**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 3839/2013

Reportable

In the matter between:

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| **HENDRIK DIPPENAAR N.O** | **First Applicant** |
| **JOHAN DIPPENAAR N.O** | **Second Applicant** |
| **ANNA SOPHIA VAN HUYSSTEEN** | **Third Applicant** |
| **and** | |
| **BUSINESS VENTURE INVESTMENTS NO 134 (PTY) LTD** | **First Respondent** |
| **JACOB STOLP LOUW N.O.** | **Second Respondent** |

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**JUDGMENT DELIVERED ON 05 FEBRUARY 2014**

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BOQWANA, J

Introduction

[1] This is an extended return date of a provisional liquidation order granted by Meer J on 28 May 2013. In their notice of motion the applicants sought an order declaring that a resolution of the first respondent's board of directors, taken on 18 February 2013, to commence business rescue proceedings and to place the first respondent under supervision, had lapsed and was a nullity, alternatively, that such be set aside on grounds set out under section 130 (1)

(a) (ii) and/ or (iii) of the Companies Act 71 of 2008 ('the Companies Act') and an order placing the first respondent in provisional liquidation in the hands of the Master of the High Court ('the Master').

[2] Relief in regard to the business rescue proceedings is no longer being pursued as an order to the similar effect was granted at the instance of the first respondent in a separate urgent application on 11 April 2013. This application is opposed only by the first respondent.

[3] The issue before this Court is whether the first respondent is unable to pay its debts and whether it is just and equitable to place it under final liquidation.

The facts

[4] The first respondent is the registered owner of the Stellenoord frail care centre, which is situated in Stellenoord Retirement Village, an upmarket security lifestyle village in Stellenbosch. The village is comprised of 75 luxury single title residential retirement villas and the frail care centre is housed in a building comprised of 24 flats, with a kitchen, dining room and a high care division. The high care division provides constant and specialised medical care and supervision for the elderly residents. The first respondent owns the immovable property housing the frail care centre.

[5] At the time these proceedings were lodged the frail care centre was owned by one Elizabeth Herbert ('Mrs Herbert') who was also its director. The applicants allege that the majority shareholding of the first respondent was held by Mrs Herbert's son, one Lance Herbert. This is however disputed by the first respondent who claims that Mrs Herbert was the sole shareholder although Lance Herbert's directorship at the time of lodging the application could not be entirely disputed. Nothing turns on this issue however as it is clear that the facility was managed and controlled by the 76 year old Mrs Herbert when these proceedings were instituted.

[6] On 22 March 2013 and whilst the liquidation application was pending the first respondent's entire share capital was sold to Lipsotex (Pty) Ltd ('Lipsotex') trading as Bank on Assets, owned and managed by Leno de Villiers ('De Villiers'), by Mrs Herbert. Lipsotex took over the management and control of the first respondent's operations. De Villiers is the sole director of both the first respondent and Lipsotex. Lipsotex's involvement as the sole shareholder of the first respondent is quite significant in the determination of the issues before me.

[7] This application was brought by the applicants in their capacity as creditors of the first respondent and as affected parties in relation to the first respondent. The first and second applicants are executors of a deceased estate of their late mother, Catherine Elizabeth Dippenaar ('Mrs Dippenaar'), who passed away on 8 September 2012. Their mother was the holder of the so called lifelong occupation right ('life right') in the frail care centre which she purchased for occupancy of a unit in the frail care centre from the first respondent in or about October 2000 at a purchase price of R200 000.00 in terms of a written agreement. The first and second applicants' standing in these proceeding is not disputed.

[8] The life right entitles the holders to accommodation and other services within the facility as stipulated in the agreement. It is purchased by way of a lump sum and payment of monthly levies. The life right terminates, *inter alia*, upon death of a holder, by agreement or on breach of the agreement. Upon its termination the first respondent shall either pay the full purchase price or the market value (as determined by the first respondent at its sole discretion) of the occupation right, whichever is the lesser amount, to the holder of the life right or to his or her deceased estate within six months after the termination date, provided the holder and/or his spouse had vacated the premises.

