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

Case No 1554/2012

In the matter between:

RYNO ENGLBRECHT N.O.	First Applicant
CHRISTOPHER PETER VAN ZYL N.O.	Second Applicant
RENE WILLOUGHBY N.O.	Third Applicant
In their capacity as joint liquidators of **WORLD FOCUS 899 CC (IN LIQUIDATION)**	Fourth Applicant

and

PROWD INVESTMENTS (PTY) LTD (Registration Number: 2005/028684/07	Respondent

Court: **CLOETE, AJ**

Heard: 21 MAY 2012

Delivered: **28** MAY 2012

ORDER AND REASONS

INTRODUCTION

[1] This is an opposed application for the provisional liquidation of the respondent.

[2] The first to third applicants are the joint liquidators of the fourth applicant (*"World Focus"*) which was placed in liquidation during April 2010. The applicants' case is that the respondent is indebted to it in the sums of R2 850 000 (in respect of a loan) and R280 000 (in respect of profits received from its illegal investment in World Focus) although the primary indebtedness relied upon is the aforementioned loan; and that the respondent, on the admission of its own directors, is commercially and factually insolvent and unable to repay the aforesaid sums.

[3] The respondent denies the existence of a loan and that it is commercially or factually insolvent, relying upon unaudited and unsigned "*financial statements*" which are annexed to its opposing affidavit. The respondent also denies that the admissions made by its directors at the enquiry relating to World Focus in terms of s 415 of the Companies Act 61 of 1973 (*"the Companies Act"*) are admissible in these proceedings.

[4] A point *in limine* raised by the respondent regarding the introduction of what it alleged to be "*new evidence*" in the applicants' replying affidavit was wisely not argued by its counsel with any degree of conviction since it is abundantly clear that the "*new*" matter was introduced in reply in direct response to certain allegations in the respondent's opposing affidavit.

BACKGROUND

[5] Prior to its liquidation World Focus conducted the business of an illegal investment (or pyramid) scheme by accepting deposits from various investors which it then utilised to pay "*dividends*" to prior investors. In the six month period preceding its liquidation World Focus received deposits from investors totalling R54 570 400.03. The scheme collapsed, resulting in its liquidation.

[6] At all material times Ms Jasmin Ebrahim was the sole member of World Focus and one of the respondent's three directors. The other directors are Ms Hajira Khalfe and Ms Faiza Daniels.

[7] On 11 September 2009 the respondent (represented by Ebrahim) entered into a written sale of shares agreement with Bold Moves 1722 (Pty) Ltd trading as Imbongi (represented by Mr Julius Steyn) ("*Imbongi*") in terms of which Imbongi sold 30% of its shares to the respondent.

[8] As part payment for the purchase price of the shares an aggregate sum of R5 million was paid to an entity named Vizifin (Pty) Ltd ('*Vizifin*'), comprised of R2 150 000 by the respondent itself and R2 850 000 by World Focus. These payments were made over the period September 2009 to February 2010 and thus prior to World Focus being placed in liquidation.

[9] The applicant contends that the payment of R2 850 000 by World Focus to Vizifin was a loan advanced to the respondent. The latter however claims

that it merely acted as a conduit for various individuals who had invested in World Focus and who had instructed World Focus to pay over their monies to Imbongi for purposes of investing in that entity.

[10] It is common cause that the respondent also invested an amount of R300 000 in World Focus and that it received a return on this investment of R580 000, thus making a "*profit*" of R280 000, which the applicant now requires to be repaid since the investment was illegal.

ADMISSIBILITY OF EVIDENCE AT S 415 ENQUIRY

[11] The respondent relies on *O'Shea NO v. Van Zyl and Others NNO* 2012 (1) SA 99 SCA in support of its contention that the evidence given at the s 415 enquiry by each of its three directors is inadmissible in these proceedings.

[12] Before considering *O'Shea* it must be mentioned that despite that judgment having been delivered on 28 September 2011 the respondent itself had no hesitation in relying on portions of the record of the s 415 proceedings in support of its application for a postponement in these proceedings on 15 February 2012.

[13] In *O'Shea* the liquidators of a certain company had held an enquiry in terms of s 417 of the Companies Act. One of the trustees of a trust testified thereat and stated that the company in liquidation had loaned monies to the trust. On the strength of that statement the liquidators later applied to sequestrate the trust on the basis that the company in liquidation was its creditor. The issue in the appeal was whether the

trustee's statement was admissible in the later sequestration proceedings. The Supreme Court of Appeal found that it was not admissible, essentially for two reasons. First, there was no evidence that the trustee had been authorised by the co-trustees to speak on their behalf. He had not even purported to do so. Second, the statement made by the trustee was made on his own behalf and could not be used against another person or entity since the latter had not been entitled to be present at the enquiry and to cross examine the trustee.

