IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-11-13

UNREPORTABLE

Case Number: 37556/08

In the matter between:

GAINSFORD, GAVIN CECIL N.O. First Applicant

VAN WYK, ALTA N.O. Second Applicant

and

JOUBERT, DIANNE MARYLYNNE Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicants, the liquidators of Quantum Communications (Pty) Ltd ('Quantum') (in liquidation), seek an order in terms of section 29 of the Insolvency Act, 24 of 1936 ('the Act') –

(1) setting aside the disposition of R493 169,18 by Quantum to the respondent;

(2) that the respondent pay to the applicants R493 169,18 together with interest thereon *a tempore morae.*

[2] On 22 February 2007 Glocell Service Provider Company (Pty) Ltd ('Glocell') launched an application against Quantum alleging that it, Glocell, was a creditor of Quantum, that Quantum owed it R12 442 394,60 and that Quantum was unable to pay its debts. Quantum delivered a notice of intention to oppose but, later, after failing to file an answering affidavit, withdrew its opposition to the application. On 2 May 2007 the court made an order placing Quantum under winding-up. The applicants launched this application on 8 August 2008. The respondent opposes the application and the parties have filed answering and replying affidavits.

[3] Section 29 of the Act is made applicable to liquidations of companies by section 340(1) of the Companies Act, 61 of 1973, which provides –

> 'Every disposition by a company of its property which, if made by an individual, could for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.'

In ***Sackstein NO v Proudfoot SA (Pty) Ltd*** **2006 (6) SA 358 (SCA)** paras 8 and 9 the court held that the relevant date at which the inability (to pay all its debts) is to be determined, is the date when reliance is

placed thereon. In the instant case that date is 8 August 2008. Accordingly, the applicants must prove that as at that date Quantum was unable to pay all its debts.

[4] The relevant part of section 29 of the Act provides:

> '(i) Every disposition of his property made by a debtor not more than six (6) months before the sequestration of his estate … which had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and it was not intended thereby to prefer one creditor above another'

Accordingly, in order to be entitled to an order in terms of section 29 of the Act, the applicants must prove that –

(1) Quantum made a disposition of its property;

(2) to the respondent;

(3) not more than six months before 22 February 2007;

(4) which had the effect of preferring the respondent above another creditor; and

(5) immediately after the disposition, Quantum's liabilities exceeded the value of its assets – see ***Simon NO v Coetzee*** **[2007] 2 All SA 110 (T)** at 112: ***Van Zyl and Others NNO v Turner and Another NNO*** **1998 (2) SA 236 (C)** para 15.

The respondent can then avoid the order if she can prove that –

(1) the disposition was made in the ordinary course of business; and

(2) the disposition was not intended to prefer the respondent above another creditor – see ***Van Zyl and Others NNO v Turner and Another NNO supra*** para 15.

[5] The applicants seek final relief on notice of motion. Where there are disputes of fact a final order can be granted only if the facts averred in the applicants' affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order. A final order may also be granted where the respondent's version must be rejected on the papers because it 'consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it on the papers' - see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E-635C and ***National***

Director of Public Prosecutions v Zuma **2009 (2) SA 277 (SCA)** para 26. Although the applicants' counsel did not request the court to reject any of the respondent's evidence in his heads of argument, in argument before the court he contends (somewhat faintly) that some of her evidence should be rejected. He also suggested that if there was a dispute of fact which cannot be resolved on the papers the court should refer the dispute to oral evidence. The respondent's evidence must be considered in the light of all the evidence and, if not credible for any of the reasons referred to, will be rejected. As far as a referral to evidence is concerned, a dispute of fact was clearly foreseeable yet the applicants chose to approach the court on notice of motion. In these circumstances I am not disposed to refer any issue for the hearing of oral evidence.

[6] The transaction alleged to be a disposition took place on 4 October 2006 when a number of book entries were made in Quantum's books of account. Immediately before the book entries were made the books of account reflected that RRI Investments (Pty) Ltd ('RRI') owed Quantum R493 169,18 on loan account and that Quantum owed the respondent R450 462,27 on loan account. On 4 October 2006 the following book entries were made in Quantum's books of account in relation to these two loan accounts:

(1) RRI's loan account was credited with R493 169,18, thus extinguishing RRI's indebtedness in the books;

(2) the respondent's loan account was debited with the sum of R493 169,18, which as a result of set-off, extinguished the credit balance in favour of the respondent and left a debit balance of R42 696,91.