[9] The third applicant is a resident at the frail care centre. She purchased a life right from the first respondent in or about 06 September 2010 at a purchase price of R450 000.00. The third applicant is held to be a contingent creditor by the first respondent.

[10] It is alleged by the applicants that the first respondent was inefficiently and badly managed by Mrs Herbert to the point that its standard of service dropped and it suffered financial distress. The first respondent's inability to pay its debts was, according to the applicants, borne out by the business rescue proceedings initiated by Mrs Herbert at which the first respondent had to confirm that it was in financial distress. In as much as the first respondent tried to dispute these allegations, it made a number of concessions that it suffered from cash flow problems at least during Mrs Herbert's period of management. Its core defence however is that '*the first respondent's liabilities can now be met through capital provided by Lipsotex in its capacity as the new shareholder*'

The provisional order

[11] Meer J found that there was no evidence to support an allegation that the first respondent's shareholding was acquired by Lipsotex as De Villiers had expressly refused to disclose the relevant information. She accordingly found that there was no acceptable proof of his appointment or authority as a director and therefore his standing to oppose the provisional liquidation.

[12] De Villiers had alleged on behalf of the first respondent that the first respondent is capitalised to meet its liabilities through Lipsotex which in effect had injected the sum of R200 000.00 (the maximum amount allegedly kept in the first respondent's attorney's trust account in respect of the first and second applicant's claim). Meer J found that there was no evidence to support this claim. She agreed with the applicants' submission that even if it was so, the fact was that the first respondent did not have its own funds to

meet its own liabilities. It would have to borrow money from Lipsotex to fund its liabilities, as it were, and by so doing it would incur more debt. The judge further found that the first respondent had not paid its outstanding debts to the first and second applicants as executors of their late mother's estate, it had entered into a payment arrangement with the Stellenbosch Municipality, and had no funds to pay staff salaries for March 2013, with De Villiers admitting to having to pay the staff from his own pocket (factors which showed that it was unable to pay its debts). Furthermore, De Villiers had alleged that he was considering selling the life rights in respect of nine vacant units in the frail care centre to an undisclosed buyer which potentially gave rise to a risk of prejudice to the creditors. Based on these considerations Meer J was satisfied that a provisional order of liquidation ought to be granted.

Final liquidation

*Applicants' case*

[13] The first respondent has since filed supplementary answering papers providing proof of Lipsotex's shareholding in the first respondent and De Villiers' authority to oppose the application on behalf of the first respondent as its director. De Villiers' *locus standi* did not seem to be taken as an issue any longer at the hearing of this application before me.

[14] The applicants however still persist with the argument that Lipsotex's takeover of the management of the frail care centre did not change the first respondent's inability to pay its debts.

[15] First, they allege that a number of creditors such as life right holders or their estates, the Stellenbosch Municipality, SARS and certain smaller trade creditors remained unpaid.

[16] Second, the first respondent as an entity has no bank account. To substantiate these allegations the applicants rely on the provisional liquidators' report.

[17] Third, Lipsotex's funding of the first respondent's debts, outside of the respondent, does not constitute capitalisation of the first respondent in that no funds have been injected into the first respondent's account to improve its cash flow and its balance sheet. Furthermore, the first respondent is a separate legal entity which is accountable to its own creditors. According to the applicants reliance on funds belonging to Lipsotex does not prove solvency and the arrangement is unsustainable as Lipsotex is not directly accountable to the first respondent's creditors and may pull out of this funding arrangement at any time leaving the creditors and the elderly vulnerable. The applicants allege that in fact this arrangement constitutes proof that the first respondent does not have its own funds and thus is still unable to pay its debts.