[14] *In casu* the facts are clearly distinguishable. First, all three directors testified at the s 415 enquiry, which was a public enquiry as opposed to a private enquiry as was the case in *O'Shea.* Second, Ebrahim herself confirmed under oath that her co-director, Daniels, would be testifying in her capacity as representative of the respondent. It is clear from the record of the proceedings that Daniels testified in that capacity. Third, the remaining director, Khalfe, confirmed when she testified that she agreed with the entire testimony of Daniels relating to the respondent and its dealings with World Focus and Imbongi. Fourth, the applicant relies not only on the testimony of the respondent's three directors but also on documentation (to which I will refer below) in support of its claim.

MERITS

[15] It is trite that in proceedings for provisional liquidation the applicant is only required to make out a *prima facie* case. However where the respondent

shows on a balance of probabilities that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds the Court will refuse a provisional liquidation order: *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 AD at 979 A and 980 C.

[16] Further, when it is alleged that the respondent is commercially insolvent the test is whether or not the respondent "*has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading*": *Absa Bank Ltd v. Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 CPD at 440 F – G.

[17] It is common cause that amounts of R2 850 000 and R580 000 were paid out of the bank account of World Focus, the first amount to Imbongi and the second amount to the respondent.

[18] As to the amount of R2 850 000 the respondent, in line with its "*conduit*" argument, claims that it was the investors and not the respondent who received the debentures or shares on account of the purchase made.

[19] The only document tendered by the respondent in support of this contention is a share certificate date 27 May 2010 reflecting that on 19 May 2010 Imbongi's holding company, Mochron Investments Ltd, issued 416 667 shares to a Mr Ahmed Dawood who was one of the respondent's investors.

[20] However in reply the applicant produced a shareholders agreement entered into between the respondent and its co-shareholder, the Hanbury Manor Family Trust (*"the trust"*) in respect of the shares held by these two entities in Imbongi. This agreement had been signed on 11 September 2009, the same date that the share sale agreement had been entered into between the respondent and Imbongi. Again, in signing the shareholders agreement, the respondent had been represented by Ebrahim and the trust by Steyn. The applicant also produced three debenture notes issued by Imbongi to the respondent in respect of the purchase of the shares dated 16 October 2009, 16 November 2009 and 30 January 2010 respectively; and a *"Confirmation of Mandate"* by Mochron Investments Ltd dated 12 April 2010 which declared that:

> *"This letter confirms PROWD Investments (Pty) Ltd has secured 8 333 334 Shares in Mochron Investments Ltd. These shares were acquired in terms of an agreement reached between PROWD and Bold Moves 1722 (Pty) Ltd, a subsidiary of Mochron Investments Ltd on 9 September 2009..... The directors of Mochron Investments Ltd have agreed to a request by PROWD to restructure up to 4 166 667 of <u>its shares</u>."*
>
> [Emphasis supplied]

[21] The applicant also produced a letter from Imbongi dated 26 May 2010 which was written to the respondent confirming the cancellation of the <u>respondent's</u> debenture notes and share certificates, and the termination of the shareholders agreement between the respondent and the trust; and

in turn confirming that replacement share certificates and debenture notes would be issued to *"agreed shareholders"*, one of whom was Dawood to whom I have referred above.

[22] The aforementioned letter and termination of the shareholders agreement were written and concluded about 6 weeks after the liquidation of World Focus. A *"settlement agreement"* giving rise to the transactions was concluded on 19 May 2010, some 5 weeks after World Focus was liquidated.

[23] No explanation whatsoever has been provided by the respondent as to why these transactions were concluded so shortly after the liquidation of World Focus. The best that the respondent could proffer is that the monies were paid by both itself and World Focus to Imbongi on behalf of the newly appointed *"agreed shareholders"* from the outset. But what the respondent has pertinently failed to address is why the share sale agreement with Imbongi was concluded by it in its own name and in its own right; why debenture notes were issued to the respondent itself; why there is not a shred of evidence to indicate the terms of *"agreed shareholder"* mandates to the respondent in respect of the latter's dealings with Imbongi; and why it was necessary to terminate the respondent's shareholders agreement and issue fresh certificates and debenture notes when, on respondent's own version, it had always held these on behalf of the "*agreed shareholders"* which were also its investors.

