

SOUTH AFRICA / JUDGMENT

Business Partners Ltd v Quick Leap Investments 221 (Pty) Ltd (6168/2010)

[2010] ZAKZDHC 65 (26 November 2010)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

K Swain

CASE / FILE NUMBER

6168/2010

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 6168/2010

In the matter between:

BUSINESS PARTNERS LIMITEDAPPLICANT

and

QUICK LEAP INVESTMENTS 221 (PTY) LTD.RESPONDENT

(Registration No.: 2004/025567/07)

JUDGMENT Delivered on 26 November 2010

SWAIN J

- [1] The applicant seeks an order winding up the respondent, a provisional winding up order having been granted on 28 May 2010.
- [2] Mr. Moosa, who appeared for the respondent, stated at the outset that there was only one point he wished to argue in opposition to a final winding up order being granted. This was that the applicant had failed to comply with the provisions of Section 346 (4A) (a) (ii) of the Companies Act No. 61 of 1973 (the Act) in that the applicant had failed to furnish a copy of the application to the employees of the respondent.
- [3] In support of this argument he referred me to the decision in

Hendricks v Cape Kingdom

2010 (5) SA 274 (WCC) at 281 I to 282 D

where Sholto-Douglas A J approved of a dictum of Davies J, where the learned Judge held that the provisions of Section 346 (4A)

- (a) (ii) of the Act were peremptory and that the inherent jurisdiction of the Court did not extend the power of the Court to condone non-compliance with the requirements of the sub-section. That the provisions of the sub-section were peremptory was based upon the use of the word “must” in the sub-section as well as the decision in the case of

Standard Bank of S A Ltd. V Sewpersadh & Another

2005 (4) SA 148(C) at 156 B – D

where it was held that the essentially identical Section in the Insolvency Act was peremptory.

- [4] The response of Mr. Quinlan, who appeared for the applicant, was that he had been taken by surprise by this argument, the upshot of which was that I granted an adjournment of the matter to the applicant, to investigate the issue of whether the respondent had employees. Mr. Moosa said he would object to the filing of any further affidavits in this regard. I indicated that on the adjourned date I would hear argument on whether the applicant should be allowed to file any further affidavits. I then adjourned the matter to 30 November 2010, when I would again be in Motion Court.
- [5] Later in the morning and during Motion Court, Mr. Quinlan appeared and asked that the matter be recalled, as his instructing attorney had drawn his attention to the fact that it was common cause on the papers, that the respondent had no employees.
- [6] I directed that the matter be recalled at which juncture Mr. Quinlan drew my attention to the following averment made in paragraph 3 of the applicant’s founding affidavit:

“The respondent

3.1

3.2

3.3

3.4 has no known employees”

- [7] The response of the respondent in paragraph 10 of its opposing affidavit, was to dispute the address averred as its main place of business and the deponent then stated

“I otherwise admit the averments made herein”.

- [8] On this basis, Mr. Quinlan submitted that the applicant no longer wished the matter to be adjourned. The response of Mr. Moosa to this unexpected turn of events was initially to submit that all that was admitted was the knowledge possessed by the applicant in this regard, and not the factual absence of employees of the respondent. There was, in my view, no substance to this argument which simply has to be stated to be rejected. The averment by the applicant was quite plainly made for the purposes of Section 346 (4A) (a) (ii) of the Act, to indicate that the plaintiff did not know of any employees of the respondent, on whom service would have to be effected. An admission of this averment was quite plainly an admission that the respondent had no employees, because the presence or absence of employees was a fact which lay peculiarly within the knowledge of the respondent.
- [9] Mr. Moosa then stated from the Bar that his instructions were that in fact the respondent had employees and that the respondent therefore wished to avail itself of an adjournment of the matter, to enable respondent to file an affidavit to prove this fact. Mr. Moosa stressed that the applicant had been afforded an adjournment to deal with this issue and the respondent should likewise be afforded a similar opportunity. Mr. Quinlan in turn objected to Mr. Moosa effectively giving evidence from the Bar in this regard and opposed any adjournment of the matter.
- [10] I then refused an adjournment of the matter and rescinded the previous order I had made adjourning the matter, for the reasons which follow.
- [11] In the first instance the grounds upon which I initially granted an adjournment of the matter to the applicant, differed greatly from the grounds upon which the respondent sought an adjournment. The applicant had quite clearly been taken by surprise by a technical point raised by the respondent without warning, at the eleventh hour. That the applicant should be afforded an opportunity to investigate the factual basis for the point, I regarded as both reasonable and justifiable. In the respondent's case however, it was clear that the purpose of the adjournment would be to file an affidavit, in an attempt to effectively withdraw an admission made on oath and to place in issue that which was at present, common cause between the parties.
- [12] Of greater significance however would be the apparent purpose in granting an adjournment and allowing the respondent to file such an affidavit, which could only result in a further adjournment of the matter to enable the applicant to serve a copy of the application and the provisional order of liquidation, upon any such employees.
- [13] Such a course of conduct would bear little prospect of having any effect upon the inevitable outcome of the present proceedings, because the papers quite plainly reveal that the respondent is unable to pay its debts in terms of Section 344 (f) of the Act.
- [14] I say this in the light of the following facts which are common cause between the parties, or undisputed.