[18] Further, on this point the applicants submit that the nature of this 'capitalisation' has not been explained. It appears that the first respondent is loaned money by Lipsotex which is not even reflected on its books and which if it is a loan would mean more debt incurred by the first respondent. Finally, it is alleged by the applicants that there is no proof that Lipsotex itself has the necessary cash flow to meet the first respondent's liabilities; it was a shelf company with no track record having been formed solely for the purposes of taking the first respondent over. According to the applicants the first respondent's business was unsustainable and on the first respondent's own version it continued to trade at a loss of R600 000.00 per annum.

[19] The applicants also allege that a case for winding-up on just and equitable grounds has also been made in that whilst under liquidation De Villiers unlawfully demanded that levies be paid to Lipsotex. He also appointed

armed security guards who intimidated and threatened the elderly and their family members and also refused some family members the right to visit their aged parents. Finally the management of the frail care centre by Lipsotex infringed the provisions of the Housing Development Schemes Act No. 65 of 1988.

*First Respondent's case*

[20] To counter these allegations the first respondent alleges that it is able to meet its liabilities as and when they fall due through capital provided by Lipsotex in its capacity as the new sole shareholder.

[21] First, it avers that an amount of R200 000 which is the maximum amount payable in respect of the first and second applicants' claim has been kept in the trust account of the first respondent's attorneys as cover for payment of the amount due pending the resolution on the *quantum* of the amount due to the estate. It alleges that it is yet to ascertain the fair market value of the life right payable by way of public auction.

[22] Second, the first respondent alleges that since Lipsotex took over, all the creditors of the frail care centre had been paid in full. Proof of payment of the Stellenbosch Municipality account and others were attached to the first respondent's supplementary answering papers.

[23] Third, it responded to the complaints about service and standards at the facility by renovating and repairing the frail care centre. It has since spent R78 300 and has set aside a budgeted sum of R1 million for repairs. Furthermore, more geriatric nurses and nurses were employed increasing monthly salaries from R75 000 to R105 000, and in this regard an operations manager was appointed at a monthly salary of R20 000. Further examples of improvements referred to include the following: a VW Caravelle minibus was purchased at a cost of R125 000 in order to transport life-rights occupants for, *inter alia*, hairdressing appointments and outings; a new

laptop computer and printer was purchased for the administration office at a cost of R 8000; a website was designed and set up in order to market the first respondent's business; new internal and external signage was purchased, at a cost of R14 000; and new equipment was purchased for the kitchen and dining area, at a cost of R 9500.

[24] On the capitalisation issue the first respondent contends that what it calls capitalisation is not in a form of loan advances but rather is funding of the first respondent by Lipsotex in its capacity as the sole shareholder investing in the growth of its equity. The first respondent alleges that it is a solvent and actively trading entity with sufficient capital resources to meet its obligations when they fall due by virtue of the funding from Lipsotex.

[25] In dealing with the allegations made by the provisional liquidators in their report, the first respondent alleged that its bank account was frozen during the business rescue proceedings and levies were paid into the trust account of the attorney's firm operated by the second respondent. With regard to the payment of the levies, the first respondent alleges that it agreed with the provisional liquidators that levies would be paid to Lipsotex so as to prevent any disruptions to the operations. This is disputed by the applicants and such practise, even if done by agreement, is in my view undesirable.

[26] According to the first respondent cash flow problems experienced occurred as a direct result of the 'unsustainable' life rights model and the only long term solution was to create a regular revenue stream from the staggered conversion of life right sales to the rental of units by residents. The new model would allegedly increase revenue from R140 000 to R220 000 per month.

[27] With regard to the tax issues raised by the applicants, the first respondent alleges that it has instructed its auditors to regularise its tax affairs but it is also constrained by the fact that it is under provisional liquidation.

*The first respondent's insolvency and inability to pay its debts*

[28] The test to be applied in ascertaining whether a company is unable to pay its debts is whether it is commercially insolvent in the sense that it is unable to meet its day to day liabilities in the ordinary course of business.[1]

[29] The facts to be taken into account are whether there are 'liquid assets or readily realisable assets available out of which, or proceeds of which, the company is in fact able to pay its debts.'[2] The inquiry is a factual one which depends on the circumstances of each case. It is not necessarily a case of whether a company's assets exceeded its liabilities. In **Irvin & Johnson v Oelofse Fisheries Ltd**[3] the Court observed that a company may at the same time be insolvent and wealthy in the sense that it may have investments locked up somewhere but not presently realisable and thus not able to meet it current demands.

