REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 76408/2013

Not reportable

Not of interest to other Judges

21/9/2015

In the matter between:

DANIEL FRIEDERICH BURMEISTER	First Applicant
LESEDING DEVELOPMENT LIMITED	Second Applicant
and	
SPITSKOP VILLAGE PROPERTIES LTD	First Respondent
JOHAN FRANCOIS ENGELBRECHT N.O.	Second Respondent
COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Intervening Party

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REASONS FOR JUDGMENT

MAKGOKA, J

[1] On 16 September 2015 I made an order dismissing this application with costs. I undertook to furnish the reasons later. These are the reasons for that order. The first and second applicants seek an order placing the first respondent (Spitskop), which is in liquidation, under supervision and to commence business rescue proceedings pursuant to s 131(4)(a) of the Companies Act 71 of 2008 (the Act), and for the appointment of a business rescue practitioner for that purpose. The first applicant is a creditor and shareholder of Spitskop, having invested R200 000.00. The second applicant has taken cession of the claims of 589 investors of Spitskop as and such, 'owns' the claims of approximately 49% of the total investors of Spitskop. The second applicant therefore represents a majority of the creditors and accordingly qualifies as 'an affected party' as defined in s 128 of the Act.

[2] Spitskop was liquidated by an order of this court on 21 August 2009. Three joint liquidators were appointed in November 2009. For reasons which are not relevant to this application, two of those were removed from office, and the third resigned voluntarily, in June 2011. The second respondent was appointed as the liquidator of Spitskop during 2012. For convenience's sake I would refer to him simply as 'the liquidator'. He opposes the relief sought by the applicants. He is supported in his opposition by the intervening party, the South African Revenue Service (SARS), represented by its Commissioner.

Application for leave to intervene

[3] SARS applied for leave to intervene in these proceedings. That application, which I heard before the main application was argued, was opposed by the applicants. SARS contended that it is an affected person, as envisaged in s128 of the Act and therefore has the right to oppose the application for commencement of rescue proceedings in terms of s131(3) of the Act. The applicants opposed the application on the ground that SARS does not possess the necessary *locus standi* to intervene in the main application. After hearing argument I granted an order allowing SARS to intervene as a party in the main application, with ancillary refief, and ordered the applicants to pay the costs of the opposition, inclusive of costs consequent upon employment of two counsel. I undertook to furnish reasons for that order as part of this judgment. Here briefly, are the reasons.

[4] Spitskop is indebted to SARS in excess of R36 million in respect of assessed Value Added Tax in terms of the Value Added Tax Act 89 of 1991. This claim was proven at a general meeting on 2 October 2012 convened by the liquidator. The claim was accepted by the liquidator, and was included in the Liquidation and Distribution account submitted by the liquidator during October 2013. The claim is not disputed by the applicants. In addition, SARS contends that Spitskop is also liable for assessed income tax in excess of R117 million in terms of the Income Tax 58 of 1962. The liquidator has not yet accepted the income tax claim and if the dispute in this regard cannot otherwise be resolved, it will have to be adjudicated upon by the Tax Court in the course of a tax appeal in terms of the Tax Administration Act 28 of 2011.

[5] In their opposition to SARS' intervention application, the applicants contended, in the main, that the investment payments provided by the investors cannot be regarded as 'income' for the purpose of calculating an income tax component on these payments due to SARS. According to the applicants, the VAT component of SARS' claim cannot be separated from the income tax component of the claim and the status of the whole claim represents 'a claim still under investigation'. On that basis, so is the argument, SARS cannot be considered to be a creditor but only a contingent and/or prospective creditor.

[6] In my view, there is no merit in this contention. While it is correct that different considerations apply to each of VAT tax and income tax, I agree with SARS' contention that the splitting of SARS' claim between VAT and income tax does not have an effect on the validity of the claim already submitted, proven and accepted by the liquidator. What is more, in terms of s 170 of the Tax Administration Act, the production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence of the fact that such assessment was raised and that all the particulars of the assessment are correct, save where such assessment is the subject in a tax appeal.

