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

Case No.: 465/20

In the matter between:

CHRISTIAN FINDLAY BESTER N.O.	First Applicant
HANLIE HENNING N.O.	Second Applicant
PULENG FELICITY BODIBE N.O.	Third Applicant

In their capacities as the duly appointed joint trustees
of the Insolvent Estate of Calitz Family Trust, IT 2422/94

and

LEGATO VERSORGINGSOORD CC	Respondent

JUDGMENT : HANDED DOWN ELECTRONICALLY ON 22 MAY 2020

HOCKEY, AJ

Introduction

[1] This is an application brought by the joint trustees of the insolvent estate of the Calitz Family Trust, IT2422/94 ('the Trust") for the provisional liquidation of Legato Versorgingsoord CC ("the respondent"). I shall refer to the joint trustees of the insolvent estate of the Trust jointly as "the applicant" herein.

[2] The application is brought in terms of provisions of the Companies Act 61 of 1973 (the 1973 Act"), specifically the provisions found under chapter XIV of that Act which remains applicable in matters such as these in terms of provisional arrangements of the Companies Act 71 0f 2008, and section 66 read with section 69 of the Close Corporation Act 69 of 1984. (See *Firstrand Bank Ltd v Lodhi 5 Properties Investments CC 2013 (3) SA* 212 GNP at 221, and also *Firstrand Bank Ltd v Mahem Verhurings CC* (91998/2015) [2016] ZAGPPHC 1076 (15 December 2016) for an elucidation of the current law relating to the liquidation of close corporations.)

[3] The applicant is represented herein by Mr R.B. Engela of the Cape Bar, instructed by De Klerk and Van Gend Incorporated. The respondent was represented by VGV Incorporated who withdrew as attorneys of record on 18 May 2020. From then onwards, Mr Charles Frederick Calitz ("Mr Calitz"), a member of the respondent represented the respondent. I granted leave to the respondent to file its heads of argument late, which was received on the day of the hearing. Such late filing is accordingly condoned.

[4] Since this matter was set down for hearing during the period that our country was in lockdown in terms of provisions of the Disaster Management Act, 2002 and the regulations issued under section 27(2) of that Act, the applicant in its practice note proposed that the matter be dealt with on the papers filed. Mr Calitz also corresponded with the court expressing his risk and health related concerns about attending court and I, having considered the papers filed on record and the prevailing conditions and circumstances of the parties, accordingly directed that the matter be dealt with on the papers filed in accordance with item 10.1 of the Directives issued by the Chief Justice dated 2 May 2020, read with the Directives issued by the Judge President of this Division of the High Court dated 11 May 2020.

[5] The applicant contends that the respondent is unable to pay its debts, and furthermore that it is just and equitable for the respondent to be would-up.

[6] The respondent, is one of several entities forming part of the so-called Calitz Family group, which operates businesses in the healthcare industry by operating frail care centres for senior and retired persons by providing them with residential and nursing facilities. Several of the entities within the group have been or are in the process of being wound up.

[7] The Trust has been sequestrated out of this court at the instance of the trustees of Skyscape Investments 101 CC ("Skyscape"), a close corporation which is part of the Calitz Family group of entities.

[8] The applicant bases this application on a loan it contends is owing to the Trust by the respondent in the amount of R14 994 343.00 ("the loan amount" or "the debt") which was ceded to the Trust by Skyscape.

[9] On 18 December 2019, the applicant, via its attorneys sent a letter of demand to the respondent for payment of the loan amount. The respondent failed to accede to the demand.

The Applicant's Case

[10] The three applicants are the joint trustees of the insolvent estate of the Trust.

[11] The applicant's case is based on the financial statements of the respondent, in terms whereof it appears, as at 31 July 2016, that the respondent was indebted to Skyscape in the loan amount. The debt was ceded by Skyscape duly represented by its joint liquidators to the Trust. The respondent is therefore indebted to the Trust in the sum of the loan amount.

