Republic of South Africa

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

Before: The Hon. Mr Justice Binns-Ward
Hearing: 12 December 2016
Judgment: 20 December 2016

Case No.s: 21739/2016 and 22169/2016

In the matter between:

THE WESTERN PROVINCE RUGBY FOOTBALL UNION Applicant

and

WESTERN PROVINCE RUGBY (PTY) LTD Respondent

and

AERIOS (PTY) LTD Intervening Creditor

and also in:

Case No. 22594/2016

In the ex parte application of:

CHRISTOPHER PETER VAN ZYL N.O. First Applicant

DALLIE VAN DER MERWE N.O. Second Applicant

(in their capacities as provisional co-liquidators of
Western Province Rugby (Pty) Ltd (in provisional liquidation))

for an order in terms of section 386(5) of act 61 of 1973

JUDGMENT

BINNS-WARD J:

[1] The applicant, Western Province Rugby Football Union, an affiliate of the South African Rugby Union (SARU), is required in terms of SARU's constitution to conduct its commercial activities through a corporate vehicle. The respondent, Western Province Rugby

(Pty) Ltd, is the company that was incorporated for the purpose of compliance with the applicant's aforementioned obligation, and also to be responsible for the management of the professional rugby business of the applicant. The applicant holds 75,1% of the issued shares in the respondent company, with the balance being owned by Remgro Sport Investment (Pty) Ltd (RSI). The applicant's president has described RSI as the applicant's 'so-called equity partner'. RSI's shareholding in the respondent is held with the consent thereto of SARU under clause 22 of the latter's constitution.

[2] On 7 November 2016 the applicant obtained an order placing the respondent into provisional liquidation. The provisional order was returnable on 12 December 2016. The application (under case no. 21739/16) was brought by the applicant, qua creditor of the company, in terms of s 344(f) read with s 345(1)(c) of the Companies Act 61 of 1973; it being alleged that the respondent is actually and commercially insolvent. It is undisputed that the applicant has a claim on loan account against the company in the amount of at least R4 325 557,62. The principal matter for determination in this judgment in proceedings on the return day is whether the provisional order should be made final or discharged.

[3] Aerios (Pty) Ltd (formerly Kagiso Vantage (Pty) Ltd and before that Kagiso Exhibitions and Events (Pty) Ltd), which is also a creditor of the respondent company, was granted leave to intervene in the proceedings. It is opposed to the winding up of the respondent company and contends that the provisional order should be discharged.

[4] Mr CP van Zyl and Ms D van der Merwe were appointed by the Master as provisional co-liquidators. They applied, in terms of s 386(5) of the Companies Act, for authority to raise money on the security of the assets of the respondent company and to do various other things that they considered necessary for the effective administration of the affairs of the company in the period before the second meeting of creditors. On 23 November 2016, with the concurrence of Aerios, an order was made by Ndita J substantially acceding to that application. The question of the powers sought in terms of sub-paragraphs 2.8 and 2.9 of the notice motion in case no. 22594/16; viz.:

> 2.8 to elect not to continue with any contracts which were executory as at the date of [the respondent company's] winding up; and
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> 2.9 to sell the property of [the respondent company] by public auction, public tender or private contract and to give delivery thereof

was, however, postponed for determination on the return day of the provisional order.[1] That is a subsidiary matter for determination in this judgment, along with certain questions in respect of costs in that application and in the application (under case no. 22169/16) by Aerios for leave to intervene and for certain related interim interdictory relief. The application under case no. 22594/2016 is also relevant because there were various cross-references to the papers in it in the affidavits in the winding-up proceedings.

[5] I shall set out the factual context in more detail presently. Suffice it to say by way of introduction that the applicant contends that it is evident that the respondent company's business has failed commercially and that it is unable to continue trading without the financial support of its shareholders. Part of the reason for the problem is what the applicant contends has been the disadvantageous effect of a contract entered into by the respondent company with Aerios for the sale of the company's advertising rights. The identified disadvantage pertains to the effect of the contract on the company's ability to contract profitably for sponsorship by third parties, which historically has been a significant source of its income. (The Aerios contract was concluded in October 2011, with various addenda thereto executed thereafter, most recently on 13 June 2013. It is apparent from the terms of the contract that it would have come into effect incrementally, as existing sponsorship agreements came to an end by effluxion of time.) In the affidavit in support of the provisional liquidators' aforementioned application in terms of s 386(5), the liquidators observed that it appeared that 'certain other contracts which were concluded between [the company] and third parties (in addition to the Aerios agreements) … have also contributed to the financial predicament of [the company]'. The indications suggest a pattern of poor business decisions by the company's management. The applicant has averred, and RSI has confirmed, that the shareholders are not willing to continue funding the respondent's operations in these circumstances. A decision to that effect was taken by the shareholders on 19 September 2016. The applicant was able to meet its current liabilities during October 2016 only thanks to a bridging loan extended by RSI on behalf of the shareholders.