[7] The provisions of s 164 of the Tax Administration Act should also be borne in mind, in terms of which the obligation to make payment for tax is not suspended by the filing of an objection or an appeal against the raising of an assessment. What is more, Spitskop has not filed objections in respect of the VAT and/or Income Tax Assessments within the relevant time frames. But in any event, the main thrust of the applicants' contention that the raising of an assessment creates only a contingent debt, is not correct. The Supreme Court of Appeal has held that an income tax debt, even prior to the raising of an assessment, is not a contingent debt.[1] For the above reasons I was satisfied that SARS is a creditor of Spitskop, and as such, qualified as an affected person in terms of s 128(1)(i) of the Act. These are the considerations which led me to make the order referred to in para 3 above, allowing SARS to intervene as a party in these proceedings.

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[1] *Namex (Edms) Bpk v Kommisaris van Binnelansde Inkomste* 1994 (2) SA 265 (A) at 289E-G.

Jurisdiction

[8] A preliminary issue, concerning jurisdiction was raised by the liquidator. It was argued that this Court lacks jurisdiction to hear this application because Spitskop's registered address is in Stellenbosch, Western Cape, thus outside the territorial jurisdiction of this Court. Counsel for the liquidator placed reliance for this submission on *Sibakhulu Construction v Wedgewood Village* [2] in which Waglay J concluded that in the wake of the Companies Act, 71 of 2008, only a High Court in the area where the registered office of the company is situated would have jurisdiction to liquidate a company and to adjudicate business rescue proceedings concerning that company, as provided for in s 23(3) of the Act. The learned Judge premised his reasoning on the fact that s 23(3) of the 2008 Act, unlike the repealed section 12(1) of the repealed 1973 Act, requires the registered office of a company to be the same as its principal office. The argument was also that since Spitskop is in liquidation, it no longer has a place of business, and therefore jurisdiction cannot be assumed under the rubric of the main place of business.

[9] The judgment in *Sibakhulu* was not followed in two subsequent High Court cases: *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation*[3] and *Firstrand Bank Ltd v PMG Motors Alberton* [4] and was impliedly overruled by the Supreme Court of Appeal (the SCA) in *PMG Motors Kyalami (Pty) Ltd and another v Firstrand Bank Ltd, Wesbank Division.*[5] In *Lonsdale*, Lacock J said the following, with which I fully and respectfully agree:

'A finding that the legislature intended the provisions of s 23(3) of the 2008 Act to be construed "for purposes of jurisdiction" (a phrase repeatedly used by Binns-Ward J in *Sibakhulu* (Supra) is, to my mind, tantamount to a finding that the legislature intended to limit or oust a local- and provincial division's jurisdiction derived from the common law and/or section 29 of the Supreme Court Act in respect of the liquidation and or business rescue proceedings of a company that "resides" or has its principal place of business within that Court's area of jurisdiction, but not also its registered address. I am not persuaded that the reasons advanced by the learned judge justify such a drastic limitation of a Court's

[2] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) para 23.

[3] *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation (Pty) (Cohen N.O. and another intervening* (312/2012) [2013] ZANCHC 11 (17 May 2013)

[4] *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd* [2013] 4 All SA 117 (GSJ)

[5] *PMG Motors Kyalami (Pty) and another v Firstrand Bank, Wesbank Division* [2015] 1 All SA 437 (SCA).

jurisdiction. Had the legislature intended to limit a Court's jurisdiction as suggested by Binns-Ward, I would have expected the legislature to have made provision for such drastic limitation in clear and unambiguous terms. This was not expressly done when the 2008 Act was promulgated or since.'

[10] The SCA also had occasion to deal with a similar argument in the *PMG Motors* case, which was an appeal against the judgment in the *Firstrand* matter (above). Although neither of the *Sibakhulu* nor *Lonsdale* matters were specifically considered by the SCA, it is clear from its reasoning that the judgment in *Sibakhulu* was not approved. The SCA concluded that the jurisdiction of a court arising from the location of the principal place of business of a company is unaffected by its liquidation. The principal place of business remains unchanged by liquidation and affords the basis for jurisdiction in respect of the applications such as business rescue.[6] The conclusion is therefore that this Court has the necessary jurisdiction to determine this application.

