

SOUTH AFRICA / JUDGMENT

Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd , In re: Mabe v Cross Point Trading 215 (Pty) Ltd (2130/2012) [2012] ZAFSHC 155 (23 August 2012)

[2012] ZAFSHC 155

COURT

Free State High Court, Bloemfontein

BEFORE

Kruger

CASE / FILE NUMBER

2130/2012

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 2130/2012

In the matter between:

LIDINO TRADING 580 CCApplicant

and

CROSS POINT TRADING (PTY) LTDRespondent

IN RE:

TSHEGOFATSO PRUDENCE MABEApplicant

CROSS POINT TRADING 215 (PTY) LTDRespondent

JUDGMENT BY: KRUGER, J

HEARD ON: 16 AUGUST 2012

DELIVERED ON: 23 AUGUST 2012

[1] This judgment concerns a liquidation application and a business rescue application under section 131 of the Companies Act 71 of 2008, both brought under the same case number.

[2] The following entities and persons feature in these proceedings:

Lidino Trading 580 CC (“Lidino”)

Elizabeth Geldenhuys = sole member

Cross Point Trading 315 (Pty) Ltd (“Cross Point”)

Directors:

(1) Tshegofatso Prudence Mabe (daughter of Orid Daddy) (“Ms Mabe”)

(2) Elizabeth Geldenhuys (wife of J.H.) (“Mrs Geldenhuys”).

The two persons who were responsible for the creation of Cross Point and who appear to have an interest in whether Cross Point is liquidated or placed under business rescue are:

Mr J. H. Geldenhuys (“Mr Geldenhuys”)

Mr Orid Daddy Mabe (“Mr Mabe”).

[3] Lidino brought an application for the liquidation of Cross Point on 25 May 2012. Mr Mabe was the deponent to the answering affidavit opposing the liquidation application, filed on 20 June 2012.

[4] In the answering affidavit Mr Mabe says that he has instructed his attorneys to bring an application in terms of section 131 of the Companies Act 71 of 2008 for business rescue. In the answering affidavit Mr Mabe alleges that Cross Point is not commercially or factually insolvent and “may be rescued by the commencement of business rescue proceedings.” Lidino’s replying affidavit was served and filed on 13 July

2012. Mrs Geldenhuys, deponent to Lidino’s replying affidavit says that no application for business rescue has been launched.

[5] The answering affidavit was served on the day set down for the hearing of the matter before Murray AJ, 21 June 2012. She postponed the matter to 26 July 2012 and ordered Cross Point to file a condonation application for the late filing of the answering affidavit and ordered Cross Point to pay the costs on an attorney and client scale. No such condonation application was ever filed.

[6] On 25 July 2012, the day before the date the matter was postponed to, Ms Mabe caused a business rescue application, in which she was the applicant and Cross Point the respondent, to be issued and served at 15h01 on Lidino’s attorneys. I received that application shortly before 16h00 on 25 July 2012.

[7] On 26 July 2012 I postponed both applications to 16 August 2012 and determined times for the filing of further papers. I ordered Mr and Ms Mabe to pay the costs occasioned by the hearing on 26 July in their personal capacities on the attorney and own client scale.