[6] It is quite evident, even if there has been no express admission by the applicant to such effect on the papers, that the plan is for the respondent's shareholders (perhaps together with others) to acquire the respondent's business as a going concern from the company in

[1] Paragraph 3 of the notice of motion had in any event provided that '*the exercise of the powers sought in paragraphs 2.8 and 2.9 above are suspended pending the hearing of the return day of the final order of liquidation on 12 December 2016*'.

liquidation. That is the only conceivable reason for RSI to have advanced funding to the provisional liquidators to keep the business of the respondent afloat pending the company's final liquidation. Moreover, it is equally clear that the shareholders would wish to acquire the respondent's business free of the burdensome contract with Aerios. This much is apparent from public statements by the applicant's president, who was also the deponent to the founding affidavit, suggesting that business will continue as usual despite the respondent's liquidation.

[7] It is not seriously disputed that if a final order were granted, it would indeed be in the interests of concurrent creditors, including Aerios, for the business of the respondent company in liquidation to be disposed of by the liquidators as a going concern. That the liquidators would be inclined to terminate at least the sale of advertising rights contract with Aerios to enable that object to be obtained is very predictable having regard to the fact that, by virtue of SARU's constitution and the applicant's related position de facto as the sole regulator of rugby in the Western Province, the only entity practicably capable of purchasing the business as a going concern will be one in which the applicant has a proprietary interest. It is common ground that whatever the fate of the respondent company, the applicant will remain as the body effectively responsible for and ultimately in control of the game of rugby in the Western Cape.

[8] Aerios opposes the application principally on the basis that the alleged inability of the respondent company to pay its debts in the ordinary course has been engineered by the applicant and is more apparent than real. It also contends that the application has been brought, not with the bona fide object of bringing about a *concursus creditorum* in which the applicant would be treated equally with the other concurrent creditors, but rather as a means of terminating its commercial arm's contractual obligations to Aerios and otherwise continuing as before. Aerios contends that the institution of the winding up application by the applicant in those circumstances is an abuse of process.

[9] It is well established that a creditor is ordinarily, subject to the possible effect of any opposing views by its fellow creditors, entitled *ex debito justitiae* to execute its unpaid claim against a company by means of winding-up proceedings. It is trite, however, that the court is vested with a discretionary power to withhold a winding-up order, which it will be disposed to exercise if it is satisfied that resort to the liquidation procedure in the given circumstances amounted to an abuse of process; cf *Wackrill v Sandton International Removals (Pty) Ltd and Others* 1984 (1) SA 282 (W) at 293C-E and the other authority cited there. The approach that

is adopted in this regard is that if a proper case for winding-up has been made out, a court will generally refuse the application on grounds of abusiveness only if the applicant's ulterior purpose is shown to have been the sole, or at least the predominant, actuating factor in the bringing of the application. Compare *Millward v Glaser* 1950 (3) SA 547 (W) at 551, and *Wackrill* supra, at 293E-F. Graphic examples of the exercise of the discretion in such circumstances against applicants for winding-up are provided in *Re a company (No 001573 of 1983)* [1983] BCLC 492, 1 BCC 937 and in *Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (3) SA 253 (W).

