

SOUTH AFRICA / JUDGMENT

Darne N.O v Druids Garden (Pty) Ltd (2023/091315) [2024] ZAGPPHC 400 (9 April 2024) [2024] ZAGPPHC 400

COURT

North Gauteng High Court, Pretoria

BEFORE

Labuschagne

CASE / FILE NUMBER

2023/091315

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Before

His Lordship Mr Justice Labuschagne AJ on 9 April 2024

Case

No: 2023/091315

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

SIGNATURE

DATE:

19/4/2024

In

the application of: EILEEN
ROXANNE DARNE
NO
Applicant
(In
her capacity as the duly appointed Executrix in the
Estate
of the Late Melanie Patricia Schaup)
and
DRUIDS
GARDEN (PTY) LTD
Respondent
(Registration
Number: 2019/054714/07)

JUDGMENT

- [1] This is an opposed liquidation application in the urgent court. On 11 September 2023 the applicant, the Executrix of the late Melanie Patricia Schaup (the deceased), instituted this application against the respondent. In the founding papers the applicant contended that the respondent stood to be wound up in terms of section 344(f), read with section 345(1)(a) of the Companies Act, 61 of 1973. In the replying affidavit and during argument, it became apparent that the applicant does not rely on the presumptions of an inability to pay debts in that section, but on section 345(1)(c) of the Act.
- [2] The application was served on the respondent on 11 December 2023 and by 23 February 2024 the answering affidavit and the replying affidavits had been filed.
- [3] On 20 March 2024 the applicant served the supplementary founding affidavit and an amended notice of motion, seeking to have the liquidation adjudicated in the urgent court.
- [4] The deceased passed away on 13 May 2022 and her Executrix contends that she is a creditor of the respondent in circumstances that will be set out below.
- [5] The respondent is engaged in the growing, manufacture and sale of medicinal marijuana and conducts its operations in the Hennops River Valley. The respondent is the operating company, attending to the day-to-day operations and Druids Holdings (Pty) Ltd is its holding company, which also holds the requisite licenses to cultivate and export medicinal cannabis.
- [6] On 7 December 2019 the deceased and the respondent entered into a written loan agreement, in terms of which the deceased loaned and advanced to the respondent an amount of R1,1 million together with interest, being repayable by no later 24 months from 7 December 2019.

- [7] The loan agreement was drafted by the financial advisor of the deceased, Mr Howie. Clause 5.1.3 of the agreement provided that the capital advanced would initially be considered an interest-bearing loan with a 24-month fixed term as to the repayment thereof. The deceased could, at her sole instance, choose to convert the loan into a 1% shareholding. The agreement contains a non-variation clause, requiring any amendment, addition, variation or consensual cancellation to be recorded in writing and signed by all the parties.
- [8] On 9 December 2019 the deceased paid R1,1 million to the respondent. The respondent contends that a meeting took place on 2 April 2020 during which the deceased converted her loan into a 1% shareholding in Druids Holdings (Pty) Ltd. This conversion is disputed.
- [9] In these proceedings the conversion of the loan into equity is the basis for a contention that the existence of the debt is reasonably disputed on bona fide grounds.
- [10] The deceased contracted cancer in 2021 and was in need of money for purposes of paying for her medical treatment.

URGENCY

- [11] On 18 March 2024 the respondent directed a letter to “Investors and JV Tunnel Partners”. The letter related to the need to make capital expenditure to deal with inter alia loadshedding to ensure the company’s viability. In the letter the respondent contended that it is unable to pay JV Partners or to provide a return on investment for investors. At a shareholders meeting on 6 March 2024 an offer by Dr Rossouw Strydom for the purchase of a 65% stake in Druids Holdings was considered.
- [12] The applicant contends that a memorandum of agreement was entered into between Druids Holdings and Dr Rossouw Strydom. The respondent contends that the agreement was merely a draft.
- [13] The memorandum of agreement in question recorded a definition of “company” that includes Druids Holdings (Pty) Ltd and all current and future subsidiaries – i.e. the respondent.
- [14] The memorandum of agreement records the following terms:
- 14.1 The seller sells 65% of the loan account to the buyer and will transfer 65% of the shares to the buyer;
- 14.2 The purchase price for the loan will be R39 450 000.00 payable within 7 (seven) days of signature;
- 14.3 The buyer will conduct a stocktake of the stock in trade of the company on or before 12 April 2024;
- 14.4 The possession, risk and benefit in the company will vest in the buyers from the effective date;

14.5 The shares will be transferred on the effective date;

14.6 The effective date would be 1 May 2024.

[15] In the agreement the seller warranted in favour of the buyer that no steps have been taken and the seller is unaware of any steps pending of threatened to deregister, liquidate or windup the company or to subject the company to business rescue proceedings. The applicant contends that his is misleading.

[16] Due to the effective date being 1 May 2024 on which date the possession, risk and benefit in the company (which included the respondent) would vest in the buyer, the applicant approaches this court on the basis of urgency.