[30] In the present case it is common cause that the first respondent generates income from the life rights and levies paid by the residents of the frail care centre pursuant to the life rights. It is apparent that this income has over a period of time not been sufficient to meet the day to day obligations of the first respondent. It cannot be disputed that during Mrs Herbert's period of management the first respondent was financially distressed and did not have funds readily available to meet its financial obligations as they fell due. Whether or not Mrs Herbert was ill advised about placing the first respondent under business rescue and supervision is neither here nor there. The point is that when Lipsotex took over the first respondent's ownership in March 2013, it did not find a company with a healthy cash flow. The first respondent was at that point unable to pay its debts.

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[1] See Rosenbach& Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) 593 D & C.L.D at 597C-D
[2] Rosenbach supra at 597E
[3] 1954 (1) SA 231 (E) at pages 239A

[31] The question is whether the first respondent has been able to demonstrate its ability pay its debts by virtue of its obligations being funded by Lipsotex. In support of the first respondent's view Mr Joubert SC who appeared for the first respondent relied on the full bench decision of **Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd**[4] where the Court held as follows:

'I respectfully disagree with the finding of the court a quo, that the fact that the payment of the admitted indebtedness was made by a third party on behalf of first to fourth appellants justifies the inference that the said appellants were unable to pay their debts. In my view, the ability of a company or close corporation to pay its debts may be demonstrated by itself making payment or by its ability to obtain the necessary finance from an exterior source. In the latter instance the creditworthiness of the debtor would normally enable it to raise the necessary funds. As submitted by Mr Brusser, the emphasis in determining the ability of a company or close corporation to pay its debts should be on the fact of payment and not the source of payment.'[5](Own emphasis)

[32] Mr Joubert also referred to the decision of **Payslip Investment Holdings CC v Y2K TEC Ltd**[6] where the Court said the following:

'The fact that respondent is able and willing to put up a bank guarantee for respondent's claim tends to strengthen the view that this claim is in fact disputed on genuine grounds. It follows that it cannot be inferred from respondent's failure to meet these claims that respondent is unable to do so. It is equally likely that the respondent is unwilling to do so.'[7]

[33] Mr Bremridge, counsel for the applicants, argued that the decisions in the aforementioned cases were made in a different context to the present matter. According to him those decisions referred to issues like *locus standi.* He further submitted that the **Payslip** decision involved a company that put up a

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[4] 2008 (2) SA 627 (C)
[5] At paragraph 16
[6] 2001 (4) SA 781(C)
[7] At paragraph 788 B – C

lot of evidence that it could pay unlike the first respondent. Firstly, it relied on a bank guarantee, which was evidence of its creditworthiness, in terms whereof the bank bound itself as a co-principal debtor for payment of the full amount. Secondly, it put up an affidavit by its auditors to confirm that it was solvent. Thirdly, it annexed its draft financial statements for the year ended 29 February 2000, which according to the respondent reflected that it was in fact solvent.

[34] Mr Bremridge was of the view that the Courts in the abovementioned decisions said they could not draw the inference from the fact that payments were made by a third party that the company was unable to pay its debts. According to Mr Bremrigde the first respondent has admitted that it could not pay its debts, and in this matter payments had been made by a third party, whilst in the **Helderberg** and **Payslip** decisions inability to pay was disputed and the respondents put up evidence by way of bank guarantees that they were able to pay. Those companies were able to demonstrate their creditworthiness which was not the case here.

Discussion

[35] First, I disagree with Mr Bremridge that the first respondent has admitted its inability to pay its debt. To the extent that such admission has been made, it is for the period prior to Lipsotex taking over. The first respondent holds that it has demonstrated its ability to pay by being able to source funds from its sole shareholder.