[10] In *Re a company* supra, the respondent company was in an admittedly parlous financial state. The petitioner for its winding-up relied on a costs order in its favour against the company to seek its liquidation. The amount of the costs had not yet been determined by agreement or taxation. Indeed, the petition was served on the very afternoon of the day on which costs order had been granted, and without any demand for payment having been directed to the company. It was clear on the facts that the application had been made not for the purposes of obtaining payment to the petitioner and the other creditors of the company, but *only* to enable the petitioner to take over the lease of a Scottish coalmine held by the company. The landlord had previously agreed with the petitioner that should a petition for the company's winding-up be presented before a certain date, it would cancel its contract with the company and conclude a lease with the petitioner. The obvious purpose of the presentation of the petition was to obtain the benefit of the petitioner's agreement with the landlord, rather than payment of its claim for costs rateably with the company's other creditors.[2] Harman J reasoned his decision to dismiss the petition as follows (at pp. 495-6 of the BCLC report):

> On a petition in the Companies Court in contrast with an ordinary action there is not a true *lis* between the petitioner and the company which they can deal with as they will. The true position is that a creditor petitioning the Companies Court is invoking a class right (see *Re Crigglestone Coal Co* [1906] 2 Ch 327), and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view. …
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> The question for me, therefore, is whether I am satisfied that the petitioner seeks this winding up for the benefit of his class. I am not concerned with his motives or with the past conduct of the company … the only proper purpose for which a petition can be presented is for the proper administration of the company's assets for the benefit of all in the relevant class.

[2] In *Ebbvale Ltd v Hosking (Bahamas)* [2013] UKPC 1 at para. 28, Lord Wilson described the facts in In re a Company as 'extreme'.

> The question, therefore, is not 'does the petitioner genuinely wish to wind up this company', as counsel for the petitioner (Mr Littman) submitted. It would be hard for me to find that this petitioner, which has taken all regular steps to prosecute its petition and which plainly has reasons to desire the winding-up of this company, since that must put beyond much cavil the future of the company's lease, does not in truth desire to wind up the company. In my judgment the true question is 'for what purpose does the petitioner wish to wind up this company'. A judge has to decide whether the petition is for the benefit of the class of which the petitioner forms a part or is for some purpose of his own. If the latter, then it is not properly brought.
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> If the petitioner can show that he and his class stand together and will benefit or suffer rateably, then his ill motive is nothing to the point. But here it is plain that no such even-handedness exists. If the petition is properly brought, then the petitioner stands to get a valuable asset for itself and the rest of the class of creditors are likely to get nothing. If the petition is not properly brought, so that in Scotland the company's lease remains un'irritated'[3] (and I have no certainty that this will be so) then the class of creditors including the petitioner may all have some hope of payment or will at least suffer rateably.

[11] In *Tucker's Land and Development Corporation*, the court declined to make a winding-up order in circumstances in which it was apparent that the application had been brought by the company's sole creditor only to stifle a pending appeal by the company. The applicant's claim was founded on a judgment debt in the matter that was subject of the appeal. It was common cause that the company was unable to pay the debt. In fact, leave having been granted to the applicant to execute the judgment pending the determination of the company's appeal, a return of *nulla bona* had been rendered. If the appeal were to be upheld, however, the company would be entitled to repayment of monies paid towards the purchase of certain fixed property and would be restored to solvency. The court found that in the circumstances there was an irresistible inference 'that the applicant's motives [were] not to bring about the liquidation for its own sake, but for the ulterior motive of putting an end to the appeal, and by so doing of eliminating, once and for all, any prospect of having to repay the moneys paid in on account of the purchase price of the stands'.

[12] In both the aforementioned examples it was evident that the applicants in instituting the proceedings were not motivated by anything other than their ulterior purposes. They had no genuine desire to avail of the winding-up remedy for the purposes for which it is provided. If, however, the applicant has a genuine interest in seeking the remedy for a proper purpose, it is not sufficient for a party opposing an application for the winding-up of a company on the

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[3] '*Irritated*' is apparently a term in Scots Law that in the relevant context means what we would understand by the word 'forfeited'.

grounds of abuse of process merely to show that the applicant has other, perhaps more important, motives for bringing the proceedings than to bring about a *concursus creditorum*. So, for example, in *Ebbvale* supra,[4] Lord Wilson accepted that the petitioner for the company's winding up in the Bahamas had an ulterior interest connected with the conduct of litigation pending between himself and the company in the English courts. The company had argued that the winding up proceedings were an abuse of process instituted by the applicant (Mr Hosking N.O.) 'to replace the direction of the company's defence of the English action by its directors with that of a liquidator who might prove to be a weaker opponent, and thereby to secure for himself an unfair advantage in the litigation'. The applicant admitted that he harboured the idea of putting the company's conduct of the English litigation in the hands of liquidators. He argued, however, 'that a liquidator would be likely to be not a weaker opponent but one who would direct the defence in a manner more responsive to the true interests of the company, whether such would be to pursue it if it was clearly likely to succeed, to abandon it on the least unfavourable terms if it was clearly likely to fail or to seek compromise on more favourable terms if the likely result was not clear-cut. Such (ran his argument) would be for the benefit of all those genuinely connected to the company, whether, like himself, as a creditor or indeed as a contributor'.[5] Lord Wilson disposed of the point as follows:

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> (b) There is no doubt that Mr Hosking's purposes in presenting the petition for the company to be wound up were intimately related to the English action.
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> (c) It is indeed probably the case that Mr Hosking regarded a winding-up order as likely to be of advantage to him in his capacity as the claimant in the English action as well as in his capacity as the petitioning creditor. For the company's continued defence of the action was leading him to incur very substantial costs in its continued prosecution and was thus generating a potential increase in its total liability to him and a corresponding increase in the risk that such could not be met. In his capacity as claimant in the action Mr Hosking therefore probably considered it advantageous to secure a winding-up order which might lead to his saving of some such costs.
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> (d) But a winding-up order was also, objectively, likely to be of substantial advantage to him in his capacity as the petitioning creditor; and to secure such an advantage was the other of his purposes. It is not necessary that it should have been his principal purpose: see *In re Millennium Advanced*

[4] Note 2 above.

[5] *Ebbvale* supra, at para. 29.

> *Technology Ltd* [2004] EWHC 711 (Ch), [2004] 1 WLR 2177 [also reported at [2004] 4 All ER 465] at para 42 (Michael Briggs QC sitting as a deputy High Court judge).
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> (e) For Mr Hosking, as trustee, was a large creditor of the company; his debt was contingently unsecured and he was not even in receipt of interest. It was in the interests of the insolvent company, and in particular of himself in that capacity, that, before it proceeded, from some source or other, to incur yet further indebtedness with which to fund the maintenance of its defence at a trial estimated to last for seven or eight days, a professional decision should be taken on its behalf about the further conduct of the defence and, in the light of the latter's apparent strength or otherwise, about the terms of any compromise which it would be commercially sensible for it to propose to Mr Hosking.
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> (f) In its defence of the winding-up petition the company therefore failed to establish that Mr Hosking's petition represented an abuse of the process of the court and failed to displace his entitlement to an order.[6]

In my judgment the reference in *Millward v Glaser* supra loc. cit. to an applicant's '*predominant motive*' falls to be understood accordingly. For the application to be stigmatised as an abuse of process, the 'predominance' of the motive must be such as to practically negate the existence of any genuine interest by the applicant in obtaining a winding-up for the proper purposes of the remedy.

[13] It is appropriate first to consider whether it has been established on a balance of probability that the respondent is indeed unable to pay its debts. The onus in this regard is on the applicant. If it is found that the applicant has discharged the onus, Aerios bears the burden of persuading the court that, in the exercise of its discretion, it should nevertheless dismiss the application by reason of it being an abuse of process. I refrain from characterising Aerios's burden of persuasion as an 'onus' advisedly, because it seems inapposite to conceive of there being an onus on a party in respect of how a court should exercise its discretionary power. Scope for the exercise of a judicial discretion in the final determination of a litigious issue becomes afforded only after any pertinent onus on a party has been discharged.[7]

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[6] At para. 33. The law on point as declared by the Board in *Ebbvale* has subsequently been applied in the Chancery Division; see the judgment of Rose J in *Maud v Aabar Block S.A.R.L. & Anor* [2015] EWHC 1626 (Ch) at para. 28.

[7] I have not found the 'shifting burden analysis' referred to in *Goode Concrete (In Receivership) v Companies Acts* [2012] IEHC 439 at para. 18-19 and also by the bankruptcy registrar in *Aabar Block SARL & Anor v Maud* [2015] EWHC 3861 (Ch) at para.s 69 and 80 that were cited by Aerios's counsel persuasive. It seems to me, with respect, to confuse the materially distinct concepts of onus of proof and burden of persuasion. The distinction is illustrated in the discussion concerning the import of s 3(4)(b) of Act 40 of 2002 in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para. 8, for example.

[14] The applicant put in evidence the audited annual financial statements for the company (and its subsidiaries[8]) for the year ended 31 October 2015. The information contained in the financial statements has not been placed in dispute by Aerios.