Factual background

[11] Having disposed of the preliminary issues, I turn now to the substance of the application. I commence with a brief factual background. Spitskop was a syndication scheme through which capital was raised from the public to finance a residential development outside Steelpoort in Mpumalanga Province. The persons in charge of the scheme were Hendrik Christoffel Lamprecht (Lamprecht) and Jacobus Johannes van Zyl (Van Zyl), and the company of which they were directors, Bluezone Property Investments (Pty) Ltd (Bluezone). Bluezone was incorporated to carry on business by means of property syndication schemes and for this purpose ten other companies were incorporated in 2005. Later, during 2006 Spitskop was added to the group. Lamprecht was a director of all these companies. Among these companies, was Blue Dot Properties 1330 (Pty) Ltd (Blue Dot), of which Lamprecht and Van Zyl were the sole shareholders and directors. Blue Dot purchased portions 6 and 7 of the farm Spitskop 333 in Mpumalanga Province, for just over R1 million on 23 April 2003.

[6] Motors above para 13.

[12] On 3 July 2006 Spitskop and Blue Dot entered into an agreement in terms of which Spitskop purchased the two portions of the farm Spitskop (the property) from Blue Dot for a purchase price of R118 300 000. The intention was to rezone the farm as residential property and to establish a township of approximately 2500 residential erven and subsequently to sell the erven. The scheme was intended to raise R425 million through 425 000 units of R1000, each consisting of one ordinary share with a par value of R1 and one secured debenture of R999, irrevocably linked to the R1 share. Bluezone was the promoter of the units, charged with their marketing, on the basis of a disclosure document.

[13] On the same day Spitskop and Blue Dot concluded the purchase agreement, 3 July 2006, Spitskop also concluded a Trust Deed with Steelpoort Debenture Trust. The obligations of the trust were to:

(a) administer the rights of the debenture holders (the holders of the linked units to be issued by Spitskop);

(b) ensure that Spitskop was properly administered insofar as was necessary for the purposes of the Deed;

(c) register and hold for the purposes of the Deed the mortgage bond to be registered over the property in favour of the Trustees to secure the debentures;

(d) enforce the rights of the debenture holders against Spitskop in the event of a default of Spitskop as set out in the debenture terms and conditions.

[14] About 1 213 investors invested approximately R361 million in Spitskop. However, by June 2009 the development of a township had not materialized, despite the local municipality having already, during January 2009, approved of such establishment. It is not clear from the founding affidavit what the impediments were. It is simply stated that the project was 'exposed to the vagaries of a range of factors and influences which are beyond the control of the developer and the professional consultant and which impact inter alia on both the costs and the duration of the project.' According to the first applicant, the process of on-going evaluation of the project resulted in the board of directors of Spitskop deciding that due to the cost escalations, coupled with the then prevailing adverse economic environment, it

would not be in the long term interests of investors to persist with the Spitskop project to final completion as initially envisaged. As a result, the directors called a special meeting on 25 June 2009, during which a resolution was taken that Spitskop's property be sold for R260 million. As it turned out, the sale never materialized.

[15] In August 2009, Mrs MA Benn, an investor in Spitskop, supported by a number of other investors, brought an urgent application in this Court for the liquidation of Spitskop. On 21 August 2009 the Court (Bertelsmann J) granted a final order placing Spitskop in liquidation. On 6 October 2009 the learned Judge furnished reasons for the order, in which the following findings were made: (a) that Spitskop was factually and commercially insolvent; (b) that it was common cause that Spitskop had lost its substratum and was unable to continue its operations. I shall later return to the relevance of these findings, especially the latter one. Despite that an amount in excess of R400 million was received from investors, only an amount of R70 million was still held by Spitskop at the time of the liquidation application. This is evident from the first liquidation and distribution account submitted during October 2013.

Issues for consideration

[16] The following six aspects would be taken into consideration to determine whether Spitskop needs to be placed under supervision in business rescue proceedings. First, the legislative and jurisprudential framework of business rescue proceedings. Second, the circumstances which led to the liquidation of Spitskop. Third, the findings of the Court when placing Spitskop in liquidation. Fourth, the applicants' business rescue plan. Fifth, comparison of the liquidation and business rescue scenarios. Sixth, the weight to be accorded to the view of SARS.

Legislative and jurisprudential framework

[17] The essential requirements to be satisfied before a business rescue order can be granted are set out in s 131(1) and (4) of the Act, which reads:

'(1) Unless a company has adopted a resolution contemplated in section 129 [which provides for voluntary business rescue proceedings], an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) . . .

(3) . . .

