

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

Case no: 8073/16

In the matter between:

WESTERN CROWN PROPERTIES 61 (PTY) LTD **Applicant**

and

ABLE WALLING SOLUTIONS (PTY) LTD **First Respondent**

CHRISTOPHER RAYMOND REY **Second Respondent**

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION** **Third Respondent**

THE HERMES TRUST **First Affected Person**

**KNOWN CREDITORS OF THE FIRST
RESPONDENT LISTED IN “X”** **Second to Seventy
Seventh Affected Person**

SENTASHA NAGIA **Intervening Party**

Date of hearing: 13 October 2017

Date of judgment: 13 November 2017

JUDGMENT

SAVAGE J:

Introduction

[1] In May 2016 the applicant, Western Crown Properties 61 (Pty) Ltd (“Western Crown”), applied to this Court for an order setting aside a resolution taken by the first respondent, Able Walling Solutions (Pty) Ltd (‘Able’), on 6 March 2016, that Able be placed under business rescue (relief which Western Crown no longer pursues); and an order that Able be placed into liquidation, alternatively, that its business rescue proceedings be converted to liquidation proceedings (referred to hereafter as ‘the main application’).

[2] The main application was opposed by the Hermes Trust, which was granted leave to intervene in the application as an Affected Person, on the basis *inter alia* that Western Crown lacked *locus standi* to seek an order that Able be placed into liquidation. Following the *locus standi* challenge having been raised, on 10 August 2016, by agreement, the main application was postponed so as to allow Western Crown to file an application for issues related to its *locus standi* to be referred to oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court. The matter was thereafter, by agreement, set down for hearing on 13 October 2017.

Background

[3] The relevant background is as follows. Able conducted a successful business as a manufacturer, supplier and installer of dismountable office partitions. During 2008 Mr Mirko Manojlovic commenced work as a consultant for Able. On 27 September 2013 Mr Craig Krull, the deponent to Western

Crown's papers, sold Able to Mr Manojlovic on the basis that the Hermes Trust, of which Mr Manojlovic is a trustee and beneficiary, would purchase Able's shares from the Able Legacy Trust, a trust controlled by Mr Krull, for R9 million. In addition, an Extrusion Design Rights Sale Agreement ('EDRS agreement') was signed, with two addenda to that agreement concluded thereafter, in terms of which Able was to purchase certain extrusion design rights to manufacture dies and make aluminium extrusions from Western Crown for R3.6 million.

[4] Mr Manojlovic took control of Able until he resigned as its director on 22 October 2014 and Mr Sentasha Nagia, who in October 2017 sought leave to intervene in the current application, was appointed in his stead. In due course, the South African Revenue Service took judgment against Able for outstanding VAT payments, Mr Nagia was implicated in having misdirected payments from Able's bank accounts to his personal accounts and a dispute arose between Western Crown and Able in relation to monies which Western Crown claimed were due to it by Able arising from certain lease agreements entered into between the parties.

[5] On 7 March 2016, Mr Nagia, following a resolution taken by Able on 6 March 2016, brought an application for Able to be placed under business rescue and Mr Christopher Rey, the second respondent, was appointed as business rescue practitioner. On 21 April 2016, Western Crown informed Mr Rey that it was a creditor of Able with claims of R1.8 million outstanding on the EDRS agreement and R34 338,75 in respect of arrear service charges and rates in

respect of three lease agreements entered into between Western Crown and Able. In addition, it sought of Mr Rey that business rescue be discontinued on the basis that there was no reasonable prospect of the business of Able being rescued. After this did not occur, Western Crown, contending that it was a creditor of Able, launched the main application. While Mr Rey abides the outcome of the main application, Able's sole shareholder, the Hermes Trust, of which Mr Mirko Manojlovic is the sole trustee and a beneficiary, opposes it challenging *inter alia* Western Crown's *locus standi* to seek the relief that it does against Able.