[15] The financial statements reflect the following:

- That the company's liabilities exceeded its assets by over R6,3 million. Included in the computation of the company's liabilities was an amount of over R23 million in respect of amounts received in advance for suite hire and season tickets in respect of events to be staged during the coming year. This, together with the fact that the applicant's loan account (described below) had no fixed terms for repayment, would suggest that the company's state of actual insolvency at the end of October 2015 was not, of itself, a reason to believe that it would be unable to pay its debts as and when they arose for payment.
- That the company sustained an after tax operating loss of over R4,1 million in 2014 and over R12,7 million in 2015. The company's accumulated losses at that date were reported as R40 419 889.
- That, as at 31 October 2015, the company was indebted to the applicant on loan account in the amount of R7 840 630, which was subsequently capitalised, as explained below. (A note to the financial statements recorded that the loan bore no interest and was interest free. A further note in the Directors' Report indicated (s.v. 'Events after the reporting period') that, in terms of a resolution adopted on 8 February 2016, the authorised share capital of the company was increased and the applicant decided on the same date to subscribe for additional shares to the value of R11 265 000, which the deponent to the founding affidavit explained amounted to a capitalisation of the company's debt to it as at that later date. The Directors' Report also indicated that on 11 February 2016 RSI subscribed for additional shares to the value of R3,735 million.) The balance sheet reflects no amount having been due to shareholders on loan account in respect of the 2014 financial year. (The company's current loan account debt to the applicant in the

[8] Club Newlands (Pty) Ltd (wholly owned) and Western Province Rugby Institute (Pty) Ltd (held as to 49% of the issued shares and classified as a subsidiary 'due to the influence of [the respondent company] over its daily operations'.

aforementioned amount of over R4,3 million has therefore been incurred in the period post February 2016.)

- That the company was indebted to First National Bank on overdraft in the amount of R4 697 335, although it held R7 449 434 in cash and cash equivalents. Its overdraft facility was reported as being R19 855 000. The company had also taken out a loan of R10 million from First National Bank (apparently in 2008) that was repayable over 10 years in monthly instalments with interest at the bank's prime rate. The final instalment is due in July 2018. The outstanding balance on this loan had been reduced from R5 063 844 to R3 906 680 during the reporting period.

- That the directors believed 'that the … company ha[d] adequate financial resources to continue in operation for the foreseeable future … . The directors [had] satisfied themselves that the … company, subject to an additional share issue after year-end, [was] in a sound financial position and that it [had] access to sufficient borrowing facilities to meet its foreseeable cash requirements. The directors [were] not aware of any new material changes that [might] adversely impact the … company'.

- That the auditors considered that the ability of the company to continue as a going concern was dependent on 'a number of factors. The most significant of these was that the shareholders of the company subscribe for additional shares in order to rectify the insolvent situation. The fact that the total liabilities exceed[ed] the assets [had] not hindered the … company's ability to pay its debts as they [became] due in the normal course of business'.

[16] It is evident, however, that the respondent company's financial position deteriorated during the 2016 financial year. In the founding affidavit the applicant's president, who is also a director of the respondent, pointed out the overdraft debt had risen to R19,855 million; the extent of the excess of its liabilities over its assets had grown to approximately R12,5 million; an operating loss of R42 million was expected for the year ended 31 October 2016 and over R57 million in the 2017 financial year. A loan from RSI had been required to pay salaries and the claims of suppliers due at the end of October 2016.

[17] Aerios has criticised the evidence concerning the respondent's financial situation in the applicant's founding papers as rather thin in obvious respects. I think that criticism was

justified. It was not explained, for example, why the company's operating loss was expected to rise from just over R6 million in August to R42 million by the end of October and extend to a R57 million loss in the following year. One might have expected the deponent to be able to give a more detailed and up to date indication of the company's actual state when he deposed to his affidavit on 7 November 2016. This was all the more so, considering that bringing the winding-up application had probably been under consideration for some weeks prior to the launch of the proceedings.

[18] The deteriorating financial condition of the company was nevertheless borne out in the management accounts for the month of August 2016, which were put in as the papers developed. These showed that the company's gross income for the financial year to 25 August 2016 had been approximately R20 million below budget. This was mainly due to 36 corporate suites having been unsold and a significant drop in public ticket sales.