[36] Whilst I understand the distinction that Mr Bremridge tries to draw between this case and the **Payslip** and **Helderberg** cases in as far as the issue of creditworthiness is concern, I however venture to say that the findings in those decisions were not based on the fact that the respondents could show their credit worthiness but that they could source funds from an exterior source to meet their obligations. Of course, when funds are sourced from a

bank creditworthiness must be shown. In this instance funds are sourced from the shareholder who may not require the company to demonstrate any creditworthiness. The focal point is whether or not funds are available to meet the first respondent's obligations whether sourced from a bank, the shareholder or within the first respondent itself.

[37] The **Helderberg** decision also found support in the case of **Nepgen v Autoachiva (Pty) Ltd**[8]where Gautschi AJ found:

> 'The mere fact that a company pays its debts using borrowed money does not render it unable to pay its debts.'

[38] In that case a submission was made that the respondent was surviving on advances of money from friendly creditors. Indeed the question is 'whether the company 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 will be in a position to carry on normal trading- in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities:'[9] It does not matter from where the funding is derived (as long as the funding arrangement is not unlawful).

[39] The first respondent has in my view been able to demonstrate that it can meet its liabilities as they fall due, albeit those liabilities being paid on its behalf by its sole shareholder. The question that remains is whether it remains buoyant after having met those obligations? My view is that it does. Evidence has been presented to show various improvements made by Lipsotex to the first respondent in trying to keep it viable and the amount of money it has 'invested' in the operations of the first respondent.

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[8](26368/11) [2012] ZAGPJHC 17 (24 February 2012) unreported decision at paragraph 26
[9]See Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993(4) SA 436 (C) at 440F

[40] The scenario in this instance is in my view akin to that of a holding company keeping its subsidiary afloat by bailing it out financially until it is able to get out of its financial crisis.By doing so it invests in the business in order to improve its equity and viability. Thus Lipsotex's investment in the first respondent would ultimately be beneficial not only to Lipsotex as a shareholder but to all the affected stakeholders, including the first respondent's creditors. I am mindful of the concerns raised on behalf of the applicants that the sole shareholder has no formal commitment to the creditors and may pull out of the first respondent at any time. It however would not make sense, in my view, for Lipsotex to invest in the manner it did in the first respondent only to walk away.

[41] This brings me to the question of whether the arrangement between Lipsotex and the first respondent constitutes capitalisation of the first respondent's business. The starting point in my view is to look at the ordinary meaning of capitalisation. In the Oxford Dictionary capitalisation is defined as '*...the provision of capital for a company, or the conversion of income or assets into capital.*'

[42] In order for a company to be able to demonstrate that it is able to meet its obligations to the creditors, the question arises whether capital provided to it by another entity should be housed within the company itself or whether it is sufficient to show that a source of funds is made available by a third party, who in this case is a sole shareholder, to pay its debts.

[43] The meaning that Mr Bremridge attaches to the concept of capitalisation is in my view quite narrow. There is nothing improper for an owner of the business to capitalise or provide capital for the benefit of the business that it owns whether that is in a form of a loan or investments. As it can be seen from the Oxford definition, capitalisation is not confined to 'injecting' funds into a bank account. Capitalisation in the present context should mean

capital provided for the first respondent by its shareholder regardless of whether it is made available in the form of a loan or an investment. How the funding is reflected in the company's financial statements is a different issue altogether and not central to the question of whether or not a company is able to pay its debts.

[44] I accept that assessing Lipsotex's liquidity is relevant in assessing the viability of the first respondent going forward, because it is the primary funder of the first respondent apart from levies that the first respondent receives from the residents of the frail care centre. I am however satisfied with the evidence annexed to the first respondent's supplementary answering papers indicating that Lipsotex has cash in the bank. It remains to be seen if Lispotex's involvement will keep the first respondent's business buoyant going forward. This is something that cannot be predicted.