[6] The Hermes Trust submits that there exists a *bona fide* dispute as to whether Western Crown is a creditor of Able. This is so in that the EDRS Agreement is not legally binding on Able given that the subject matter of the agreement, being the extrusion design rights, did not vest in Western Crown but in Able when the agreement was concluded on 27 September 2013. This is so since the Transfer of Rights Agreement was signed on 30 October 2013 by Mr Krull, on behalf of Able, Western Crown and himself, purportedly transferring the extrusion design rights which are the subject of the EDRS agreement from Able to Western Crown. This was after conclusion of the EDRS agreement. As a result, as at the date of conclusion of the EDRS Agreement Able owned the rights that were the rights in question and in law could not have purchased what it already owned.¹ Consequently, there was no meeting of minds on conclusion of the contract and, it was submitted, Western Crown cannot be a creditor under the agreement.

¹ *Cawcutt v Teperson and Saaks* 1916 CPD 406 at 409; *South African Permanent Building Society v Levy* 1916 CPD 406 at 409.

[7] In addition, following the conclusion of the EDRS Agreement, it was submitted for the Hermes Trust that it subsequently became aware that the extrusion design rights did not vest in Western Crown since the partitions are manufactured according to specifications set forth in drawings and it is these drawings which reflect ownership of the design. Since they were authored in 2011 by Mr Adam O'Connor of Thinktank Industries CC t/a Think Design, from whom Able purchased the designs, in terms of the Copyright Act 98 of 1978 it is the designer, as the author, who obtains copyright over the designs unless in terms of s 22(3) of the Copyright Act there has been a valid written assignment and consent given in respect of such designs. Think Design did not undertake the designs for Western Crown, nor was it paid by Western Crown. Rather, those designs, and designs from General Alu Extrusions, have over the years been paid for by Able. Since there was no valid written assignment and consent given in respect of the designs, Western Crown could not have sold the rights under the EDRS Agreement on 27 September 2013 and for this reason too, it was contended, it is not a creditor of Able.

[8] It was further contended that Able is not indebted to Western Crown in terms of the monies due under the lease agreements entered into in that it has overpaid Western Crown by the amount of R4 million; it has made improvements to the premises in the sum of R204 220,67; it has further overpaid Western Crown the sum of R269 241,64 for rental; and given that the amounts allegedly owing in respect of utilities are disputed. Consequently, it was submitted that Western Crown does not hold the requisite *locus standi* to launch the main application and that that application is capable of determination on the

uncontested facts as set out above. As a result, the application to refer to oral evidence certain issues related to Western Crown's *locus standi* should therefore be dismissed, together with the main application, and with the costs of two counsel granted to the Hermes Trust.

[9] Western Crown contends that the issue of the EDRS Agreement, including the substance of the transaction entered into between the parties, can properly be determined if the issue is referred to oral evidence. This is so since on Western Crown's version it caused Able to pay for the dies which were the subject of the designs, consented to the use of the designs by Able having assigned the intellectual property rights in question to itself and passed these to Able. As a result, it was submitted that Western Crown is a creditor in respect of monies outstanding in terms of that agreement. Furthermore, with regards to the monies outstanding under the lease agreements entered into between the parties, it was argued that given that there exists a dispute on the papers as to whether Western Crown was a creditor of Able, this issue should properly be referred to oral evidence. Consequently, Western Crown seeks that its application be granted since the hearing of oral evidence would resolve the disputes raised on the papers regarding this issue.

Subsequent developments

[10] Despite having been granted a postponement of the main application in August 2016, Western Crown thereafter did not progress either that application or its application for a referral to oral evidence, apparently given its view that it seemed inevitable that Able would be placed under order of

liquidation, pursuant to the provisions of s141(2) of the Companies Act 71 of 2008 ('the Act').

[11] On 31 August 2017 Mr Rey advised affected persons at a meeting concerned with Able, and in form CoR 125.2, that he had concluded in terms of s141(2)(a) of the Act that there was no reasonable prospect that the business of Able could be rescued. He therefore gave notice that '*business rescue proceedings are terminated upon the filing of this Notice, in the manner contemplated in section 132(2)(a)(ii)*'. At the meeting, Mr Rey further indicated that he would abide Western Crown's liquidation application and would, if necessary, file papers in that application, should he deem it necessary.

[12] It was argued for Western Crown that having terminated business rescue, Mr Rey is obliged to seek the liquidation of Able in terms of s141(2)(a)(ii) of the Act. This is disputed by the Hermes Trust. Western Crown submitted that since it is a foregone conclusion that Able should be wound up, and since Mr Rey had been invited to apply for the liquidation of Able and has not done so, it (being Western Crown) was required to proceed with its application for a referral to oral evidence in the matter in order to progress the main application given that the business of Able should properly, and in the interests of creditors, be wound up.

