

SOUTH AFRICA / JUDGMENT

Grobbelaar v Panamo Properties Seventy (Pty) Ltd, Klein v Lagler (10626/2007, 11612/2007) [2009] ZAWCHC 55 (18 March 2009)

[2009] ZAWCHC 55

COURT

Western Cape High Court, Cape Town

BEFORE

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CASE / FILE NUMBER

10626/2007, 11612/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

(CAPE

OF GOOD HOPE PROVINCIAL DIVISION)

CASE

NO.: 10626/2007

In

the matter between :

JOHAN

FRANCOIS GROBBELAAR Applicant

and

PANAMO

PROPERTIES SEVENTY (PTY) LTD Respondent

and

in the application of:

Case

No.: 11612/2007

EGON

KLEIN First

Intervening Creditor

and

KARI

LAGLER Second

Intervening Creditor

for

leave to intervene in the above matter

JUDGMENT

[1] These are opposed applications for the liquidation of Respondent and for leave for First and Second Intervening Creditors to intervene in the liquidation application. It is convenient to deal with the application to intervene at the outset. [2] The two Intervening Creditors each hold 33.3% of the shares in Respondent, while the remaining 33.3% of the shares is held by Applicant. It appears that both Intervening Creditors enjoy fairly substantial claims on loan account against the Respondent. It is not in serious contention that both Intervening Creditors have the necessary locus standi to intervene in the liquidation application. However, a party seeking leave to intervene must establish that if such leave is granted, that it will be in a position to advance the cause that it joins. An intervening party that seeks to oppose a winding-up application must show a prima facie defence to the winding-up application (*Holzman NO and Another v Knight's Engineering and Precision Works (Pty) Ltd* 1979(2) SA 784 (W) at 797 A-B; *Fullard v Fullard* 1979(1) SA 368 (T) at 372 A). It is on this latter ground that the application to intervene is being opposed by the Applicant. In my view, the defences advanced by the Intervening Creditors constitute sufficient grounds justifying an order allowing them to intervene in the matter. [3] The application for liquidation is based on the grounds that in terms of section 344(c) of the Companies Act 61 of 1973 ("the Act") Respondent has suspended its business for a period of more than a year and moreover that in terms of section 344(h) of the Act it is just and equitable to liquidate Respondent. [4] Applicant avers in the founding affidavit that Respondent conducted the business of a property holding and development company. This was not disputed in the answering affidavit. It was accordingly submitted on Applicant's behalf that Respondent's main object is to buy, sell and develop immovable properties. Applicant avers that the last business (within the meaning of section 344(c) of the Act) that was conducted by Respondent was the sale of a property during January 2006. The distribution of the nett proceeds of this sale has given rise to a dispute between Applicant and the two Intervening Creditors. The parties have deadlocked on this issue and the nett proceeds are being held in the trust account of the transferring attorneys since 2006. No other property transactions had been conducted since the mentioned sale of January 2006. Applicant accordingly avers that Respondent has suspended its business for a period of a year as envisaged in section 344(c) of the Act and that there is no prospect of Respondent resuming its business within the foreseeable future. The latter contention is based upon the grounds that all working relationships as well as the relationship of trust, honesty and friendly co-operation between Applicant and the two Intervening Creditors as the main roleplayers, had broken down irretrievably without any reasonable prospect that this relationship could be restored and the business of Respondent could be resumed. Applicant moreover contended that it was clear from the versions of both Applicant and the Intervening Creditors that once the various creditors had been paid, Respondent would be de facto insolvent and would be unable to pursue its main business of buying and developing property. [5] In opposing the application, the Intervening Creditors denied that Respondent has not conducted any business for a year. In this regard it was submitted on their behalf that Applicant has failed to establish the objects of Respondent and