[7] These book entries on 4 October 2006 were made in the following circumstances. The respondent, who is a businesswoman, was at all relevant times the managing director of Quantum. The Stedi Share Trust was the sole shareholder of Quantum and the trustees of the trust were the respondent and one S.P. Joubert. The respondent and her former partner, Lionel Boshoff, were the shareholders of RRI. On 11 December 2002 RRI purchased a vacant erf at Mabalingwe Country Club for R420 000. Quantum paid the purchase price on behalf of RRI and to reflect this payment a loan account in the name of RRI was opened in Quantum's books of account in the sum of R420 000. Thereafter Quantum paid the monthly levies to Mabalingwe on behalf of RRI and these amounts were debited to RRI's loan account. By 4 October 2006 Quantum's books of account reflected that RRI's loan account was in debit in the sum of R493 169,18. On the same date, Quantum's books reflected that the respondent's loan account was in credit in the sum of R450 462,27. This was the total of unpaid salary owing to the respondent and the capital she had contributed to Quantum. On 4 October 2006 the book entries referred to were made which had the effect that the books no longer reflected that RRI owed

Quantum R493 169,18 and that Quantum owed the respondent R450 462,27. The respondent's loan account now reflected that it was in debit in the sum of R42 696,91 (i.e. that the respondent owed Quantum R42 696,91). It is not in dispute that the book entries on 4 October 2006 were made pursuant to a resolution taken by Quantum's shareholder on 14 August 2006 but it is not known why the book entries were made only on 4 October 2006. The question which arises is when did the disposition take place.

[8] On 14 August 2006 Quantum's shareholder (represented by the respondent and S.P. Joubert) resolved that the respondent would take over the RRI loan. This obviously included the purchase price of R420 000 and the levies paid in respect of the property. The total at that stage is not known. This resolution was passed with the consent of the respondent, the new debtor, and RRI, the original debtor represented by the respondent. Such an agreement is clearly a novation. The debt of RRI was extinguished and a new or additional debt, in the same amount, owing by the respondent to Quantum was created. Since a novation can be entered into orally – there are no formalities – the agreement on 14 August 2006 had the effect of transferring the obligation of RRI to the respondent – see ***Froman v Robertson*** **1971 (1) SA 115 (A)** at 122E-H; ***Brenner v Hart*** **1913 TPD 607** at 611-612; ***Van Achterburg v Walters*** **1950 (3) SA 734 (T)** at 745C-F – which immediately resulted in the set-off of the respondent's indebtedness to Quantum and Quantum's indebtedness to the respondent, leaving the

balance of R42 696,91 – see ***Schierhout v Union Government*** **1926 AD 286** at 289-90; ***Mahomed v Nagdee*** **1952 (1) SA 410 (A)** at 416H; **Christie *The Law of Contract in South Africa* 5 ed 476.** It seems to me that Quantum gave up nothing as a result of the novation and set-off and it is questionable whether the transaction is a disposition as defined in the Act. Nevertheless, it seems clear that if this was a disposition it took place on 14 August 2006 which is more than 6 months before Quantum's liquidation and section 29 cannot apply. That seems to be the end of the matter.

[9] The applicants' counsel correctly points out that this point was not raised by the respondent in her answering affidavit and was therefore not fully canvassed in the affidavits – see ***Van Rensburg v Van Rensburg en Andere*** **1963 (1) SA 505 (A)** at 509H-510B; ***Cabinet for the Territory of South West Africa v Chikane*** **1989 (1) SA 549 (A)** at 360F-G; ***Minister van Wet & Orde v Matshoba*** **1990 (1) SA 280 (A)** at 285E-F. He also points out that the parties accepted that the disposition took place on 4 October 2006 when the entries were made in the books. While I agree that the issue was not canvassed in the affidavits it is clear from the evidence given by the respondent at the enquiry (on which this application is based) and the resolution itself that the disposition took place on 14 August 2006 and this cannot be ignored. Nevertheless I shall consider the other issues as there was full argument.

[10] To decide whether section 29 is applicable and whether the requirements of section 29 are satisfied the financial position of Quantum at two stages must be determined. In terms of section 340(1) of the Companies Act the court must find that when the applicants launched this application on 8 August 2008 Quantum was unable to pay all its debts and in terms of section 29 of the Act the court must find that immediately after the disposition on 4 October 2008 Quantum's liabilities exceeded the value of its assets.

