

SOUTH AFRICA / JUDGMENT

Knoop NO and Others v SAFIC (Pty) Ltd (2023/038511) [2023] ZAGPJHC 867 (3 August 2023) [2023] ZAGPJHC 867

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2023/038511

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case Number: 2023/038511
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
NOT REVISED
03/08/23
In

the matter between: KURT
ROBERT KNOOP N.O.
First
Applicant
MARGARETHA
SUSANNA GOODRICH N.O.
Second
Applicant
As
the provisional liquidators of
ACCENTUATE
MANAGEMENT SERVICES (PTY) LTD
(IN
LIQUIDATION)

(Registration
number: 2003/005962/07)
ACCENTUATE
MANAGEMENT SERVICES (PTY) LTD

(IN
LIQUIDATION)

(Registration
number: 2003/005962/07)

Third
Applicant

And
SAFIC

(PTY) LTD

(Registration
number: 1981/010263/07)

Respondent
ORDER

[1]

The respondent is provisionally wound up and
placed in the hands of the Master.

[2]

A rule nisi is issued calling upon any interested
person to appear and show cause on the 23rd
of October 2023 why
a final order for winding up should not be granted by this court.

[3]

The rule nisi is to be published in the Government
Gazette, the Staatskoerant and The Star
and Die Beeld
newspapers.

[4]

The cost of this application are costs in the
winding up.

JUDGMENT

Fisher J

Introduction

- [1] This is Part B of an application brought by the provisional liquidators of Accentuate Management Services (Pty) Ltd (“AMS”). The liquidators seek the provisional winding up of the respondent on behalf of AMS qua creditor of the respondent
- [2] The application was initially brought in the urgent court. It now comes before me by way of the Commercial Court Directives.

- [3] Part A has already been decided ex parte. In terms thereof an order was granted for the extension of powers of the liquidators so as to encompass all the powers contemplated in section 386(4) of the 1973 Companies Act.[1] On the basis of such extension of powers they now seek to move this application.
- [4] The respondent sought the reconsideration of the order under Part A, but this was not pressed with much enthusiasm by counsel for the respondent, Mr Daniels. This is unsurprising and sensible as no case is made out for such reconsideration.
- [5] The application for the provisional winding up is sought on the basis that the respondent is factually and commercially insolvent and on the basis that it is just and equitable that the respondent be wound up.

The issues

- [6] A debt of R 22 million owing to AMS by the respondent is the fulcrum on which the dispute in this case rests. The respondent alleges that this indebtedness to AMS was acquired by three individuals and thus that the debt is longer owing by the respondent to AMS. The respondent argues that the absence of such debt means that it is not factually insolvent, that it is trading profitably and that it is well able to pay its debts as and when they arise.
- [7] This assertion strikes at the heart of the dispute. If the debt was not acquired, the respondent is insolvent; if it was acquired then the respondent argues that not only is the respondent solvent but the liquidators also lack locus standi in that AMS is not a creditor of the respondent.
- [8] The liquidators argue that the basis for the alleged transfer of the indebtedness is not made out on the face of the documents and the surrounding facts and that the debt has not been transferred as alleged. They argue that the purported sale of shares and claims agreement relied on for this defence is nothing more than a contrivance designed to create the impression of the assignment of the debt when this has, in fact, not taken place under the agreement.
- [9] Thus, the question which falls squarely to be determined is whether the respondent has shown on balance that the validity of the alleged transfer of the debt,[2] and thus that the indebtedness is disputed on bona fide and reasonable grounds.[3]
- [10] With this in mind, I turn to an analysis of the facts surrounding the alleged disposition of the debt. The figures referred to have been rounded up or down for the sake of convenience.

The alleged disposition of the debt

- [11] The Platt family in the form of brothers Fred and Eric are main protagonists in the saga relating to the sale of the debt owed to AMS as are Messrs Douglas Cutter and Luke Quinn.