*Just and Equitable*

[45] Even if it was found that the first respondent was unable to pay its debts, it does not necessarily follow that the applicants would be entitled to a winding up order. In dealing with the question of whether the doctrine of *ex debito justitiae* was still good under the new Companies Act era, Sutherland J concluded in the decision of **Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another**[10]:

'[31] In plain terms, it is seems now to be incorrect to speak of an 'entitlement' to a winding up order simply because the applicant is an unpaid creditor. The rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees, and with the public interest too. I endorse the perceptive observation by Eloff AJ in Southern Palace at [20] (Supra) about the shift in terminology between a 'reasonable probability' in the judicial management provisions of the Companies Act, 1973, and the phrase "reasonable prospect" in Section 131 of the Companies Act, 2008. To the ear and eye of a South African Lawyer, a

[10][2013] 3 All SA 146 (GSJ)

"reasonable probability" is the hallmark of a happening that, on balance, is more likely than not, whilst the phrase "reasonable prospect' suggests merely a chance, albeit a good one. The norm that infuses the law about the governance of companies after the advent of the Companies Act, 2008, means that the age of creditor supremacy is over. This outcome must be distinguished from that illustrated in Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd 2003 (2) SA 253 (SCA) at [10] where it was held that a rule nisi should not be discharged for any other reason than one that goes to the root of the applicant-creditors causa, which on the facts of that case, was a real right possessed by the creditor in respect of the debtors' asset under a perfected notarial security bond in favour of the creditor.

[32] It is true that Newcity does not expressly invoke any of the factors that are properly the subject matter of the wider set of considerations now relevant under the Companies Act, 2008, but that is not of moment because the principled preference of a rescue over the demise of a company is sufficient to defeat the older viewpoint examined here.

[33] Upon an application of this approach, it must therefore be asked if liquidation in this particular case can reasonably be avoided, a question that is independent of the prospect of a business rescue option, as addressed earlier. In my view, despite some wrinkles in the substance of what Newcity advances, there is a sufficient body of fact and rationality in what is on offer to result in a reasonable pragmatic programme of payments that could avoid the extinction of Newcity.'

[46] I must align myself with Sutherland J's reasoning and that of a number of recent decisions which stipulate that the new dispensation under the new Companies Act, 2008 introduces a new approach to corporate governance.[11] It has been held that liquidation is a drastic and a destructive process, which

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[11] In *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC), Binns-Ward J stated at para 14: 'It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible.'

should be resorted to only when there is no reasonable possibility that the company can be saved.[12]

[47] Although these decisions were raised in a context of a business rescue, they do find application in this case as well, particularly the **New City** decision. The principle I attach to them is that, the discretion of the Court is no longer as narrow as set out in the decisions decided prior to the 2008 Companies Act, such as **Rosenbach& Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd[13], where it was held by** Caney J quoting Buckley on the Companies' Act:

'that a creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the Act.'[14]

[48] In his article '**Ex debito justitiae principle liquidated?'**, Don Mahon expresses a view that while it is clear that the introduction of the business rescue regime provides an alternative to liquidation, it appears to have been accepted by Sutherland J in the **ABSA Bank v Newcity** matter that even if a company does not meet the requirements for the granting of a business rescue, the court must still apply the change in mind set when considering whether to exercise its discretion against granting a winding-up order.[15] I agree with this view because Sutherland J found the business rescue application to have been an abuse of the court process and refused it but he nevertheless did not grant a final winding up order but instead ordered **New City** to dispose of its assets for the payment of **ABSA Bank** with various safeguards to **ABSA Bank's** interests, including leave that they could approach the Court on the same papers if the directions of the Court were not complied with.[16]

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[12] See *Absa Bank v New City* supra at paragraphs 20.2 and 32

[13] 1962 (4) SA 593 (D) at 597

[14] See also *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C)at 440F to 441A

[15] DR, March 2013:38-40 [2013] DEREBUS 44

[16] Absa Bank v New City supra at paragraph 34

[49] Business rescue proceedings were set aside in this present matter but independently a new shareholder came on board to improve the first respondent's infrastructure and has taken strides to lift the standards of the frail care centre and to pay the first respondent's debts. Clearly this is not the kind of company that should be wound up.

