IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 70273/2009

Date: 23 February 2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

23/2/11 .....
DATE

.....
SIGNATURE

In the matter between:

PAUL DANEEL KRUGER N.O.	1st Applicant
ERNEST LODEWYK BERMAN N.O.	2nd Applicant
THEODOR WILHELM VAN DEN HEEVER N.O.	3rd Applicant
(In their capacities as the joint liquidators of Spitskop Village Properties Limited (in liquidation))	

and

BLUE DOT PROPERTIES (PTY) LTD	Respondent

JUDGMENT

PRETORIUS J.

A provisional order of liquidation of the respondent was granted on 10 June 2010. The order was served on the respondent by the Sheriff and advertised

in the Government Gazette and Beeld.

Mr HC Lamprecht, one of the two directors of the respondent was provisionally sequestrated on 5 October 2010. The applicants submit that Mr Lamprecht has no *locus standi* to oppose the application for a final liquidation order due to the fact that he is an unrehabilitated insolvent. No further papers had been filed since the provisional order had been granted and the court has to adjudicate the matter as it was when the provisional order was granted. Mr Badenhorst, for the trustees, supports the application for the final liquidation.

Section 218(1)(d)(i) of the Companies Act 61 of 1973 provides:

> *"218 Disqualifications of directors and others*
>
> *(1) Any of the following persons shall be disqualified from being appointed or acting as a director of a company or, except for a body corporate, from being concerned or taking part, directly or indirectly, in the management of a company:*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) save under authority of the Court-*
>
> *(i) an unrehabilitated insolvent;"*

This disqualification arises as soon as an order for the provisional sequestration of a person's estate is made, which in this instance was 5

October 2010. Mr Gouws, for Mr Lamprecht, conceded that in this matter mr Lamprecht could no longer oppose the application for the final liquidation of the respondent as he has no *locus standi.* His only argument was that when the pleadings were complete Mr Lamprecht had not yet been provisionally sequestrated. This argument cannot be entertained as the provisions of the Act are quite clear.

The facts that the applicants rely on for the final liquidation of the respondent is related to previous applications relating to companies and entities which are related to the Spitskop syndication scheme.

The property which is the subject matter of several applications and this application is portions 6 and 7 of the farm Spitskop in Mpumalanga. These two properties were purchased on 23 April 2003 for the amount of R1 057 000.00 by the respondent. The respondent was a that stage a close corporation with its' member, Mr Lamprecht. During 2003 it was converted to a company with registration number 2003/018195/07 and was known as Blue Dot Properties 1330 (Pty) Ltd with directors Mr Lamprecht and Mr van Zyl. Mr van Zyl was the legal adviser of the respondent and signed the deed of sale of Spitskop on behalf of the respondent and Mr Lamprecht signed on behalf of Spitskop for an amount of R118 300 000.00 on 3 July 2006. They were both directors of both entities and there was no arms-length sale.

This property formed the basis of a syndication scheme to the amount of R425 million. No improvements had taken place on the property since the

original sale in April 2003 for approximately R1 million.

The Government Gazette of 13 March 2006 set out the requirements pertaining to the minimum information that must be contained in a property syndication disclosure document. In terms of paragraph 2 the investors' funds will, prior to finalization, be deposited into a trust account. Funds may only be withdrawn from the trust account to pay for the transfer of immovable property into the name of the buyer.

Spitskops' own documents indicated that millions of rand had been paid out contrary to the provisions of the Government Gazette before transfer taken place. Spitskop had paid administration fees, audit fees, a due diligence study, legal fees, promoters fees, travelling - and accommodation fees, unspecified professional fees and unspecified services in the amount of R28 780 000 before establishment of the township had been approved. A further amount of approximately R32 million was paid to the brokers to promote the syndication scheme. Interest paid to investors in the amount of R15,8 million was paid out of the capital amount paid by investors.

Spitskop marketed the syndication scheme notwithstanding not disclosing that a land claim existed on the land and that the Greater Thubatsi Municipality had certain requirements that had to be met before an application to establish a township would be considered.

The promoter of Spitskop was Blue Zone Property Investments (Pty) Ltd. As

soon as Spitskop had collected R118 300 000.00 from investors, this amount was paid to the respondent as the full sale price of Spitskop, although the disclosure document specified that only a deposit would be paid. This was done before the property was transferred. Blue Dot, the respondent, thus made a profit on R1 million of approximately R117 million without any right or improvements to Spitskop in a period of 4 years.