[13] On 4 October 2017 Mr Sentasha Nagia, the sole director of Able appointed on 22 October 2015, represented by Western Crown's attorneys of record, launched an application, which he sought to be heard on an urgent basis on 13 October 2017 with the hearing of Western Crown's application. In this

application, Mr Nagia seeks to be joined as an intervening party in proceedings; an order that Able's business rescue proceedings be discontinued; and that Able be finally liquidated, alternatively provisionally liquidated. On 6 October 2017, Able, Mr Rey and the Hermes Trust opposed Mr Nagia's application. No opposing papers had been filed by the date of hearing of this matter on 13 October 2017.

[14] It was contended for Able and the Hermes Trust that it was audacious for Western Crown to approach this Court to seek the relief that it does, when it had not pursued its application for a referral to oral evidence for more than a year, and when the real basis for pursuing the matter was that it seeks its costs in a matter which, although with a record now spanning some 2000 pages, is fatally flawed given Western Crown's lack of *locus standi*. While it may be that Able might be wound up in the future, it was argued that there was no basis on which justify granting Western Crown's application for an order of liquidation given its lack of *locus standi* in the matter. Furthermore, any determination of Mr Nagia's application was premature since opposing papers had not been filed and when, it was submitted from the bar, that in any event Mr Nagia has been removed as a director of Able and consequently lacks the requisite *locus standi* to pursue the application.

Evaluation

[15] It is trite that an applicant will not be permitted to lead evidence to supplement an omission in his or her founding affidavit,² or to embark upon a fishing expedition in order to advance his or her case³ or close holes in it. Oral evidence may be permitted where the disputed issues fall within a narrow range⁴ and where there are reasonable grounds for justifying such an order. In reaching a decision as to whether a referral to oral evidence should be made, facts peculiarly within the knowledge of a party, which, for that reason, cannot be directly contradicted or refuted by the other party, must be carefully scrutinised.⁵

[16] Western Crown elected to pursue the main application, cognisant of the history of the matter and the contractual relationship which existed between the parties. The date on which the EDRS agreement was entered into, and on which the applicable extrusion design rights were allegedly assigned, were facts which fell squarely within its knowledge at the time it elected to approach this Court in May 2016 when the application was launched. Yet, the assignment of rights agreement signed by Mr Kroll was only produced on its discovery having been sought in terms of rule 35(12); with the date of such

² *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 2 All SA 405 (N); 1981 4 SA 175 (N) 179; *Carr v Uzent* 1948 2 All SA 219 (W); 1948 4 SA 383 (W); *Liss Shoe Co (Pty) Ltd v Moffett Building & Contracting (Pty) Ltd* 1952 2 All SA 425 (O); 1952 3 SA 484 (O).

³ *Hopf v Pretoria City Council* 1947 2 All SA 289 (T); 1947 2 SA 752 (T); *Seton Co v Silveroak Industries Ltd* 2000 JOL 5998 (T); 2000 2 SA 215 (T) 230H.

⁴ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T); *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 4 All SA 330 (D); 1975 4 SA 87 (D); *De Beers Consolidated Mines Ltd v Minister of Mines* 1956 3 All SA 48 (W); 1956 3 SA 45 (W); *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1978 4 SA 696 (T); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 4 All SA 147 (A); 1987 2 SA 1 (A) 23–25.

⁵ *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 4 All SA 330 (D); 1975 4 SA 87 (D); *Gumede v Minister of Law & Order* 1987 3 SA 155 (D); *Secfin Bank Ltd v Mercantile Bank Ltd* 1993 3 All SA 833 (W); 1993 2 SA 34 (W) 37; *Atkinson v Rare Earth Extraction Co Ltd* supra; *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2007 ZASCA 153; 2008 1 SA 184 (SCA).

assignment of rights agreement, as opposed to the date on which the EDRS agreement had been entered into, not addressed in the applicant's founding papers in the manner required.