(4) After considering an application in terms of subsection (1), the court may –

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that -

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

[18] An applicant must therefore satisfy at least one of the requirements in s 131(4)(a)(i)-(iii), and in addition, demonstrate a reasonable prospect of rescuing the company. A company is deemed to be 'financially stressed' in terms of s 128(1)(f) if two jurisdictional facts are met. First, if it appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months. The second consideration, in the alternative, is if it appears reasonably likely that the company will become insolvent within the immediately ensuing six months.

[19] The Supreme Court of Appeal explained in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) Pty Ltd & others*[7] that the potential

[7] *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA).

business rescue plan in s 128(1)*(b)*(iii) has two goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. The question is therefore whether a business rescue application can succeed where the proposed rescue plan provides for the secondary goal only. In other words, whether the requirement of 'rescuing the company' as contemplated in s 131(4)*(a)* is satisfied where it is clear from the outset that the company can never be saved from immediate liquidation and that the only hope is for a better return than that which would result from liquidation.[8]

[20] In the present case, the relevant requirements are those set out in (i) and (iii). I must therefore determine whether Spitskop is financially stressed or if it is equitable, for financial reasons, to place it under supervision. In respect of the latter requirement, a determination must also be made as to whether there is a reasonable prospect for rescuing Spitskop. Counsel for both the liquidator and the intervening party argued that Spitskop, by reason of being in liquidation, being commercially and factually insolvent, cannot be categorized as financially stressed within the meaning of s 128.

[21] That argument is no longer sustainable in the light of the judgment of the Supreme Court of Appeal in *Richter v Absa Ltd,*[9] which was handed down on 1 June 2015, after the matter was argued. There, it was concluded that a proper interpretation of 'liquidation proceedings' in relation to s 131(6) of the Act must include proceedings that occur after a winding-up order.[10] The simple effect of that judgment is that final liquidation is no bar to supervision and commencing business rescue proceedings. That means a court determining an application such as the present, is still required to determine, among others, whether a company is 'financially stressed.'

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[8] *Oakdene v Farm Bothasfontien* para 23.

[9] *Richter v ABSA Bank* 2015 (5) SA 57 (SCA).
[10] Para 18.

[22] It is difficult to imagine how a company which has been liquidated on the basis of commercial and factual insolvency, as Spitskop was, can at the same time be found to be 'financially stressed' within the context of the deeming provisions of s 128(1)(f). This is particularly relevant in the present case, as at the time of the liquidation application, Spitskop was commercially and factually insolvent, without even taking SARS' claims into account. However, for the present purpose, I assume, without finding, that by virtue of being in liquidation, Spitskop is 'financially stressed.'

[23] Having concluded thus, the overriding consideration in s 128(1)(b) and (h) still seems to be that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company i.e facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. The question as to what would constitute a 'reasonable prospect' has been subject of a number of decisions in the various divisions of the High Court.[11]

[24] In *Propspec Investments v Pacific Coasts Investments 97 Ltd*[12] the court cautioned against setting the bar too high, but at the same time warned that 'vague averments and mere speculative suggestions' will not suffice in this regard. In order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect. Van der Merwe J explained:

'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned

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[11] See, for example, *Southern Palace Investments 265 v Midnight Storm Investments 386* 2012 (2) SA 423 (WCC); *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC); *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments Ltd (Reg no:2007/019270/06) and Another (Grayhaven Riches 9 Ltd and others as Interested Parties; First Rand Bank Ltd as Intervening Creditor)* [2012] 4 All SA 590 (WCC); *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & Others (Marley Pipe Systems (Pty) Ltd & Another Intervening)* 2012 (5) SA 515 (GSJ); *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC).

[12] *Propspec Investments (Pty) v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB).

colleagues, I believe that they place the bar too high. In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company , as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'[13]

[25] The Supreme Court of Appeal had occasion to consider the issue, for the first time, in *Oakdene*, above, where it described the concept of 'reasonable prospect' as a yardstick higher than 'a *mere prima facie* case or an arguable possibility' but lesser than a 'reasonable probability' – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings.[14] Brand JA, referred with approval the remarks of Van der Merwe J in *Propspec Investment,* above.