[17] There is a line of authority to the effect that winding-up proceedings are inherently urgent. (See: *Van Greunen v Sigma Switchboard Manufacturing CC* [2003] ZAECHC 12 (27 March 2003); *Fourie and Another v Housezero Construction Pty (Ltd)* 2022 (JDR) 0102 (GP); *Ex Parte Nell NO and Others* 2014(6) SA 545 (GP).

[18] The respondent contends that the matter is not urgent. In this regard it contends that the authorities referred to do not assist the applicant since they have been threatening the launching of

liquidation proceedings from 2021 and in fact launched this application in the normal course on 11 September 2023. The respondent relies on *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* [2023] ZAGPJHC 846 (1 August 2023) where the following was said in par [6] of the judgment:

“There is, accordingly, no class of proceeding that enjoys inherent preference. Counsel appearing in urgent court would, in my view, do well to put the concept of ‘inherent urgency’ out of their minds. There are, of course, some types of case that are more likely to be urgent than others. The nature of the prejudice an applicant will suffer if they are not afforded an urgent hearing is often linked to the kind of right being pursued. Spoliation is a classic example of this type of claim. Provided that the person spoliated acts promptly, the matter will nearly always be urgent. The urgency does not, though, arise from the nature of the case itself, but from the need to put right a recent and unlawful dispossession. This applicant comes to court because they wish to restore the ordinary state of affairs while a dispute about the right to possess a thing works itself out. Cases involving possible deprivations of life and liberty, threats to health, the loss of one’s home or some other basic essential of daily life, such as water or electricity, destruction of property, or even crippling commercial loss, are also likely to be urgent.”

[19] The respondent contends that the agreement underpinning the claim of urgency is merely a draft which was presented by purchasers to Druids Holdings and was circulated to all shareholders, including the applicant, for their oversight and input. The document is alleged to be subject to extensive revision and no agreement can be concluded with the purchasers unless agreements are concluded simultaneously with other shareholders, which includes the applicant, who wish to dispose of their shares. It is alleged that this can only be concluded simultaneously. As this has not occurred, the agreement referred to is a draft.

[20] The respondent further contends that the respondent's attorney had discussed the matter with the applicant's deponent, and he was advised that the respondent's attorney would be overseeing

the revision and editing of the agreement and further undertook to share all of the drafts with the deponent -who is also the applicant's attorney.

[21] The respondent further contends that section 348 of the Companies Act

provides substantial protection to all creditors in that the effective date of the commencement of liquidation is the date the

application is issued, i.e. 11 September 2023. Consequently, a concursus creditorum is established retrospectively and subsequent dispossessions would therefore be ineffective.

[22] According to Henochsberg's Commentary on the Companies Act, the

purpose of section 348 is to nullify any attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair

advantage during the period between the presentation of the application for a winding-up order and the granting of that order by

a court. (See: Lief NO v Western Credit Africa (Pty) Ltd 1966(3) SA 344 (W) at 347 B – C).

[23] The arguments advanced by the respondent regarding the agreement being ineffective, or merely a draft, have some merit. So too the argument in respect of section 348. However, the false representation in the draft regarding the seller being unaware of any liquidation proceedings, together with the letter of 18 March 2024 to investors does raise sufficient red flags to warrant the court being approached on an urgent basis.

[24] On balance, I am therefore satisfied that the matter is sufficiently urgent for consideration in the urgent court.

IS THE APPLICANT'S DEBT BONA FIDE DISPUTED ON REASONABLE GROUNDS?

[25] The dispute between the parties relates to the existence of the debt. In Imobrite (Pty) Ltd v DTL Boerdery CC [2022] ZASCA 67 (May 2022) the Supreme Court of appeal summarised the principles to be applied in cases where a debt is disputed as follows:

"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused."

A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is in bona fide dispute, or where the motive is to oppress or defraud the company or frustrate its rights."

[26] However, an unpaid creditor has a right *ex debito justitiae* to a winding-up order against a company that has not discharged its debts. (See: *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2022(1) SA 91 (SCA) at par [12]; *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* [2023] ZAWCHC 202; 2023(6) SA 452 (WCC) (10 August 2023).

[27] The applicant disputes the meeting of 2 April 2020 at which the respondent contends the deceased converted her loan into a 1% shareholding in Druids Holdings. This meeting would have taken place in a time of total lockdown during the pandemic. Secondly, the deponent for the applicant, who is also the attorney of record of the applicant, contends that it is unthinkable that the deceased would not have disclosed the conversion to either her financial advisor or her attorney.

[28] The response to this contention is that the meeting took place at the respondent's premises on a smallholding where the deceased also had a cottage. There was therefore no need to travel on public roads. This meeting was also confirmed by Mr Verral, a shareholder in Druids Holdings and the owner of the land on which the respondent's premises are being conducted.

[29] In an email of 6 April 2020 by Craig Howie (the deceased's financial advisor) to Cian McClelland, the following is stated:

"How are you all at Druids?"

I would just like to follow up on our last meeting. ..."