[17] Furthermore, it appears from the material placed before this Court that Western Crown would have been aware that there existed a dispute between the parties as to whether Able owed monies to Western Crown arising out of the lease agreements entered into between the parties. Yet, the nature of the payment dispute arising from the lease agreements was not detailed in a manner which placed the Court in a position from the outset to determine whether Western Crown was indeed a creditor of Able in respect of such monies.

[18] In light of these circumstances, and the conflictual relationship which had developed between Mr Krull and Mr Manojlovic, Western Crown would have been aware from the outset that its *locus standi* as a creditor of Able may be placed in issue in the matter, more so given that liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed on reasonable grounds.⁶

[19] What was required of Western Crown was that it place all necessary material before this Court in order to indicate its *locus standi*. A referral to oral evidence is not intended to cure defects in the applicant's founding papers or close holes in it. Nor is there any purpose served in granting such an application when on the facts already before the court the factual position is evident. Having regard to the totality of the facts before this Court, and the

⁶ *Kalil v Decotex (Pty) Ltd and Another* [1988] 2 All SA 159 (A). See too *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T), at 347H-348

submissions made by counsel, I am of the view that the grant of the application for the referral of issues to oral evidence is not warranted in the circumstances of this matter and that the application falls to be dismissed.

[20] The main application was postponed until the date of hearing of the application for oral evidence. I am satisfied that, on the material before this Court, Western Crown has failed to show that it holds the requisite *locus standi* to pursue the relief sought in the main application since it has not shown that it is as a creditor of Able and when there are clear and *bona fide* disputes regarding whether debts which Western Crown alleges are owed to it are in fact so. The fact that the business rescue practitioner recorded claims raised by Western Crown against Able does not prove that such claims are *bona fide*, nor does it warrant a conclusion by this Court that Western Crown as a result of that recordal constitutes a creditor with the requisite *locus standi* to seek an order of liquidation against Able. For all of these reasons, absent the requisite *locus standi*, the application for liquidation launched by Western Crown falls to be dismissed. There is no reason as to why costs should not follow the result and, given the extent of the matter and the issues raised, such costs are to include those of two counsel.

[21] While it was contended by counsel for Western Crown that Mr Rey was obliged under s141(2)(a)(ii) to apply to Court for the liquidation of Able having terminated business rescue, it is apparent from a reading of that provision that such an application for liquidation ‘*must*’ be made where ‘*there is no reasonable prospect for the company to be rescued*’ but that this is constrained

by the words “*at any time during business rescue proceedings*”. The effect is that having come to the view that there is no reasonable prospect of business rescue and before business rescue has been terminated, the liquidator must apply for the liquidation of the company in terms of s142(2)(a)(ii). In this matter, business rescue proceedings ended in terms of s132(2) when Mr Rey gave notice of such termination on 31 August 2017. It followed that he was thereafter under no obligation to apply for the liquidation of Able since business rescue proceedings no longer continued.

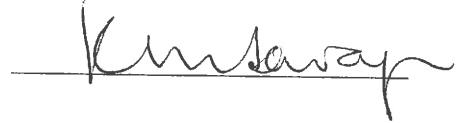
[22] Whilst it may be that Able in due course may be placed into liquidation, the fact that Mr Rey did not seek such an order does not alter the findings above in relation to the *locus standi* of Western Crown. There is also no basis on which to justify the granting of the application made by Mr Nagia for the liquidation of Able at this point. To do so would be premature given that opposing papers have not to date been filed in the matter, but also when there appear to be issues relating to Mr Nagia’s own *locus standi* to bring his application given his alleged removal as a director of Able.

Order

[1] In the result, an order is made in the following terms:

1. The application made by Western Crown Properties 61 (Pty) Ltd, as applicant, for the referral of certain issues to oral evidence is dismissed with costs, which costs are to include those of two counsel.
2. The application made by Western Crown Properties 61 (Pty) Ltd, as applicant, for an order that the first respondent, Able Walling Solutions

(Pty) Ltd, be placed into liquidation is dismissed costs, including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'K M Savage', written over a horizontal line.

K M Savage

Judge of the High Court

Appearances:

For the applicant:

A Newton

Instructed by Ashesson-Smith

For the respondent:

S Kirk-Cohen and C Small

Instructed by Cliffe Dekker Hofmeyr