The circumstances of Spitskop's liquidation

[26] The circumstances which led to Spitskop's liquidation are not clear from the founding affidavit. The applicants cannot assert that they did not know of those circumstances. Accepting that the applicants were not in control of the property syndication scheme (Lamprecht and associates were), the circumstances that led to the demise of Spitskop were set out in detail in a related judgment of the SCA in *Dulce Vita CC v Van Coller and others* [15] (the *Dulce Vita* matter). The applicants were certainly aware of those circumstances, as the outcome of that case was a springboard to this application, and much reliance was placed on that judgment for a number of the applicants' contentions. Any business rescue plan had to address the circumstances which led to financial meltdown. That this has not been done in these proceedings is a weakness in the applicants' case, because a rescue plan must,

[13] Propspec Investment, above paras 11 and 15.
[14] *Oakdene* para 29.
[15] *Dulce Vita CC v Van Coller and others* [2013] 2 All SA 646 (SCA). This was an appeal against a finding by this Court (Ismail J) that the syndication scheme operated by Spitskop contravened s 11 of the Banks Act 94 of 1990 by accepting deposits from investors in a 'property syndication scheme' as defined in Notice 459 issued in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988. The Supreme Court of Appeal reversed the finding of this Court.

among others, seek to address and rectify those circumstances. In *Southern Palace* [16] Eloff AJ said the following in this regard:

'While every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company...'[17]

[27] Fortunately, some light is shared in this regard in the *Dulce Vita* matter, and for that reason I have decided against non-suiting the applicants. I would therefore quote liberally from the judgment. The following appear in paras 11- 16 of the judgment:

"[11] Bluezone provided brokers with brochures and copies of the disclosure document and they commenced the marketing of the scheme to investors. In terms of the scheme the investors were required to complete the application form and pay the purchase price of the units to Honey Attorneys. Some investors did this before the offer was formally made in the disclosure document on 3 July 2006. By that date Honey Attorneys had already received more than R20 million from investors. Subsequently, about twelve hundred investors subscribed for the units and by early 2009 all the units were taken up. Between 3 July 2006 and 31 December 2007 Spitskop received approximately R350 million and by May 2008 the full amount of R425 million.

[12] On 23 July 2007, without insisting on transfer into its name, Spitskop paid the full purchase price of the property (R118 300 000) to Blue Dot. Spitskop also paid VAT on the transaction which amounted to R16 million. The directors of Blue Dot immediately divided the proceeds of the sale. Lamprecht received R95 653 000; Van Zyl received R5 500 000 and Bluezone R11 223 000.

[13] On 20 November 2007 Blue Dot transferred the property into the name of Spitskop and Spitskop registered a mortgage bond in favour of the Trust to secure the indebtedness of Spitskop to the Trust in an amount of R425 000 000 and an additional amount of R850 000 for costs.

[14] In the meantime, Spitskop had from 3 July 2006 disbursed large amounts to Bluezone and the various professionals that it had employed. By 31 December 2007 Spitskop had received R351 491 254 and disbursed R269 939 305. Despite making little or

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[16] See fn 11 above.
[17] Para 24.

no progress with the development, Spitskop continued to disburse its funds. Although a large proportion of the professional fees were disbursed by 4 March 2009, there had been no physical development of the property.

[15] It seems clear that the property development was doomed to fail. Land claims had been registered in terms of the Restitution of Land Rights Act 22 of 94; the holders of mineral rights over the property had not consented to the development; Spitskop had difficulty in complying with the Provincial and Local Authorities' requirements for the establishment of the township and there was no certainty that the company would be able to provide the bulk services of water, electricity and sewerage.

[16] In August 2009 a number of investors brought an urgent application for the liquidation of the company. It was common cause that Spitskop had lost its substratum and was unable to continue its operations. On 21 August 2009 the North Gauteng High Court, Pretoria (Bertelsmann J) granted a final order of liquidation."

Court's findings in the liquidation application

[28] As stated in para 15 above, granting the final order placing Spitskop in liquidation, Bertelsmann J, as part of his reasoning, made a finding that Spitskop's had lost its substratum and was unable to pursue its objective. The applicants seek to argue in these proceedings that Bertelsmann J's judgment and order were premised on a mistaken assumption that the land claims that were pending in respect of the properties constituted a potentially insurmountable impediment to the realization of the objective of Spitskop. It seems that subsequent to the granting of the order placing Spitskop in final liquidation on 21 August 2009, but before the furnishing of the reasons for the order on 6 October 2009, the land claims had been set aside and de-gazetted, as a result of which they were no longer a consideration.