[19] The allegedly expected operating loss of R42 million referred to in the founding papers remained expressly unexplained. It was apparent, however, that the company faced a claim of about R70 million by Aerios in respect of amounts allegedly due in terms of their contractual relationship. The dispute about this had been referred to arbitration. There had also been litigation between Aerios and the company during 2016, in the course of which Aerios had obtained interdictory relief prohibiting the company from acting in breach of its contractual obligations, and subsequently contempt proceedings arising from the company's non-compliance with the interdict. Aerios described that there had been settlement talks and alleged that agreement on a resolution of the dispute had been reached in principle with the company's negotiators, subject only to confirmation by the company's board. Details of the contemplated settlement are not available. It may be that the anticipated loss included provision for a substantial unbudgeted contractual liability by the company to Aerios. One does not know.

[20] The provisional liquidators have shown that they required to borrow money in order to keep the company afloat as a going concern. Aerios appears to have accepted that much, for it agreed to an order investing the liquidators with authority to do that. In my view this bears out the applicant's allegation that the company is unable to meet its day-to-day financial commitments without outsider funding. That has hitherto been provided by the shareholders. But, as mentioned, they are not willing to expose themselves further.

[21] Aerios appears to consider that the applicant is duty-bound to finance the company's trading. It has failed to put up a cogent basis for its argument. Its contention that the company is effectively the applicant's alter ego, and that there cannot be a winding-up of the one without the other, does not bear scrutiny. The applicant rugby union is a legal personality that is able to conduct its business through a company just as a natural person may do. The essential object that any person has in deciding to carry on an enterprise through a company rather than personally is to obtain the benefits of the resultant separation of personality for legal purposes, viz. limited liability. I am unable to distinguish the argument that Aerios appears to advance in this regard from that which was famously discounted by the House of Lords in the leading case of *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.[9]

[22] The applicant will not be able to continue the respondent company's business as a going concern as if the respondent had never existed. It will be obliged to purchase it at fair value. The liquidators would owe a duty to all the creditors, including Aerios, to ensure that the business was not disposed of below fair value. Determining the fair value in the peculiar circumstances of the current case may well be a challenging undertaking. The aforementioned expressions by the applicant's president in public statements uttered after the provisional order had been made that everything would go on as before, save for the Aerios contracts, fall to be understood in the context of the objective effect of the company's liquidation. They plainly oversimplified the factual position.

[23] The notion propounded by Aerios that the company's inability to meet its current liabilities was engineered and that its illiquidity could have been addressed by negotiating an increase in its overdraft facility is fanciful. There is no reason to disbelieve the evidence by the company's banker that it would be unwilling to increase the overdraft facility without assurance that the company was able to service any increased indebtedness. The applicant and RSI, having decided not to increase their own direct exposure as creditors of the company, would logically have no wish to allow the company to increase its debt levels by further borrowing on overdraft. The funding assurances that the bank would reasonably

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[9] The relevant essence of the decision is captured in the following statement in the speech of Lord McNaghten concerning the effect of the Companies Act, 1862: '*The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.*'

require would therefore not be forthcoming. Moreover, the company's audited financial statements reflect that its bank borrowings are secured, amongst others, by an unlimited suretyship given by the applicant and mortgage bonds over the applicant's fixed properties. Any increase in the company's overdraft would therefore automatically constitute an equivalent increase (contingently at least) in the applicant's exposure.

[24] I also find nothing untoward, as suggested by Aerios, in the application of the amount borrowed from RSI to cover the company's October current expenses, to pay not only player and staff remuneration, but also an amount it admitted to owing Aerios. Aerios appeared to imply that the payment to it was part of a strategy to create illiquidity. In my view a more likely reason in the circumstances for the payments was to avoid any possibility of a situation in which allegations of undue preference might arise after the company's liquidation. Such an eventuality could hold potentially adverse consequences for some of the company's creditors with whom the applicant and RSI might wish to keep on good terms in any business they might conduct through another vehicle acquired to take over the respondent's enterprise. Whatever the reason, the very fact that the company needed to borrow the money to meet its commitments confirms the allegations concerning its inability to meet its obligations without shareholder support.

[25] The inability of the respondent company to pay its debt has been adequately established on the papers. Aerios indicated that if the court were inclined to arrive at that conclusion, it sought to have the matter referred to oral evidence, if only to establish its allegations of abuse of process. That avenue was not vigorously pursued in oral argument, advisedly so. There is nothing to indicate that oral evidence or cross-examination of the deponents to the affidavits in support of the applicant's case would disturb the probabilities as they appear from the papers.