[14.1] The parties concluded a written loan agreement during March 2006 in which the applicant loaned and advanced the sum of R2M to the respondent, which was repayable on 01 July 2007.

[14.2] The respondent failed to repay the loan on due date and thereafter sought and obtained extensions of time from the applicant within which to make payment, which culminated in a final date for repayment of the loan, being 01 February 2009.

[14.3] The respondent failed to repay the loan on 01 February 2009.

[14.4] On 19 April 2010 the respondent wrote to the applicant stating:

[14.4.1] The respondent was having problems with its tenants who collectively were in arrears to the value of just over R1M.

[14.4.2] This situation had resulted in the shareholders of the respondent being reluctant to loan the respondent any more money.

[14.4.3] The applicant was asked to pend any legal action for fourteen days to enable the respondent to pay off all the arrears and obtain the signatures of sureties for a new agreement.

[14.4.4] The respondent stated that if it was unable to resolve the issues within the fourteen day period, and to avoid legal costs on both sides, the respondent was prepared to hand its immovable property over to the applicant to put it up for sale. Any excess available from the sale, after having settled the loan account, would be refunded to the respondent.

[14.5] As at 29 March 2010 the respondent was in arrears with its rent payable to the eThekweni Municipality in the amount of R45,782.50 which had increased by 30 May 2010 to R49,796.67. In addition, as at the later date the respondent was in arrears with its electricity, water and refuse accounts with the Municipality, to the tune of R156,848.19.

[15] Evidence that a company has failed on demand to pay a debt, payment of which is due is cogent prima facie proof of inability to pay its debts

“for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources”

Rosenbach & Company (Pty) Ltd. v Singhs Bazaar

1962 (4) SA 593 (D) at 597

Henochsberg on the Companies Act

Vol 1 Meskin pg 709

[16] In addition, as held in the case of

Kalk Bay Fisheries Ltd. v United Restaurants

1905 TH 22

a court might properly find that a company is unable to pay its debts where it had admitted to its creditors that it could not pay, had failed to adhere to an agreement with them to effect payment in monthly instalments, had failed to pay interest due on its debenture stock and there was no explanation by it for these failures.

[17] In the present case it is common cause that the respondent engages in the business of commercial property investment and that the asset of the respondent, over which the applicant has the security of a first mortgage bond, is a lease the respondent has with the eThekweni Municipality in respect of an immovable property. As pointed out above the respondent is in arrears with its rental payments to the eThekweni Municipality. By way of a letter dated 29 March 2010 the eThekweni Municipality threatened to cancel the lease on the ground, inter alia, of the non-payment of rent by the respondent.

[18] When regard is had to the foregoing and the fact that it appears on the papers that rentals received by the respondent from tenants of the property are its main source of income, and that it is common cause that the respondent has not, since August 2008, been able to pay any amount to the applicant, I am satisfied that the applicant has discharged the onus of proving on a balance of probabilities that the respondent is unable to pay its debts, within the meaning of that term as contained in Section 345 (1)

(c) of the Act.

[19] In this context, to grant an adjournment to the respondent for the purpose of the respondent attempting to show that the respondent has employees, in the face of an express admission to the contrary, would simply serve to unreasonably delay matters. I regard the request for an adjournment as simply a dilatory ploy on the part of the respondent, to delay the inevitable. To grant an adjournment for this purpose would be to elevate form above substance. I cannot see how the giving of notice to any “employees” of the respondent and their possible participation in the present proceedings, could have any bearing upon the parlous financial state of the respondent and its inability to pay its debts.

The order I grant is the following:

- (a) The rule nisi is confirmed and the respondent is finally wound up.
- (b) The applicant’s costs are to be costs in the liquidation of the respondent.

K. Swain J

Appearances: /

Appearances:

For the Applicants : Mr. P. Quinlan

Instructed by: : Maharaj Attorneys

Durban

For the Respondent : Mr. M.F. Moosa

Instructed by : Siven Samuel & Associates

C/o Messenger King

Date of Hearing : 23 November 2010

Date of Filing of Judgment : 26 November 2010

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