- [12] Prior to its liquidation, AMS, the respondent and Floorworx Africa Pty (Ltd) (“Floorworx”) formed part of a group of associated companies which were wholly owned by Accentuate Limited (“Accentuate”) which was listed on the Johannesburg Stock Exchange (JSE).
- [13] The respondent is a manufacturer and supplier of cleaning chemicals, equipment and consumables as well as of a range of water treatment technology. Floorworx manufactures and distributes a variety of flooring solutions. Thus, these entities have synergies.
- [14] Furthermore, the respondent is receiving approximately R 49 000 per month from Floorworx in respect of rental of shared IT/switchboard premises. Floorworx also purchases, on a monthly basis, chemicals, adhesives and solutions from the respondent in an amount of approximately R 300 000.
- [15] The respondent and Floorworx also each own valuable goodwill and intellectual property relating to their product bases. The preservation of these assets for those guiding the affairs of the group is obviously important.
- [16] Eric Platt a director of the respondent, who makes the answering affidavit, explains that AMS was used to perform a finance/treasury function for the group and to render management and administrative services to the subsidiaries. It did not otherwise trade.
- [17] Accentuate is a holding company only and also does not trade. It does not hold a bank account. Thus, the two trading entities in the group were the respondent and Floorworx.
- [18] The group, as a whole, fell into financial distress from about 2018. This distress led to a scheme which brought about the liquidation of AMS and to the concluding by key group executives of the transactions which led to the alleged disposition of the debt in issue.
- [19] As part of this scheme Accentuate was delisted and placed in voluntary business rescue on 14 April 2022. Floorworx was also placed in voluntary business rescue at the time.
- [20] Fred, at this stage, held directorships in Accentuate, Floorworx and AMS. Eric was a party to the agreement under which the debt was purportedly transferred out of AMS and is the current managing director of the respondent. Quinn was also previously a director of Accentuate and he and Cutter are directors of the respondent.
- [21] In the annual financial statements for the year ended 30 June 2019, it is recorded that AMS had accumulated losses of R 22.2 million and that its liabilities exceeded its assets by R 22.1 million.
- [22] The respondent, at this stage, is reflected in its financial statements as owing AMS R14 million pursuant to a loan which was unsecured, bore interest at a rate linked to prime and had no fixed term of repayment. It was furthermore noted by the respondent’s auditors and directors in these financial statements that there was uncertainty as to the recovery of this loan due to the going concern status of AMS.

- [23] The liquidators point out that in AMS's financial statements for the period ending June 2020, a loss of R 31.5 million was recorded. Importantly, the loan between AMS and the respondent was not recorded in the financial statements for this period and neither was the transaction under the agreement. Thus, the loan had simply been made to seem to disappear through creative auditing and accounting.
- [24] Elsewhere in the later financial statements, the loan of R 14.1 million is recorded as having been "paid". This is extraordinary in that it is common cause that it was never paid. Mr Daniels for the respondent argued that I should regard this as a forgivable mistake on the part of the directors and auditors.
- [25] In the financial statements of the respondent for the period ending June 2018 a loss of R8.3 million is recorded. Its assets exceeded its liabilities by R 4.3 million for this period.
- [26] It seems that it was at this stage that the respondent took the loan from AMS in the amount of R 14.1 million.
- [27] In the respondent's financial statements ending 2019, the net loss had increased to R10.8 million and the total liabilities exceeded the assets by about the same amount. Doubt was expressed on the respondent's ability to continue as a going concern.
- [28] Pursuant to its delisting, Accentuate was left with one major shareholder which owns approximately 90 % of its shareholding, Pruta Securities (Limited) Jersey ("Pruta").
- [29] It is probably not unrelated to the business dealings at issue that Pruta is established in a notorious tax haven. There can be little doubt that the main protagonists in this case or at least some of them are connected in some way with Pruta.
- [30] Eric explains that the business rescue of Floorworx and Accentuate led to FNB calling up the loan facility from AMS. Because of the usual cross sureties within the group this led to claims against the other group members by FNB. Eric suggests that this was unexpected in that these cross sureties had been "overlooked". This is unlikely. It is more probable that it was part of the plan of isolating AMS and attempting to keep the other members of the group viable by using the external finance from Pruta selectively.
- [31] Thus, part of the scheme appears to have involved the indebtedness of FNB being settled by loan finance obtained from Pruta. This loan finance was applied selectively to protect the respondent from foreclosure by FNB whilst leaving other creditors of AMS and thus essentially of the group at risk. Furthermore, in terms of the scheme, the main asset of AMS, being the claim against the respondent, was to be stripped out of AMS thus rendering AMS hopelessly insolvent whilst the respondent was, in theory, to be free of this debt.