[29] The applicant spent considerable amount of time in these proceedings seeking to demonstrate that Bertelsmann J's order was premised on the existence of the land claims lodged against the property. The applicants emphasized that, those claims having been set aside, the thrust of the order had been eroded. Needless to state the obvious, I am not sitting as a Court of appeal over that finding. But that argument seems misplaced, in any event. Although in its judgment certain remarks were made about the land claims as a potential hurdle, the Court's judgment was not based solely on that aspect. The key considerations were the commercial and

factual insolvency of Spitskop, and a finding that Spitskop had 'lost its substratum and its inability unable to continue its operations.

[30] These findings have not been challenged on appeal. In the *Dulce Vita* matter, the Supreme Court of Appeal accepted it as a fact that Spitskop had lost its substratum.[18] Having not appealed against that finding, it was expected of the applicants, at the very least, to demonstrate that post-liquidation, that position had somewhat changed. They have not. It is very instructive how this aspect was dealt with by the first applicant. To start with, this was not addressed at all in the founding affidavit.

[31] In his answering affidavit, the liquidator pertinently raised the issue, in approximately 8 instances,[19] pointing out the applicants' failure to address the issue. In his replying affidavit, the first applicant contends himself with bald denials, or 'taking note' of the liquidator assertions, without dealing with the contents. The standard reply was: 'I have taken note of the contents of these paragraphs. I confirm that these issues will be dealt with in more detail during argument of the matter.' Overlooking, for the moment, that this is an impermissible manner of dealing with pertinent issues raised in an answering affidavit (which should have been addressed in the founding affidavit, in any event) the promise to deal with the issue during argument came to nought, as there was no meaningful submissions on what had changed since the liquidation to demonstrate, at the very least, that this was no longer the position.

[32] To my mind, this constitutes a hurdle for the applicants – not necessarily fatal, but a formidable one, nevertheless. This is so because, absent the company's substratum, it is difficult to see how it can be said that business rescue would provide a return for its creditors and shareholders better than they would receive in liquidation. What is more, the applicants are silent about any plans to recover money which has been expended without any development taking place. The liquidator points out that he has determined that despite the fact no final township approval has been granted, the persons in control of Spitskop had expended an amount of over

[18] Para 16.
[19] Paras 44.2, 4.43, 48.5, 48.6, 48.7, 48.10 and 49.4 of the Answering Affidavit.

R3,5 million. There is no explanation of any plan as to how, in business rescue, these vast sums would be recovered.

The applicants' business rescue plan

[33] The applicants' avowed intention is to provide a better return for Spitskop's creditors and shareholders through the proposed business rescue proceedings than what they would receive as opposed to the probable dividend the creditors are likely to receive in the current liquidation proceedings. When considering the applicants' business rescue plan, it is to be borne in mind that the only asset owned by Spitskop is the immovable property comprising portions 6 and 7 of the farm Spitskop. In that regard, it is worth mentioning that since the date of its purchase on 3 July 2006, to date, the property remains an undeveloped agricultural land. Its development requires a rezoning of the property from agricultural land to that of a township. The business plan proposed by the applicants is premised on the assertion that the development of the property has reached a stage between the issuing of the conditions of establishment of a township by the local authorities and the issuing of a certificate in terms of s 101 of the Town-Planning and Township Ordinance 15 of 1986.

[34] According to the applicants, the issuing of a s 101 certificate is a significant step, in that it would have an influence on the value of the property. To that end, the applicants rely on costs estimate for the expected duration of the project to the point where a s 101 certificate is obtained. It would require R10 million to obtain the certificate. That amount would be accessed from the money currently available as indicated in the liquidation and distribution account of October 2013. The applicants say that as soon as the s 101 certificate is issued, Spitskop 'the value of the properties will automatically increase by almost three fold.' The statement is not supported by any evidence.

[35] The applicants rely on various valuations it obtained in respect of the property, ranging from R63 million to R170 million. The most recent valuation, dated 1 May 2013, is for R51,9 million, procured on behalf of the applicants by Simunye Valuers and Property Consultants. As correctly pointed out on behalf of the liquidator and the

intervening party, none of these valuation reports are presented under oath, and can safely be disregarded as inadmissible hearsay evidence. In the applicants' favour, I will consider the contents of the valuation report. But before I do so, I make the following observations. First, the fact that the reports attribute such differing amounts to the same property should bring into doubt their accuracy and reliability.