Both Mr Lamprecht and Mr van Zyl were directors of Blue Zone. On 21 August 2009 Spitskop was finally wound-up by court. It is clear that there was no arms length transaction when Spitskop was sold to the respondent. This was in contravention of the provisions of the Government Gazette. An investigation was launched by the Financial Services Board and the report forms part of the papers before court. According to the bank statements Spitskop received at least an amount of R351 491 254.00 from investors in the period 3 May 2006 and 31 December 2007. An amount of R269 939 305.00 was paid towards non recoverable costs or expenses.

This contravened clause 2(b) of the Gazette which provides:

> *"Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or under writing by a disclosed underwriter with details on the underwriter, or repayment to an investor in the event of the syndication not proceeding."*

No transfer had taken place when the money was withdrawn from the trust

account for the full amount. No underwriting took place and the investors were not repaid at any stage. The document drafted by the auditors of Spitskop demonstrates that investors' funds had been paid out unlawfully in contravention of the provisions of the Gazette. Nowhere in the disclosure document was it disclosed that Mr Lamprecht and Mr van Zyl were to earn a profit of R117million from the sale of Spitskop. The sale of land was not made subject to the respondent obtaining or having any rights to establish a township.

A further problem attached to Spitskop was the land claim as it is set out in the sale agreement:

> *"7.2 The purchaser acknowledges that (it will)*
>
> *(iv) Satisfy itself that no land claim has been lodged against the property or a portion of the property in accordance wit the provisions of the Restitution of Land Rights Act, No 22 of 1994, as amended."*

This contrary to the fact that a land claim was lodged and published in the Government Gazette on 21 May 2004, which was known by Mr Lamprecht. A further disturbing fact is that the sale price was paid out of investors' funds before transfer of the farms had taken place. There is no disclosure in the disclosure document that no development rights had been obtained when the disclosure document was signed.

A further problem was that Bluezone, of which Mr Lamprecht was a director,

was not authorized to promote the scheme in terms of the Financial Advisory and Intermediary Services Act 37 of 2002. The promoter agreement was signed by Mr Lamprecht on behalf of Spitskop and on behalf of Bluezone by Mr Lamprecht. Once again they were both directors of both companies.

It is obvious that Blue Dot received at least R117 million as profit from the transaction which had not been at arm's length. The affairs of Spitskop and the respondent are inextricably linked and the winding-up of the respondent will facilitate the investigation as to the flow of funds and ensure appropriate action to possibly retrieve investers' funds.

Mr Robinson, a forensic auditor appointed by the applicants, investigated the claim that the business of the respondent was never done in this court's jurisdiction. His conclusion is:

> *"I can confirm that the principle place of business of the respondent was situated in the Castle Walk Building, Erasmuskloof, Pretoria, also the offices from which the Bluezone portfolio was managed.*
>
> *The ledger and other accounting books of the respondent was held at the said offices.*
>
> *I also confirm that Mr Lamprecht, who mainly attended to the management of the Respondent was situated in the Bluezone offices in Pretoria. Furthermore all the other administrative duties, for instance Tax Returns and alike were conducted from the offices of Bluezone*

situated in Pretoria."

In **Bison Board Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A)** at 496 A-B Hoexter JA held:

> *"...individually, but it is convenient to acknowledge, in general terms, that it was held in each of them that a company resides at the place where its general administration is located, ie at the seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business. For the sake of brevity I shall refer to this as the company's 'place of central control'. That a company resides at its place of central control was again accepted in Vanderbijl Park Health Committee and Others v Wilson and Others 1950 (1) SA 447 (A) at 466 - 7. The principle is accordingly well established in our law, and I can see no warrant for departing from it."*

A further indication that the general administration of the respondent took place in these offices are the attached letterheads indicating the address as in Pretoria and showing the Pretoria fax and phone numbers for the respondent. The court is satisfied that this court has jurisdiction in the matter.

The indebtedness of the respondent is premised on documentary evidence in terms of which an amount of R134 million was paid by Spitskop to the respondent. The proof of payments from Spitskop to the respondent emanates from Spitskops' bookkeepers.