[24] The overwhelming probabilities are that the set of transactions on 19 May 2010, 26 and 27 May 2010 were nothing other than an attempt on the part of the respondent to avoid its obligations to World Focus in respect of what was clearly a loan. In my view the respondent has failed to show on a balance of probabilities that its indebtedness to World Focus of R2 850 000 is disputed on *bona fide* and reasonable grounds and the defence raised must fail.

[25] As to the payment by World Focus to the respondent of R580 000, the latter did not take issue with any of the applicant's allegations. The respondent's counsel informed me that this was because it was not the primary basis for the relief sought by the applicant. That however is not the point. Specific allegations were made by the applicant in its founding affidavit to the effect that Ebrahim had suggested to her co-directors that the respondent should *"invest"* in World Focus and that the respondent proceeded to make that investment in an amount of R300 000. It was also alleged that the respondent received a return of R580 000, leaving a *"profit"* of R280 000. The respondent's answer was simply that *"save for stating that the averments contained herein are irrelevant to the current proceedings the contents hereof are admitted"*. The respondent thus admits that it received a payment pursuant to an illegal investment scheme and that such payment was therefore not for value and falls to be set aside in accordance with s 26 of the Insolvency Act 24 of 1936.

[26] Accordingly, on its own version, the respondent admits its liability to World Focus in the amount of R280 000.

[27] I now turn to the issue of the respondent's insolvency. At the s 415 enquiry Daniels admitted in her testimony that the respondent's liabilities exceeded its assets, and that this had been the case since what she referred to as "*the World Focus debacle*". When she was asked what the respondent could repay to World Focus she replied *"Well, we've got nothing*".

[28] During argument the respondent's counsel made the bald submission that the respondent is neither factually nor commercially insolvent. She was however unable to point to any portion of the respondent's "*financial statements*" to support the submission of factual solvency, and the respondent itself had already admitted through Daniels at the s 415 enquiry that it was commercially insolvent.

[29] The *"balance sheet"* produced by the respondent for the financial year ended 28 February 2011 (and which is disputed by the applicant) reflects "*assets"* of R3 130 394.96 and "*liabilities"* of R2 720 000, to which must be added the amounts owed to World Focus totalling R3 130 000. On either version the respondent's liabilities thus exceed its assets by R2 719 605.04 and it is factually insolvent.

CONCLUSION

[30] Having regard to the aforegoing I am satisfied that the applicant has shown that it is a creditor of the respondent and that the respondent is insolvent.

[31] I accordingly make the annexed order.

CLOETE, AJ

"X"
28.5.12

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

BEFORE THE HONOURABLE MS. ACTING JUSTICE CLOETE
CAPE TOWN:
DATE : 28 MAY 2012

Case No.: 1554/2012

In the matter between:

RYNO ENGELBRECHT N.O.	First Applicant
CHRISTOPHER PETER VAN ZYL N.O.	Second Applicant
RENE WILLOUGHBY N.O.	Third Applicant
(in their capacity as joint liquidators of	
WORLD FOCUS 899 CC (IN LIQUIDATION)	Fourth Applicant

and

PROWD INVESTMENTS (PTY) LTD	Respondent
(Registration Number: 2005/028684/07)	

ORDER

Having heard counsel for the parties and having read the papers filed of record IT IS ORDERED THAT:

1. Respondent is hereby placed under provisional liquidation.

2. A rule nisi do issue calling on respondent and all persona interested to appear and show cause, if any, to this Honourable Court, on **TUESDAY, ~~28~~ 19 JUNE 2012** at **10h00** as to:

   2.1 why respondent should not be placed under final liquidation;

2.2 why the costs of the application should not be costs in the liquidation.

3. Service of this order shall be effected:

3.1 by the sheriff at the registered address of respondent at 6th Floor, Office Block 1, The Cliffs, Tyger Waterfront, Bellville, Western Cape;

3.2 by the sheriff upon respondent's employees by affixing a copy to a notice board, or affixing same to the front door of the main place of business of respondent at 6th Floor, Office Block 1, The Cliffs, Tyger Waterfront, Bellville, Western Cape;

3.3 by the sheriff upon the South African Revenue Service; and

3.4 by one publication in each of the Cape Times and Die Burger newspapers.

BY ORDER OF COURT

COURT REGISTRAR