- [32] The scheme was purportedly orchestrated through the terms of the Sale of Shares and Claims agreement entered during March 2020 (“the agreement”). In terms of the agreement, Eric Platt, Cutter and Quinn purchased from Accentuate the shares of the respondent from Accentuate and purportedly the claim for the repayment to AMS of the loan of the respondent.
- [33] In terms of the agreement, the loan owing respondent had by this been increased to R 22 million. This claim for R22 million, which was an asset belonging to AMS, was purportedly sold to the three purchasers. Accordingly, in theory, the loan no longer fell to be paid by the respondent to AMS but was payable to the three purchasers. The purchase consideration for both the claim and the shares of the respondent was R 10 million.
- [34] The clear aim of the scheme which emerges from the agreement was to acquire control over the business of the respondent including its goodwill and intellectual property on the basis that it was rendered debt free.
- [35] The sale claims were defined to mean all the claims of Accentuate against the respondent and the AMS loan.
- [36] In relation to the devising of the scheme, it is alleged on behalf of the respondent by Eric Platt that, when the group fell into distress, the directors sought restructuring advice from Stephen Roper. It seems that an attempt is made by Eric to place the orchestration of the scheme at the door of Roper.
- [37] It was decided by the directors in the group to appoint Roper as Business Rescue Practitioner (“BRP”) of Floorworx and Accentuate once these entities were in business rescue. It seems that there was initially cooperation between the directors and Roper.
- [38] The success of the scheme, on the face of the agreement depended on the cooperation of Roper as BRP of Accentuate and Floorworx.
- [39] The relationship between Roper and these directors has, however, soured. In February 2023 Pruta launched an application to remove Roper.
- [40] Eric attempts in the answering affidavit to create the impression that the Platts, Quinn and Cutter are at arm’s length from Pruta. As I have said, this is unlikely.
- [41] The BRP is thus no longer cooperative. He is represented by the same attorneys who represents the liquidators. Thus, there is a concerted approach afoot; the BRP of Accentuate qua purported seller of the claim and the liquidators of AMS adopt the same stance – being that the purported disposition of the claim of AMS against the respondent is part of an unlawful scheme to dispossess AMS of its asset and is void ab initio.
- [42] The agreement is called a “Sale of Shares and Claims Agreement”. This is misleading as to the sale of the claims. It assumes that the debt in issue was Accentuate’s to dispose of. However, it was not.

- [43] I was asked by Mr Daniels to presume a cession of the debt to Accentuate on the basis that there was no objection made on behalf of AMS to the transaction at the time. This is a stretch. As I have said, the BRP of Accenture accepts the fact that the sale was incompetent and that there was no cession of the claim.
- [44] In any event, such a cession would be a blatant dispossession for no value on any version and the transaction certainly would not pass a solvency and liquidity test.
- [45] It can be safely assumed, at this stage, that the sale by Accentuate of the shares to Eric Platt, Quinn and Cutter is prima facie not at arm's length.
- [46] The following peculiarities which are inherent in the text of the agreement reveal the illegality of the transaction. The AMS loan was "deemed" to be reduced by the payment of the purchase price of R10 million which was, in fact, due to Accentuate. Such a contortion is inexplicable in normal commercial terms. Why would the purchase price for the shares and claims not go to the seller (Accentuate) but rather to the entity whose claim has been purchased from the seller?
- [47] Thus, at least for the purposes of this provisional application, there is no feasible basis on which this loan has been made to disappear.
- [48] Once it is accepted that this "disappearing" loan could not actually legitimately have disappeared, it follows that the loan, in fact, remains an asset for the benefit of the creditors of AMS.
- [49] There has been an attempt made to disguise the disposition as being acquired for value on the basis of the payment of the purchase price under the sale of shares and claims into the bank account of AMS. It is, however, common cause that Accentuate had no bank account and that the AMS account was habitually used by the group. In terms of the agreement Accentuate is the payee and the payment was to it and not AMS.

Conclusion

- [50] Shorn of all the creative accounting and the leaps of logic and sleight of hand that the scheme requires, the transaction is patently invalid ex tunc.
- [51] Thus, to my mind, the indebtedness of the respondent has not been shown to have been extinguished. I, thus, find that, for the purposes of this part of the application, the respondent is insolvent.

Order

- [52] I thus order as follows:
- [2] A rule nisi is issued calling upon any interested person to appear and show cause on the 23rd of October 2023 why a final order for winding up should not be granted by this court.

[3] The rule nisi is to be published in the Government Gazette, the Staatskoerant and The Star and Die Beeld newspapers.

[4] The cost of this application are costs in the winding up

D FISHER

JUDGE OF THE HIGH COURT

JOHANNESBURG

Heard: 20 July 2023

Delivered: 03 August 2023

APPEARANCES:

For the applicants:

Adv. J E Smit

Adv. L Van Rhyn van Tonder

Instructed by:

Smit Sewgoolam Incorporated

For the respondent:

Adv. A J Daniels SC

Adv. E Larney

Fullard Mayer Morrison Incorporated

[1] 61 of 1973.

[2] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956

(2) SA 346 (T).

[3] Kalil v Decotex (Pty) Ltd [1987] ZASCA 156; 1988 (1) SA 943 (A).

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