that it could accordingly not be concluded that Respondent has not pursued its objects since the transaction of January 2006. The Intervening Creditors aver that Respondent was still conducting business in that it must still complete its financial records and account to debtors and creditors, it must still consider and make payment of dividends to shareholders and the directors of Respondent will still have to hold a meeting to consider the mentioned matters. [6] It is clear that the business of Respondent entails the holding and development of immovable property. It is clear in my view that Respondent has conducted no business subsequent to the transaction of January 2006 and that there are no reasonable prospects that Respondent would engage in any other property transactions subsequent to the distribution of the nett proceeds presently held in trust by the transferring attorneys. Respondent has accordingly suspended its business for a whole year as envisaged in section 344(c) of the Act. [7] It constitutes a further ground for winding-up, if it appears to the Court that it is just and equitable to do so as envisaged by section 344(h) of the Act. In the matter of *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985(2) SA 345 (W) the Court held that the disappearance of a company's substratum as well as grounds analogous to those for the dissolution of partnerships

will render it just and equitable to wind up a company. The substratum of a company has disappeared when the realisation of its

objects have become objectively impossible (*Meskin Henochberg's on the Companies Act* Vol. 1 5th ed.

p. 704). [8] In view of the facts set out above concerning the Respondent's failure to conduct its business since 2006, I am satisfied that the realisation of its object of holding and developing property has become objectively impossible. [9] It is also clear in my view that it is just and equitable for Respondent to be wound up on grounds analogous to those applicable

to the dissolution of partnerships. In my view, Respondent would qualify as a "domestic" company where a situation obtains which requires the members to act reasonably and honestly towards one another and with friendly co-operation in running its affairs. It is clear in my view that such a situation no longer exists as is exemplified by the deadlock concerning the distribution of the nett proceeds of the January 2006 sale. [9] In the circumstances I am also satisfied that it is just and equitable that Respondent should be wound up as envisaged by section 344(h) of the Act. [10] In the circumstances I make the following order: Respondent is placed under provisional liquidation;

A rule nisi hereby issues calling upon all persons interested to show cause, if any, on Tuesday, 18 March 2008 at 10h00 why :

- (i) Respondent should not be placed under final liquidation; (ii) The costs of this application should not be costs in the liquidation. (c) That service of this order be effected :
- (i) on Respondent by the Sheriff at its registered office; (ii) on the First and Second Intervening Creditors personally by the Sheriff; (iii) on the South African Revenue Service; (iv) by one publication in each of the Cape Times and Die Burger newspapers;

(v) on all creditors of Respondent by way of prepaid registered post. DENZIL POTGIETER, A.J.

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 10626/2007

In the matter between :

JOHAN FRANCOIS GROBBELAAR Applicant

and

PANAMO PROPERTIES SEVENTY (PTY) LTD Respondent

and in the application of:

Case No.: 11612/2007

EGON KLEIN First Intervening Creditor

KARI LAGLER Second Intervening Creditor

for leave to intervene in the above matter

JUDGMENT

- [1] These are opposed applications for the liquidation of Respondent and for leave for First and Second Intervening Creditors to intervene in the liquidation application. It is convenient to deal with the application to intervene at the outset.
- [2] The two Intervening Creditors each hold 33.3% of the shares in Respondent, while the remaining 33.3% of the shares is held by Applicant. It appears that both Intervening Creditors enjoy fairly substantial claims on loan account against the Respondent. It is not in serious contention that both Intervening Creditors have the necessary locus standi to intervene in the liquidation application. However, a party seeking leave to intervene must establish that if such leave is granted, that it will be in a position to advance the cause that it joins. An intervening party that seeks to oppose a winding-up application must show a prima facie defence to the winding-up application (*Holzman NO and Another v Knight's Engineering and Precision Works (Pty) Ltd* 1979(2) SA 784 (W) at 797 A-B; *Fullard v Fullard* 1979(1) SA 368 (T) at 372 A). It is on this latter ground that the application to intervene is being opposed by the Applicant. In my view, the defences advanced by the Intervening Creditors constitute sufficient grounds justifying an order allowing them to intervene in the matter.
- [3] The application for liquidation is based on the grounds that in terms of section 344(c) of the Companies Act 61 of 1973 ("the

Act") Respondent has suspended its business for a period of more than a year and moreover that in terms of section 344(h) of the Act it is just and equitable to liquidate Respondent.

