbrecht did subsequently confirm his support for the application on 25 September 2012 is material. In the circumstances, I find that a case has not been made out to justify an order of costs *de bonis propriis* against the first applicant.

[34] I am satisfied that given that section 386(5) required an application to this court in order to grant leave to the applicants to raise money on the security of the assets of the company, costs stand to be costs in the winding up of the company.

ORDER

In the result, the following order is made:

1. This application complies with the provisions of section 382(1) of the Companies Act 61 of 1973.

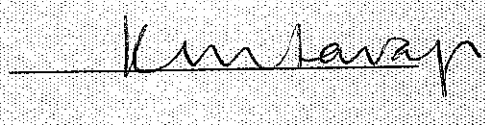
2. The applicants are authorised in terms of section 386(5) of the Companies Act, in relation to the administration of Dynmar Twaalf (Pty) Ltd (in liquidation):

2.1 To exercise the power to bring or defend any action or other legal proceeding of a civil nature in terms of section 386(4)(a) of the Act (as read with item 9 of Schedule 5 of the Act) and to pay the attorneys and/or counsel their costs and disbursements in this regard, subject to taxation by the appropriate taxing master, out of the assets of Dynmar Twaalf;

2.2 To exercise the power in terms of section 386(4)(f) of the Act (as read with item 9 of Schedule 5 of the Act) to continue any part of the business of Dynmar Twaalf which may be necessary for its beneficial winding-up;

2.3 To borrow an amount of up to R750 000 in order to pay the premium for the applicant's bond of security and disbursements in respects of rates, taxes, security costs, cleaning and maintenance, and to pay interest on this loan amount.

3. Costs of this application are to be treated as costs in the winding up of Dynmar Twaalf.



K M Savage

Acting Judge

Date of hearing: **10 October 2012**

Date of judgment: **15 October 2012**

Appearances:

For the applicants: Mr B Manca SC
Mr Morrissey
Instructed by Edward Nathan Sonnenbergs Inc.

For the respondents: Mr A de Villiers
Instructed by Assheton-Smith Inc.