[36] Secondly, the first applicant himself had earlier made an offer to purchase the property for R7,5 million, which offer was rejected by the liquidator. Although it is not clear from the papers as to the lapse of period between the date of the offer and the valuation by Simunye, it is still a huge jump from R7,5 million to R51,9 million. This brings into question the first applicant's sincerity and *bona fides* when he made that offer, more so that he does not disclose on what basis he made that offer, i.e. whether it was based on a valuation or any other scientific method. Interestingly, the first applicant says that he does not intend proceeding with the purchase of the property as such sale 'would in any event not be to the benefit of all creditors/investors in the Spitskop project...'

[37] I turn now to the contents of the *Simunye* valuation report. First, as correctly pointed out by the liquidator, the eventual valuation of R92,5 million envisages the land after zoning has taken place, and there is partial servicing. This clearly does not pertain to the land as it currently is, being an undeveloped agricultural land. It pertains to a property on which final township approval would have taken place, and a s 101 had been issued and a part of the internal engineering services had been installed. Second, consideration must be given to the costs. According to Simunye report, an amount of R332 461 210 is required to complete the township development. This means that a potential purchaser must, in addition to the purchase price, have this amount available. I agree with the liquidator that it cannot simply be assumed that the potential purchaser would have such funding. Third, there is no certainty whether electricity will be available for the proposed development.

[38] Fourth, it appears from the Simunye report that the proposed development is currently hampered by a servitude registered in favour of the owners of portions 1- 27 of the farm Spitskop to enjoy the reasonable right of aqueduct over the

property. An opinion is expressed that the right of aqueduct should be incorporated in the proposed township development. The applicants have failed to deal with this aspect, and the related costs, in their founding affidavit.

[39] Lastly, it appears that one of the conditions for the establishment of the township is that a right of way servitude has to be registered against portions 3, 4 and 5 of the farm Spitskop. The owner of those portions is an entity involved in mining, and would have to consent to the registration of such servitude on the condition that it does not interfere with its mining activity. There is no indication that such consent has been obtained. Despite this, the Simunye report assumes that registration could take place within two years prior to proclamation and construction of internal services. There is no basis for this assumption. The upshot of the above criticisms is that the applicants' business rescue plan is premised on 'vague averments mere speculative suggestions' cautioned against in *Propspec,* above.

Liquidation compared to business rescue supervision

[40] It is clear from the circumstances which led to the demise of Spitskop and its eventual liquidation, that its business was carried on recklessly and fraudulently by Lamprecht and those who controlled the property syndication scheme. Despite the conclusion by the Supreme Court of Appeal in the *Dulce Vita* matter, above, that the syndication scheme did not contravene the provisions of Notice 459 and s 11 of the Banks Act, the Court made the following pertinent observations:

'[I]t is clear that the promoters of the scheme, Lamprecht, Van Zyl, Durandt van Zyl, Van Niekerk and Bester, used a number of legal instruments to induce the gullible and the injudicious to invest large amounts of money in a scheme which, when properly analysed, never had a reasonable prospect of succeeding. It is also clear that some of the promoters abused their positions to pay themselves very large amounts from the funds which Spitskop had received. The evidence indicates that some, if not all, of the promoters, and possibly others, carried on the business of Spitskop recklessly or with intent to defraud the investors and are both civilly and criminally liable in terms of section 424 read with s 441 of the Companies Act 61 of 1973; that the promoters, and possibly others, did not comply with the requirements of Notice 459 and therefore committed a criminal offence...'[20]

[20] *Dulce Vita* (above) para 37.

[41] In my view, these observations, and in particular the fact that there were 'transactions of dubious validity and other sinister aspects in the management'[21] of Spitskop's affairs, make the present case pattern-made for liquidation rather than business rescue supervision. As Brand JA explained in *Oakdene*, these are the very circumstances at which the investigative powers of the liquidator – under s 417 and 418 of the *1973 Companies Act* – and the machinery for the setting aside of improper dispositions of the company's assets – provided for in the Insolvency Act 24 of 1936 – are aimed. There is no comparable provision in business rescue proceedings for such wide-ranging statutory powers.