[11] The applicants rely primarily on the fact that Glocell had a well-founded claim against Quantum for more than R12 million for services rendered and that Quantum did not have assets of sufficient value to meet Glocell's claim. The respondent disputes this indebtedness to Glocell and contends that Glocell in fact owed far more to Quantum at all relevant times. The respondent relies heavily on an unreported judgment of Ebersohn AJ delivered on 10 September 2009 in ***GC Gainsford NO and Alta van Wyk NO v DM and SP Joubert,*** North Gauteng, Case Number 15404/08. In this case the same issue arose and the learned judge found that the evidence in that case showed that at the commencement of the winding-up on 22 February 2007 Glocell owed far more to Quantum than Quantum owed to Glocell. The learned judge seems to have accepted that it had been established that Glocell owed Quantum R15 million in respect of credits for what was called 'call sponsor fraud'. The respondent has not incorporated

into the present proceedings her evidence in case number 15404/08 and these findings are not binding on me.

[12] As far as Quantum's financial position and Glocell's claim are concerned the following evidence is not disputed:

(1) On 14 August 2006 Quantum disposed of all its movable assets (i.e. furniture, fittings, and office and computer equipment) to another company controlled by the respondent, Quantum CST (Pty) Ltd at book value. The evidence indicates that Quantum received no value for these assets;

(2) On 20 October 2006 Glocell sent Quantum a letter of demand in which Glocell alleged that Quantum was indebted to Glocell in the sum of R13 015 985,00 which included an overdue balance of R7 782 928,00. Glocell demanded payment of the overdue balance within 7 days;

(3) Quantum failed to pay Glocell the sum of R7 782 920,00 or any other amount within 7 days or at all;

(4) On 30 October 2006 Glocell sent a letter to Quantum referring to a meeting held on 27 October 2006 in connection with the

overdue balance on Quantum's account and recorded that the following points had been agreed –

(i) the balance overdue on Quantum's account amounted to R7 782 920,00;

(ii) Quantum had provided Glocell with a series of 33 monthly post-dated cheques of R100 000 each (amounting to R3 300 000), the first to be paid on 31 October 2006 and the last to be paid on 30 June 2009;

(iii) an amount of R453 308,57 (VAT inclusive) had been identified as attributable to fraudulent call sponsor usage on Quantum's lines and that that amount less commission would be credited to Quantum's account with Glocell;

(iv) Quantum contended that there was further fraudulent call sponsor usage in excess of the amount of R453 308,57 as set out in (iii) above and to accommodate further investigation Glocell undertook to facilitate an introduction for Quantum to the Vodacom Fraud Division in order for the matter to be resolved by Quantum;

(v) in the event that Quantum and the Vodacom Fraud Division conclusively proved further fraudulent usage and Vodacom agreed to pass credit to Glocell for the amount proved; Glocell would pass a credit to the Quantum account for this amount less the commission deducted from the charges originally credited to the Quantum account.

(The other points raised in the letter are not relevant for present purposes);

(5) On 31 October 2006 the respondent sent a letter to Glocell in answer to Glocell's letter dated 30 October 2006 in which the respondent said *inter alia* –

(i) that for purposes of these negotiations they had used the figure of R7 789 928 reflected in Glocell's letter of demand dated 19 October 2006 but that there were a number of small amounts which could affect that amount and that these could amount to approximately R400 000;

(ii) the monthly cheques would service the outstanding debt;

(iii) Quantum believed that the total fraud was closer to R2 million but that this required further investigation;

(iv) Quantum had previously requested information from Glocell as to the computation of R453 308,57 but had not yet received this information;

(v) Quantum called upon Glocell to provide this information so that the issue could be resolved;

(6) as at 4 October 2006 Quantum owned an Audi TT Coupe and a Chrysler Grand Voyager;

(7) as at 4 October 2006 Quantum owed the respondent R450 462,27 on loan account in respect of salary and capital brought into the company and had a claim for R493 169,18 against RRI;

(8) on 22 February 2007 Glocell launched a liquidation application against Quantum in which it alleged that Quantum was indebted to it in the sum of R12 442 394,67;

(9) Quantum opposed Glocell's liquidation application but failed to file an answering affidavit. Quantum then withdrew its opposition to Glocell's application and on 2 May 2007 Quantum was placed under final winding-up;

