

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Cardio Fitness Properties (2012/2008) [2013] ZAGPJHC 408 (28 November 2013) [2013] ZAGPJHC 408

COURT

South Gauteng High Court, Johannesburg

BEFORE

Beltramo

CASE / FILE NUMBER

2012/2008

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SOUTH
GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC
OF SOUTH AFRICA)
CASE
NO: 2012/2008
28/11/2013
In

the matter between: ABSA
 BANK
 LIMITED Applicant
 and
 CARDIO
 FITNESS
 PROPERTIES Respondent

JUDGMENT

BELTRAMO AJ

- [1] The applicant seeks to finally wind up the respondent on the basis of its inability to pay its debts. The return date of the provisional winding up order was extended on several occasions at the instance of the respondent.

[2] At the hearing of the application for a final winding up order (29 October 2013), the respondent was not represented and I heard

argument on the merits of the application after dismissing a business rescue application launched on the eve of the hearing.

[3] I reserved my judgment to Friday 1 November 2013 on the issue of whether a final winding up order should be granted. On reflection I ought to have finally wound up the respondent on the return day. However I did not do so and on Thursday 31 October 2013, I was

advised that a second business rescue application had been launched by an interested party.

[4] On Friday, 1 November 2013, I heard argument by the behalf of the applicant in the business rescue application as why I was precluded from granting a final winding up order. The issue as to whether I was precluded from granting a final winding up order was opposed.

[5] The applicant's counsel in the business rescue application argued that the business rescue application suspended/and or precluded me from granting of a final liquidation order. Reliance was placed on the judgment of Makgoba J.[1]

[6] In terms of s 131(6) of the Companies Act 71 of 2008 ("the Companies Act"), if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of sub section (1), the application will suspend those liquidation proceedings until:

(a) The court has adjudicated upon the application;

(b) The business rescue proceedings end, if the court makes the order applied for.

[7] Van der Bijl AJ, in *ABSA Bank Limited v Summer Lodge (Pty) Limited and Others* (unreported, case number 2012/63188) (in which provisional winding up orders against several respondents were granted) held at paragraph

[19] of the judgment:

"[19] It is not the intention of the section to render a liquidation order to be set aside or discharged by the issue of a business rescue application in terms of section 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company be precluded from carrying on business. The company remains to be finally or provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalised."

[8] Van der Bijl AJ also held that liquidation proceedings only commenced on the granting of a liquidation order, whether provisional or final, and therefore the mere issue and service of a business rescue application would not suspend legal proceedings brought to obtain a liquidation order.

- [9] On 30 August 2013, Boruchowitz J held (in the unreported judgment of ABSA Bank Limited and Makuna Farm CC, case number 2012/28972), that it would be permissible for a court to grant a final winding up order and that to do so would not be inconsistent with the object and purpose of s 131(6) of the Companies Act.
- [11] Makgoba AJ, who heard the Summer Lodge application on the return day determined what he described as the pivot question in the application, namely whether the launching of a business application would suspend the applications for a winding up of the respondents ex lege automatically.
- [12] To determine this issue, Makgoba J considered the words 'liquidation proceedings'. Makgoba J held that the word 'liquidation' is the process of determining the liabilities and apportioning the assets towards discharging the indebtedness of the debtor and the word 'proceeding' to mean the action of proceeding; a particular way of doing or accomplishing something.
- [13] Makgoba J held that the meaning of the words 'liquidation proceedings' in s 131(6) of the Companies Act is confined to the actual process of winding up a company consequent upon an order of winding up having been issued by a court and words 'liquidation proceedings' excluded the legal action and/or process taken in order to obtain a winding up order.
- [14] Makgoba J held that once the 'liquidation proceedings' had commenced by the granting of the liquidation order, whether provisional or final, the mere issue and service of a business rescue application in terms of s 131(1) of the Companies Act would suspend the 'liquidation proceedings'.
- [15] On this reasoning, Makgoba J held that Van der Bijl AJ was correct in granting the provisional orders but then suspended the provisional orders and extended the return days until the court had adjudicated upon the business rescue applications, or the business rescue applications ended, if the court made the order applied for.
- [16] Section 131(6) of the Companies Act makes it plain that only the 'liquidation proceedings' are suspended and not the legal action taken to obtain a winding up order whether provisional or final, nor any winding up order the court may grant in a winding up application.
- [17] Makgoba J's judgment is flawed in two respects. Firstly, the suspension of the provisional order is inconsistent with s 131(6) of the Companies Act, as it is only the 'liquidation proceeding' that are suspended. The winding up order is not suspended and the company remains provisionally or finally wound up, as the case may be. Secondly, having concluded that it is the 'liquidation proceedings' and not the winding up application that is suspended, nothing prevented Makgoba J from finally winding up the company.
- [18] I am of the view that the approach adopted by Boruchowitz J in his judgment given in the matter of Makuna Farm CC is the correct approach and I agree with his finding that it is permissible for a court to grant a final winding up order, and to do so would not be inconsistent with the object and purpose of s 131(6) of the Companies Act. The suspension

of the liquidation proceedings, which takes effect on the launching of a business rescue application, operates ex lege and the suspension of the liquidation proceedings will not be affected by the granting of a final winding up order. In the present application, the liquidation proceedings were suspended on the launching of the business rescue application and they remain so suspended until the court deals with that application.

[19] The respondent is profoundly insolvent and is liable to be wound up. There was no opposition to a final winding up order.

[20] Accordingly, I make the following order:

20.1. The respondent is finally wound up.

20.2. The costs of the winding up application are to be costs in the liquidation.

20.3. The liquidation proceedings remain suspended until the court has adjudicated upon the business rescue application or the business rescue proceedings end, if the court makes the order applied for.

20.4. The costs of the argument on the issue of whether I am precluded from granting a final winding up order are to be paid by the applicant in the business rescue application.

DATE OF JUDGMENT: 27 November 2013

[1] ABSA Bank Limited v Summer Lodge (Pty) Limited 2013 (5) SA 444

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