[42] In this regard, the liquidator has already convened enquiries in terms of s 417 of the *1973 Companies Act*, at which the evidence of a number of witnesses has been heard. Through that evidence, the liquidator has been able to uncover that Lamprecht had moved substantial amounts of money to Zambia, and that he was, despite him having been sequestrated, channeling such funds into trusts and corporations in South Africa. Evidence presented at the s 417 enquiry had also established that the funds moved to Zambia formed part of the Spitskop estate.

[43] The liquidator has secured the agreement of the proprietor of the business in Zambia in whose account is paid by Lamprecht, to no longer make payments directly to the trusts or corporations nominated by Lamprecht, but to start paying such funds to the estate of Spitskop. It also important that the enquiries and litigation that the liquidator has initiated and authorized, have the approval of SARS, the major creditor of the estate. What is more, the liqudator is involved in no less than five applications and actions aimed at recovering monies siphoned off by Lamprecht and his associates.

[44] Closely associated with the above considerations, is the lapse of time since Spitskop was placed in final liquidation. It has been a period close to 4 years between the granting of the liquidation order and the launching of this application. I appreciate the fact that the delay was not so much of the applicants' doing, as the decision of the SCA in the *Dulce Vita* matter had a direct bearing on the timing of this

[21] Phrases used by Brand JA in *Oakdene* para 35.

application. But whatever the explanation might be, the fact is that a considerable period of time has elapsed since Spitskop was placed in liquidation. I have earlier indicated far-reaching steps that have been taken by the liquidator, in the winding-up process. That cannot be undone without undesirable consequences.

[45] In *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation and Others*[22] the Court was faced with the choice between liquidation and business rescue, where the company had been in business rescue and provisional liquidation for more than a year. Van Eeden AJ made the following observations:

'The passing of more than a year without any solution renders the reasonable prospect of a plan being developed remote. It seems the reasonable prospects of rescuing the company have been exhausted ... [a]s already stated, I do not think it has been demonstrated that Newcity, the shareholder, will receive a better return if business rescue is ordered and the biggest creditor is in favour of liquidation. A creditor will normally know best whether a better return will be achieved by business rescue or not. In my view balancing the rights and interests of these stakeholders require that finality now be reached.[23]

[46] The above remarks are apposite and trenchant. What is more, the company in the present case, Spitskop, is in a far worse position, as it is in final liquidation, as compared to the one referred to in *Newcity*, above, which was in a provisional liquidation.

SARS' views

[47] I must also take into account the views of the major creditor of Spitskop, SARS, which does not support the application for placing Spitskop under supervision and commencing business rescue proceedings. I can only ignore SARS' views if they were unreasonable or *mala fide*.[24] It was further emphasized in *Oakdene* that the court is unlikely to interfere with the creditors' decision unless their attitude was

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[22] *Newcity Group (Pty) Ltd v Pellow N.O. and others ; China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013).
[23] Para 25.
[24] *Oakdene*, above, paras 37 and 38.

unreasonable. In the present case, it admits of no debate that SARS' opposition to the proposed business rescue plan is both reasonable and *bona fide*.

Conclusion

[48] To sum up, in all circumstances I take a view that there is a very real possibility that liquidation will in fact be more advantageous to creditors than the proposed business rescue supervision proposed by the applicants. There remains the issue of costs. Both the liquidator and the intervening party made use of two counsel. I am of the view that such employment was warranted, given the nature of issues canvassed in the application. I would therefore allow for costs of two counsel in each instance.

[49] For all of the above reasons I made the order referred to in para 1. For the sake of completeness I repeat the order below:

1. The application is dismissed;
2. The first and second applicants are ordered to pay the costs, including the costs of two counsel for each of the first and second respondents, on the one hand, and those of the intervening party, on the other. Such costs are to be paid by the applicants jointly and severally, the one paying the other to be absolved.

T.M. Makgoka
Judge of the High Court

Order granted:	16 September 2015
Reasons furnished:	21 September 2015
Appearances:	
For the Applicants:	Adv. L.K. Van der Merwe
Instructed by:	Cawood Attorneys, Pretoria
For the First and Second Respondents:	Adv. M. M. Rip SC Adv. J Vorster
Instructed by:	Leahy & Van Niekerk Inc., Pretoria
For the Intervening Party:	Adv. H.G.A Snyman SC Adv. C. Naude