[26] A winding-up of the respondent company would not, of itself, result in the termination of its contractual obligations to Aerios. Aerios would not have the right to compel specific performance, but the liquidators would have to decide whether to abide by the contracts or to terminate them. The liquidators would have a duty to make their decision with conscientious regard to the best interests of the creditors. An election by a liquidator to terminate the Aerios contracts would be regarded as equivalent to repudiating them. In such an event Aerios would be entitled to claim damages against the company in liquidation. The relevant law was recently rehearsed in *Ellerine Brothers* (*Pty*) *Ltd v McCarthy Limited* 2014 (4) SA 22 (SCA) at para.s 11-12. There is accordingly no substance in the contention

by Aerios, also not pursued by its counsel in oral argument, that a winding-up order at the instance of the applicant would result in an unconstitutional infringement of its property rights.

[27] As noted at the outset of this judgment, it seems clear that the applicant was to a material degree motivated to institute the proceedings as a means to eventually being placed in a position to continue the company's business without some of its current encumbrances. That does not derogate, however, from its genuine intention to bring about a *concursus* in which its claims against the respondent company will be treated rateably with those of all other creditors in its class. Effecting its intention in the latter respect is objectively liable to be of material advantage to it in the context of the company's demonstrated inability to pay its way as a going concern. Applying the principle elucidated in *Ebbvale* supra,[10] I have therefore not been persuaded that the court's discretionary power should be invoked to dismiss the application as an abuse of process.

[28] In the result, a final order will be made.

[29] Aerios's counsel conceded in oral argument that if the winding-up were made final, there would be no reason why an order should not be granted in terms of paragraphs 2.8 and 2.9 of the notice of motion in case no. 22594/16. That concession was reasonably made.[11] Such an order will follow. It seems unlikely that Aerios's opposition to that part of the application in proceedings before Ndita J on 23 November 2016 could have contributed significantly to the co-liquidators' costs. An order was taken by agreement. I therefore propose to make no further order as to costs in that matter. Any costs incurred by the liquidators in those proceedings that might not have been determined in terms of para. 7 of the order made by Ndita J shall be costs in the winding-up.

[30] The costs of the Western Province Rugby Football Union and (if any) of the provisional co-liquidators in case no. 22169/2016 shall follow the result of the winding-up application.

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[10] See para. [12] above.

[11] I think that Aerios's opposition to the relief was reasonable at the stage when it was not certain that a final order would be made. However, paragraph 3 of the notice of motion had made it clear that the authority sought in terms of para.s 2.8 and 2.9 would not vest before the return day of the provisional order.

[31] The costs reserved for determination in terms of the order made by Hlophe JP on 21 November 2016 under case no. 21739/2016 in respect of an application for the enrolment of proceedings on the return date on the fourth division roll shall be costs in the winding-up.

[32] The following orders are made:

I. In case no.s 21739/2016 and 22169/2016:

a. The respondent, Western Province Rugby (Pty) Ltd (registration no. 1996/003264/07), is placed into final liquidation in the hands of the Master.

b. The applicant's costs of suit in case no. 21739/2016 and any costs incurred by it and the provisional liquidators in case no. 22169/2016 shall be allowed as costs in the winding-up, including the costs of two counsel.

c. The costs reserved for determination in terms of the order made in chambers by Hlophe JP on 21 November 2016 under case no. 21739/2016 shall, insofar as such were incurred by the applicant and/or the provisional liquidators, also be costs in the winding-up.

II. In case no. 22594/16:

a. Further to the order made by this Court on 23 November 2016, the applicants are hereby also authorised, in terms of s 386(5) of the Companies Act 61 of 1973 read with item 9 of schedule 5 to the Companies Act 71 of 2008, to exercise the following additional powers in relation to the administration of Western Province Rugby (Pty) Ltd (in liquidation) ('*WPR*'):

i. to elect not to continue with any contracts that were executory as at the date of the commencement of *WPR*'s winding-up; and

ii. to sell the property of *WPR* by public auction, public tender or private contract and to give delivery thereof.

b. Any costs incurred by the applicants that might not have been determined in terms of para. 7 of the aforesaid order of 23 November 2016 shall be costs in the winding-up. Save as aforesaid, there shall be no further order as to costs.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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