[30] The respondent contends that this is confirmation of the meeting of 2 April 2020, despite the restrictions imposed during the pandemic.

[31] The respondent further refers to a Chrysalis contract concluded on 24 July 2020 between Chrysalis Holdings (Pty) Ltd and Druids Holdings in terms of which Chrysalis would require 20% shares in Druids Holdings. This sale did not proceed.

[32] The deceased was not a party to this agreement but, in clause 3.12 thereof, she is reflected as a 1% shareholder in Druids Holdings. Further, as at 16 June 2020, the share register of Druids Holdings

indicated the deceased had 100 shares, i.e. 1%.

[33] On 23 March 2021 the deceased sent an email to the respondent's

accountant, asking for a meeting and for a copy of the agreement.

[34] On 7 April 2021 the deceased requested Mr McClelland for repayment of her loan for purposes of paying for her cancer treatment.

[35] Up to that stage, there are objective indicators that the deceased was the holder of 1% of the shares in Druids Holdings.

[36] What complicates these objective facts is the conduct of the respondent when it was approached by the deceased after she had contracted cancer and had the need for money to pay for her treatment. So, for example, when the deceased's attorney sent a letter of demand for repayment of the loan on 13 April 2021, the respondent responded by means of a letter dated 15 April 2021, in which Mr McClelland stated that interest is only due at the end of the year. Mr McClelland indicates that he cannot think why he would have said something like that in the light of the conversion.

[37] In a letter of 29 April 2021 the attorney of the deceased contended that the deceased had elected not to take up her shares. The respondent's response to this is that the attorney is not in a position to state that fact as he was not present when the conversion meeting of 2 April 2020 took place.

[38] On 12 May 2021 Mr McClelland, in an email, further contended that the respondent's attempts to assist the deceased were "outside of our contractual obligations".

[39] What the respondent was advancing was a willingness to try and assist the deceased from a humanitarian perspective, rather than based on a duty to repay the loan.

[40] The deceased temporarily terminated the mandate of her attorney, Mr Lessing, and appointed Sheri Greiff as her attorney. While she was the attorney of the deceased, Mr McClelland of the respondent sent Ms Greiff an email of 3 May 2022 in which, inter alia, the following is recounted:

"As explained to Mel and her two sisters when she visited the farm last, when Mel told me that she no longer wanted the equity in the company, I informed her that we did not have that cash on hand as it was invested into infrastructure as intended.

Since then myself and the company have done everything possible to assist, including the highest monthly payments we could afford, and the supply of free medicine for her. We offer to pay her consultation and treatment with Dr Brett from AMC and she did not take that up. ...

I know that Mel is very unhappy with me as she is not responding to my messages. But as explained we are doing everything possible to assist, especially because we care about her and her condition."

[41] This email indicates that the deceased conveyed to Mr McClelland that

she no longer wanted the shares that she had been given and would rather have the money for her cancer treatment. Mr McClelland's

explanation was that they did not have that type of money at hand and would assist her in other ways as far as they could to pay for her medical treatment. This again is consistent with the conversion having taken place and the deceased having regretted doing so.

[42] The evidence establishes arguments going both ways on whether there had been a conversion of the loan into shares or not. I am on balance, however, satisfied that the objective evidence, especially

during 2020, of a conversion of the loan into shares demonstrates that the existence of the debt is disputed on bona fide grounds. By virtue of this conclusion liquidation proceedings are not competent and the application cannot succeed.

[43] If I am a wrong in the aforesaid assessment, there is sufficient evidence of fatal non-compliance with section 346(4A) as far as service of the original liquidation application and the subsequent urgent application is concerned. The original application was not served on a trade union. The return of service by the Sheriff does not indicate that he enquired about whether there was a trade union. Further, the application was served on a single

employee, whereas the Act requires the application to be affixed publicly on a notice board, gate or door. As far as the urgent

application is concerned, it was not served on either a Trade Union or the employees.

[44] Service on the categories of persons identified in section 346(4A) is

peremptory (*Stratford and Others v Investec Bank Limited and Others* 2015(3) SA 1 (CC) at par [40]).

[45] The inherent jurisdiction of a court does not extend to condoning non-compliance with the requirements that a copy of the application be furnished to the parties specified in section 346(4A). (*Hendricks NO and Others v Cape Kingdom (Pty) Ltd* 2010(5) SA 274 (WCC) at para [35] to [36]). In the Hendricks matter the court considered the provisions of section 346(4A) (a)(ii) and approved the views expressed by Davis J in *Moodliar NO and Others v Hendricks NO and Others* [2009] JOL 24459 (WCC) at par [28]. Non-compliance cannot be condoned.

[46] In the premises, despite the application being found to be urgent, it

must fail on both the aforesaid grounds. Firstly, the debt is disputed on bona fide and reasonable grounds. Secondly, peremptory statutory requirements in section 346(4A) were not complied with.

[47] I therefore make the following order:

1. The application is dismissed with costs.

LABUSCHAGNE, AJ

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