[12] A letter of demand for payment of the loan amount was sent on behalf of the applicant to the respondent on 18 December 2019. The respondent failed to make any payment in terms thereof. The loan amount therefore became due and payable.

[13] The respondent is dormant and ceased trading since 31 July 2016. It appears from the financial statements of the respondent, which bears the same date 31 July 2016, that it had liabilities of R15 469 343.00 consisting mainly of the loan amount.

The Respondent's Case

[14] The respondent disputes that the loan amount is due and payable and contends that the loan amount was part of inter-company loans which were non-interest bearing and which were payable when sufficient funds became available.

[15] The respondent furthermore claims that the applicant fails to take account of the "true legal relationship" between the Trust, Skyscape, and the respondent in respect of any debt owed by the respondent to Skyscape as documented in the financial statements of Skyscape and the respondent, namely that of a loan account. Mr Calitz states in paragraph 5 of his answering affidavit that:

> "…*the said relationship must be seen in the context of the business operations of the respondent and its inter-relationship with other entities controlled by the Calitz family. The Applicant did not even try to do so and treated the operations of the Trust, Skyscape and respondent as if they are not part of a group of entities that fall under the control of members of the Calitz family*".

[16] Further, in paragraph 8 of the answering affidavit, Mr Calitz states that:

> "*It is important to note that all debts owed by or to any of the two entities, i.e. Skyscape and respondent (and the Trust) by agreement, were treated by all the trustees, members and directors as loans granted against the favourable terms referred to hereinabove. As stated hereinabove, it was agreed that all loans would only be repayable if and when it would advance the business purposes and objectives of the Calitz family group as a whole. This means the loans would not be enforced in a way which may harm or prejudice the Calitz family group as a whole."*

[17] Mr Calitz further states that the Mr Bester, who deposed to the founding affidavit on behalf the applicant, "*refers to an amount of R14 994 343.00 that was allegedly due as at 31 July 2016, approximately four years ago."*

And further, in paragraph 10:

> *"The Calitz group had a turnover of more than R100 000.00 since that date. It is therefore important to note that financial statements of each entity [must be] brought up to date to determine the correct amount (if any) still due by the respondent to the applicants."*

The law and evaluation on evidence

[18] It is trite that in opposed applications for the provisional winding up of companies, the applicant must establish a prima facie case on a balance of probabilities of the evidence before it *(*see *Kalil v Decotex (Pty) Ltd and Another 1988*(1) SA 943 at 976 C and further, and also the judgment of Rogers J in *Orestisol*ve *v NDFT Holdings* 2015 (4) SA 449 at 453I-J.)

[19] The applicant must establish that it has a claim on a prima facie basis. Without this, the applicant has no locus standi. In the present matter, the financial statements of the respondent, which was approved and signed off by its members,

reflect and indebtedness of the loaned amount to Skyscape. This debt was ceded to the applicant who demanded settlement thereof on 18 December 2019. The debt thus became due and payable from that date.

[20] If the debt relied upon by the applicant is disputed on bona fide and reasonable grounds, the court will refuse the granting of a winding-up order, as per the so-called "Badehorst rule". This rule was confirmed by the Supreme Court of Appeal per Fourie AJA in *Freshvest (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016), where it was held that:

> *"In essence, the matter serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on a bona fide and reasonable grounds. This has become known as the 'Badenhorst rule 'after* Badenhorst v Northern Construction Enterprises (Pty) Ltd *1956 (2) SA 346 (T) at 347-348."*

[21] I am not persuaded that the respondent contests the debt on which the applicant relies on bona fide and reasonable grounds. The respondent does not dispute that the relevant entries in its financial statements were made (and approved by its members), but merely states that "*the members did not realise the implication of these entries."*

[22] The respondent now, almost four years later, contends that the journal entries by its auditors who attended to the various financial statements must be re-assessed. It states this despite the fact that the respondent has been dormant since the date of the financial statements of 31 July 2016.