This court has regard to the nondisclosure of the land claim on the property and the non-compliance with the Government Gazette ruling syndication schemes,by the respondent and this should be investigated. This will be to determine the prejudice suffered by the general public and to investigate all the agreements between the different entities and parties to the entities and to ensure an equitable return of investors' funds, if any. The court finds that it will be just and equitable to wind up the respondent in these circumstances.

The evidence shows that the respondent is not involved in any business and does not have any assets. The full amount of the purchase price of Spitskop had been paid to Mr Lamprecht, Mr van Zyl and Bluezone. The respondent will not be able to pay its liabilities even should restitution take place and respondent become the owner of Spitskop again. No case is presented by the respondent that it will engage in business in future. The court cannot but come to the conclusion that the respondent is insolvent and should be wound-up.

An application to intervene was served on 22 February 2011 at 15h00. It must be noted that the notice of motion reads:

> *GELIEWE KENNIS TE NEEM dat die tussenbeitredende party, JACOB JOHANNES VAN ZYL, tydens die likwidasie aansoek van die Respondent, BLUE DOT PROPERTIES (EDMS) BPK, op 22 FEBRUARIE 2011 om 10h00…"*

It is clearly impossible that this could have taken place as it was only served on 22 February 2011 at 15h00.

The application is by Mr van Zyl, the director of the respondent. This application was brought at the time that judgment would have been given in this matter on 23 February 2011 at 10h00. The prayers in the notice of motion set out in prayer 2:

> *"Dat die aansoek van die Applikante om likwidasie van die Respondent van die hand gewys word met koste."*

Mr Gouws, counsel for the intervening creditor had to admit that this prayer should be ignored. The affidavit by Mr van Zyl sets out that he is a director and shareholder of the respondent. He further states that he had been told that due to the fact that Mr Lamprecht has been sequestrated and cannot oppose this application, he should intervene. The court must mention that Mr Lamprecht was provisionally sequestrated on 5 October 2010. Mr van Zyl does not explain why he had not intervened at an earlier stage. He does not set out any reason as to why he should be allowed to intervene at this late stage.

It is clear from the dates and time of the notice of motion that it was drafted after the court had indicated that a final order would be granted on 23 February 2011.

In **Shapiro v SA Recording Rights Association Ltd 2008 (4) SA 145 WLD**

at 153 para 19 Gautschi AJ found:

> *"It is furthermore required that an applicant for intervention show that he or she has a* prima facie *case, that the application is seriously made and is not frivolous."*

Mr van Zyl does not set out that he has a *prima facie* case. The court can only come to the conclusion that this application was launched after the court had indicated that Mr Lamprecht cannot oppose the matter and that the court intended to grant a final liquidation order.The court finds that this application is not serious as Mr van Zyl has had ample time from 5 October 2010 to launch this application, but has failed to do so.

Due to this application being launched at this late stage it was necessary for senior counsel to attend to the opposition of the application in court. Mr Puckrin, for the applicant, has requested the court to grant attorney and client costs against Mr van Zyl. I must agree that the manner in which this application was launched indicates a degree of desperation which cannot be supported by facts.

An application for a cost order was filed by the previous attorneys of the respondents, Strydom and Bredenkamp. They had withdrawn as attorneys of record of the respondents. In an affidavit it was set out that notwithstanding demand by the attorneys the account, although taxed, has not been paid by the respondent. The result is that the attorneys are supporting the application for liquidation on the basis that the respondent cannot pay its' debts. The

attorneys had been paid by the liquidators until the Mareeva injunction had been granted. This application is not opposed and left to the discretion of the court. The respondent opposed this application vigorously and the court cannot find any reason why the taxed account of the attorneys in this matter should not form part of the liquidation costs.

The following order is made:

1. The provisional order for the winding-up of the respondent is confirmed and the respondent is liquidated;
2. The costs of the liquidation are costs in the liquidation including the costs of two counsel for the applicant and the costs of counsel for the trustees as well as the costs of the attorneys, Strydom en Bredenkamp.
3. The application for intervention is dismissed with costs on an attorney and client scale, including the costs of two counsel.

Judge Pretorius

Case number	: 70273/2009
Heard on	: 22 February 2011
For the Applicant	: Adv CE Puckrin SC

	: Adv MA Badenhorst SC
	: Adv J Hershensohn
Instructed by	: Schabort INC
For the Respondent	: Adv J Gouws
Instructed by	: Lombard en Vennote ING
Date of Judgment	: 23 February 2011