(10) On 19 September 2007 Glocell proved a claim against Quantum in the sum of R14 407 361,32 for cellular airtime and contracts. The statement of account attached to the claim reflects that up to 30 September 2006 the total sales to Quantum amounted to R16 297 108,88;

(11) On 18 December 2007 the applicants signed a report to be submitted to the second meeting of creditors in which they referred to Glocell's claim which, when taken into account, resulted in Quantum's liabilities exceeding its assets by R12 490 000;

(12) Attached to the applicants' report dated 18 December 2007 was a statement made by the respondent in terms of section 363(2) and (4) of the Companies Act setting out Quantum's assets and liabilities. The respondent signed the statement under oath on 2 May 2007 and she confirms the contents of the annexures to the statement. One contains a list of creditors (including Glocell, for the sum of R12 422 445,77) totalling R12 613 473,87. Another contains a list of creditors which total R376 850,00 but does not include Glocell or any reference to a claim against Glocell for R15 million or any other amount.

[13] It is clear from the evidence that if Glocell had a claim for R12 million against Quantum from September 2006 to May 2007 Quantum's

liabilities substantially exceeded its assets at all times; that it can be accepted that when the applicants decided to invoke the provisions of section 29 Quantum was unable to pay its debts and that when the disposition took place on 4 October 2006 Quantum's liabilities already exceeded its assets.

[14] Against the background of the common cause facts set out above the respondent, without incorporating affidavits filed in the liquidation application or the affidavits filed in the reconnection application or the affidavits filed in case number 15404/08, purports to convey to the court the relevant parts of these affidavits. The respondent states that the agreement referred to in Glocell's letter dated 19 October 2006 was not final and relies on her reply dated 31 October 2006 to support this. Significantly her letter does not challenge the statement in Glocell's letter that it had been agreed that the arrear balance was R7 782 928,00 which may be subject to adjustment up to R400 000 and that R3 300 000 would be paid in respect of the arrear balance by means of the series of cheques. Nor does the letter challenge the agreement that Glocell would only give Quantum credits which were established by Quantum and Vodacom's Fraud Division (i.e. in respect of Call Sponsor Fraud that Glocell would pass a credit in favour of Quantum only if Quantum and Vodacom's Fraud Division conclusively prove further fraudulent usage and Vodacom agreed to pass a credit to Glocell for the amount proved, in which case Glocell would pass a credit to Quantum less the amount of commission.) The respondent's

statement that no finality had been reached in respect of the arrear amount is only true insofar as there would be a possible reduction of the amount not exceeding R400 000. The letters do not establish that the whole amount was disputed, only that R400 000 was disputed. The respondent goes on to allege, correctly, that in her letter she had pointed out the total of the amounts involved in the fraud would be closer to R2 million. She also alleges that it has subsequently been established that the total fraud credit approaches the amount of R15 million. There is no evidence to support this statement and in the circumstances already referred to this allegation cannot be accepted as the truth.

[15] The last requirement for the applicants to satisfy is that the disposition had the effect of preferring the respondent above another creditor. The nature and effect of the transaction have already been described. This issue must be considered from the respondent's point of view. It is clear that the respondent was not paid her claim of R450 462,27. In fact the disposition had the opposite effect. Instead of the respondent receiving payment of the amount of the loan account it was extinguished because the respondent accepted liability for RRI's debt to Quantum which exceeded the amount owing to her. The application must therefore fail on this ground as well.

[16] The respondent has set out fully why the transaction of 14 August 2006 was concluded. It was part of the dissolution of her partnership with

Lionel Boshoff and involved the respondent paying approximately R1 million to Boshoff and the respondent taking over RRI's loan account with Quantum. This dissolution and the associated transactions were effected in the ordinary course of business. With regard to the intention to prefer the respondent above another creditor, again this must be considered from the respondent's point of view. Clearly the respondent was not going to receive payment because she was accepting liability for RRI's debt which exceeded the amount owed to her by Quantum. The respondent has therefore satisfied the requirements to the proviso to section 29 and is not liable on this ground either.

Order

[17] The application is dismissed with costs.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 37556/08

HEARD ON: 16 September 2009

FOR THE APPLICANTS: ADV. J.E. SMIT

INSTRUCTED BY: Edward Nathan Sonnenberg

FOR THE RESPONDENT: ADV. N. DAVIS SC

INSTRUCTED BY: Routledge Modise Attorneys

DATE OF JUDGMENT: 13 November 2009