[23] I agree with the applicant that the financial statements had tax implications and what the respondent is now suggesting is that it must go back 4, 5 maybe 6 years to "*unscramble to proverbial egg, and re-engineer or re-constitute the financial statements of all of the entities in the Calitz family group."*

[24] What is concerning about Mr Calitz's contention relating to the re-assessment of financial statements is that most of the entities in the group have been wound-up or is in the process of being wound-up. It is therefore not for Mr Calitz himself, or for the auditors that he may appoint to attend to the financial statements of these entities to attend to re-assessment of such entities. These are in the hands of the liquidators, whose responsibilities include the preparation of the liquidation and distribution accounts.

[25] The Agreement relied upon by Mr Calitz, namely that the inter-company loans would only become repayable if and when it would advance the business purposes and objectives of the Calitz family group as a whole and that these debts would not be enforced in a way which may harm or prejudice the Calitz family group, is also problematic. I agree with counsel for the applicant that in the circumstances where the entities in the Calitz group is either dormant or have been liquidated, the indebtedness of the entities will never become payable and can never be enforced. I agree furthermore with his argument that the "*agreement*" relied upon by Mr Calitz falls within any or all the four classes of agreements that are void for vagueness as mentioned in *Levenstein v Levenstein* 1955 (3) SA 625 at 619, where it is stated:

> *"Firstly, ... in such cases the so-called contract is not enforceable because the promise is 'dependant on a condition which in fact reserves an unlimited option to the promissor'...Secondly, where the vague and uncertain language justifies the implication that the parties were never ad idem ... Thirdly, where there is no concluded contract as in the case ...' ...of continuing negotiations broken off in medio'...In all these cases the element of uncertainty is fatal to the existence of the so-called contract; in the first class because there is uncertainty as to whether the promisor will ever acknowledge the existence of an obligation, in the second, there is uncertainty as to whether he has acknowledged as being his obligation, and*

in the third class there is uncertainty as to the subject matter which has still to be agreed. The fourth class concerns those cases where the unspecified details of the contract ar questions of fact capable of determination by evidence."

The Grounds For Winding-Up And Discretion

[26] This application is brought on the basis that the respondent is unable to pay its debts and that it appears just and equitable that the respondent should be wound-up.

[27] It is trite that the court must exercise its discretion judicially in opposed applications such as this matter. Once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds. The discretion of the court not to grant a winding-up order in such circumstances of an unpaid creditor is a narrow one (see *Afgri Operations Ltd c Hamba Fleet (Pty) Ltd* (542/2016) [2017] ZASCA 24 (24 March 2017)). In the Afgri matter it was held by the Supreme Court of Appeal in paragraph 12 that:

"Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt…. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only."

[28] It appears from the financial statements of the respondent that as at 31 July 2016, it had accumulated losses of R77 355.00 and that its total liabilities exceeded its assets by R77 255.00. It had not traded since 31 July 2016. This is a clear

indication that it is unable to pay its debts amounting to R15 469 158, which consist largely of the loaned amount.

[29] In the result, I am of the, since the respondent is not disputing the loaned amount on bona fide and reasonable grounds, the applicant has clearly demonstrated its locus standi in bringing this application, the respondent is clearly not in a financial position to pay its debts, that it is just and equitable for the respondent to be provisionally wound-up.

I accordingly make the following order:

1. The respondent is placed under provisional liquidation;

2. A rule nisi is issued, calling on all persons interested to appear and show cause, if any, to this court on a date to be fixed as to why;

    2.1 the respondent should not be placed under final liquidation; and

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

3. Service of this order is to be effected by;

    3.1 the Sheriff on the respondent at its registered address;

    3.2 the Sheriff on the South African Revenue Service; and

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

S HOCKEY

Acting Judge of the High Court