- [4] Applicant avers in the founding affidavit that Respondent conducted the business of a property holding and development company. This was not disputed in the answering affidavit. It was accordingly submitted on Applicant's behalf that Respondent's main object is to buy, sell and develop immovable properties. Applicant avers that the last business (within the meaning of section 344(c) of the Act) that was conducted by Respondent was the sale of a property during January 2006. The distribution of the nett proceeds of this sale has given rise to a dispute between Applicant and the two Intervening Creditors. The parties have deadlocked on this issue and the nett proceeds are being held in the trust account of the transferring attorneys since 2006. No other property transactions had been conducted since the mentioned sale of January 2006. Applicant accordingly avers that Respondent has suspended its business for a period of a year as envisaged in section 344(c) of the Act and that there is no prospect of Respondent resuming its business within the foreseeable future. The latter contention is based upon the grounds that all working relationships as well as the relationship of trust, honesty and friendly co-operation between Applicant and the two Intervening Creditors as the main roleplayers, had broken down irretrievably without any reasonable prospect that this relationship could be restored and the business of Respondent could be resumed. Applicant moreover contended that it was clear from the versions of both Applicant and the Intervening Creditors that once the various creditors had been paid, Respondent would be de facto insolvent and would be unable to pursue its main business of buying and developing property.
- [5] In opposing the application, the Intervening Creditors denied that Respondent has not conducted any business for a year. In this regard it was submitted on their behalf that Applicant has failed to establish the objects of Respondent and that it could accordingly not be concluded that Respondent has not pursued its objects since the transaction of January 2006. The Intervening Creditors aver that Respondent was still conducting business in that it must still complete its financial records and account to debtors and creditors, it must still consider and make payment of dividends to shareholders and the directors of Respondent will still have to hold a meeting to consider the mentioned matters.
- [6] It is clear that the business of Respondent entails the holding and development of immovable property. It is clear in my view that Respondent has conducted no business subsequent to the transaction of January 2006 and that there are no reasonable prospects that Respondent would engage in any other property transactions subsequent to the distribution of the nett proceeds presently held in trust by the transferring attorneys. Respondent has accordingly suspended its business for a whole year as envisaged in section 344(c) of the Act.

[7] It constitutes a further ground for winding-up, if it appears to the Court that it is just and equitable to do so as envisaged by section 344(h) of the Act. In the matter of Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985(2) SA 345 (W) the Court held that the disappearance of a company's substratum as well as grounds analogous to those for the dissolution of partnerships

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objects have become objectively impossible (Meskin Henochberg's on the Companies Act Vol. 1 5th ed.

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[8] In view of the facts set out above concerning the Respondent's failure to conduct its business since 2006, I am satisfied that the realisation of its object of holding and developing property has become objectively impossible.

[9] It is also clear in my view that it is just and equitable for Respondent to be wound up on grounds analogous to those applicable

to the dissolution of partnerships. In my view, Respondent would qualify as a "domestic" company where a situation obtains which requires the members to act reasonably and honestly towards one another and with friendly co-operation in running its affairs. It is clear in my view that such a situation no longer exists as is exemplified by the deadlock concerning the distribution of the nett proceeds of the January 2006 sale.

[9] In the circumstances I am also satisfied that it is just and equitable that Respondent should be wound up as envisaged by section 344(h) of the Act.

[10] In the circumstances I make the following order:

Respondent is placed under provisional liquidation;

A rule nisi hereby issues calling upon all persons interested to show cause, if any, on Tuesday, 18 March 2008 at 10h00 why :

- (i) Respondent should not be placed under final liquidation;
- (ii) The costs of this application should not be costs in the liquidation.
- (c) That service of this order be effected :
 - (i) on Respondent by the Sheriff at its registered office;
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(v) on all creditors of Respondent by way of prepaid registered post.

DENZIL POTGIETER, A.J.

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