[50] The concerns raised by the applicants about the mismanagement of the premises by Lipsotex are not of such a nature as to warrant final liquidation of the first respondent. Those in my view can be addressed without resorting to liquidating the first respondent. Recent decisions of the Courts promote rescue of the company over its demise.[17]

[51] In exercising my discretion on whether the first respondent should be placed under final liquidation, I have considered the rights of the creditors, the livelihood of the residents and all the factors presented before me. I have already mentioned that it makes no sense to me why Lipsotex would invest money into the first respondent's business by improving the facility, making payments only to walk away. Furthermore, De Villiers has stated under oath that: 'while it is envisaged that the life rights model will be phased out as the various agreements terminate, the first respondent is naturally bound by the terms of the agreements and will continue to refund the purchase price of the effective life right as and when it occurs.' The first respondent also alleges that it hopes to earn more money from its new business model. I give no view as to the viability of this new model as no expert evidence was led in this regard.

[52] It is also important to take into account that, in respect of the first and second applicant's claim, a maximum of R200 000 has been placed into the first respondent's attorneys trust account in order to meet the claim once quantified. That factor potentially diminishes the allegation that the first

[17] Absa Bank v New City supra at paragraph 32

respondent has demonstrated that it has no money to pay the debt owing in respect of the life right purchased by the first and second applicants' deceased mother.

[53] The first respondent's attorneys' letter attached to the answering affidavit confirming that a maximum amount of R200 000 has been kept in the attorneys trust account is in my view sufficient to prove that the amount is available. The first respondent must however endeavour to ascertain the market value of the life right as soon as possible. Whilst the market value is determined at its sole discretion, it cannot delay payment on this basis as the amount was payable six months after termination of the life right in terms of the agreement. It would be an act of bad faith for the money kept in the trust account not to be paid to the applicants after it had alleged in these proceedings that the money was kept for that purpose. In fact failure to pay might be good reason for the applicants to bring another application for the liquidation of the first respondent. In this regard, I strongly suggest that urgent attempts be made by the first respondent to assess the market value of the life right and for the relevant payments to be made as soon as possible.

[54] As regards to the alleged infringement of the Housing Development Schemes for Retired Persons Act, I am not convinced that this point is relevant simply because the scheme as it were should be under the management of the provisional liquidators. To the extent that there was intereference with the work of the provisional liquidators by De Villiers or any person, my view is that, that was unlawful and should have been stopped (an urgent application was apparently brought by the provisional liquidators against De Villiers and Lipsotex but was struck off due to lack of urgency, and was never pursued further allegedly due to lack of funds on the part of the provisional liquidators). I am however not pursuaded that such intereference was good reason to liquidate the first respondent.

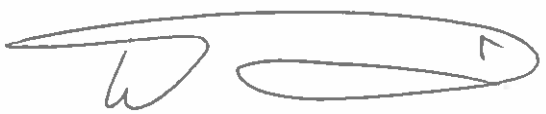
[55] Taking into account all the factors presented before me, I am of the view that it would not serve the interests of the parties concerned, to place the first respondent into final liquidation. I am of the view that the provisional order should therefore be discharged and the costs follow the result.

[56] The matter was extensive and of such a nature that it did justify use of two counsel. The punitive costs order asked by the first respondent is however not justified taking into account the fact that the first respondent was, as I outlined, unable to pay its debts during Mrs Herbert's period of management.

[57] In the premises, the following order is made:

1. The application is dismissed and the Rule Nisi issued on 28 May 2013 is discharged.

2. The applicants are ordered to pay the first respondent's costs including the costs of two counsel.



N P BOQWANA

Judge of the High Court

APPEARANCES:

FOR THE APPLICANTS: Adv I. C. Bremridge

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FOR THE FIRST RESPONDENT: Adv. Z.F. Joubert SC with Adv. E Spammer

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