- [8] On 1 August 2012 Mrs Geldenhuys and Lidino filed an application to intervene and oppose the business rescue application, together with an affidavit by Mrs Geldenhuys also serving as an answering affidavit to the business rescue application. A replying affidavit in the business rescue application was deposed to by Mr Mabe on 10 August 2012. No objection was raised to the intervention application of Mrs Geldenhuys and Lidino.
- [9] On 10 August 2012 the attorney of Cross Point and Mr Mabe withdrew as attorney of record. Mr Mabe requested leave to present the case on behalf of his daughter, Ms Mabe and Cross Point on 16 August 2012. Mr Tsangarakis, for Lidino, properly and correctly pointed out that there was no basis upon which Mr Mabe, not being an attorney or advocate, could appear, but stated that it was important for Lidino to bring this matter to finality. I deemed it in the interests of justice to allow Mr Mabe to present the case for Ms Mabe. The two persons who have an interest in these proceedings are Mr Geldenhuys and Mr Mabe.
- [10] The events leading to the creation of Cross Point are set out in the founding affidavit to the liquidation application. In February 2011, Mr Geldenhuys approached Mr Mabe to start a BEE Compliant Construction Company. It was decided that Ms Mabe and Mrs Geldenhuys would be the directors of the new company, Lidino. Lidino would apply for specifically (but not only) tenders by local and national government. In the founding affidavit Mrs Geldenhuys says:
- “7.4.2 It was agreed that my husband and Daddy Mabe had the necessary knowledge and expertise required by the Respondent [Cross Point] to perform in terms of its anticipated contractual obligations in the event that a tender was awarded to it. To this end, I would be supported and represented by my husband and Me Tshegofatso Prudence Mabe would be supported and represented by her father, Daddy Mabe in conducting the affairs of the Respondent.”*
- [11] In March 2011 Cross Point was awarded a sub-contract in what is described as the Cell C project. The contract had a total value of R1 083 000,00. Mr Geldenhuys attended at the sites and started with the erection of cell phone reception towers, while Mr Mabe was still involved in another project. On 15 June 2011 Cross Point was awarded another sub-contract relating to roofing at C-Max Prison in Pretoria. The sub-contract was awarded to Keren Kula Construction (Pty) Ltd and was for R2 289 440. Because Mr Geldenhuys could not continue to oversee both projects, it was agreed that Mr Geldenhuys would attend to the C-Max project, and Mr Mabe would supervise the Cell C project.
- [12] In the answering affidavit Mr Mabe says that problems arose because employees of Cross Point were not paid in time whereas employees working for Lidino CC, of which Mrs Geldenhuys was the sole member, were paid. Mrs Geldenhuys was in control of the finances of Cross Point, and Mr Mabe says she was biased towards Lidino’s employees to the prejudice of other employees. Mr Mabe contends in the answering affidavit that Mr Geldenhuys and Mrs Geldenhuys used Cross Point to get contracts, using his daughter’s favourable BEE status, then Mr and Mrs Geldenhuys took over those contracts into Lidino. The thrust of Mr Mabe’s opposition to the liquidation application is that Lidino (i.e. Mr &

Mrs Geldenhuys) have taken over the contracts and money due to Cross Point. Mr Mabe seemed to realise that the business rescue application is not an appropriate remedy in the circumstances prevailing here. He even went so far as to say in argument (without prompting) that the remedy under section 163 of the Companies Act 71 of 2008 dealing with the relief from oppressive or prejudicial conduct or from the abuse of the separate juristic personality of a company might have been more appropriate than a business rescue application in these proceedings.

- [13] The founding affidavit in the business rescue application is made by Ms Mabe. She describes herself as a director and shareholder of Cross Point, residing at Meadowlands, Soweto. In March 2011 Cross Point was bought as a shelf company. Ms Mabe was at that time a full time student at Boston College Westgate. The arrangement between Mr Geldenhuys and Mr Mabe was that each would contribute R50 000 as well as their expertise in the construction industry. Since she was a student at the time, she would not participate in the day-to-day management of Cross Point. Cross Point would tender for projects “since my participation would give the company a favourable Black Economic Empowerment rating. This included tenders by Local, Provincial and National Government.” She goes on to state that she did not have any experience in the management of a company or construction projects. She says in October 2011 she had a break in her studies and started actually participating in the day-to-day administration of the company. In answer to this allegation, Mrs Geldenhuys says in the answering affidavit:

“15.3 The deponent attended the business of the Second Respondent for two days in the month of October 2011 whereafter she became bored and was never to be seen again.”

15.4 The deponent is invited to place before the Honourable Court any documentary proof which substantiates the allegation that she was ‘...actively participating in the day-to-day administration of the Respondent’. “

No such proof was advanced by Ms Mabe.

- [14] Ms Mabe says Mrs Geldenhuys refused to make invoices and bank statements available to her and Mr Mabe. In the answering affidavit Mrs Geldenhuys says she gave Ms Mabe the bank statements F8 and F9 attached to the founding affidavit. In the replying affidavit Ms Mabe says:

“These bank statements are not reflective of all the finances of Cross Point.”

She says she queried the bank statements in her e-mail of 9 November 2011 (General Statements). Ms Mabe does not dispute the allegation of Mrs Geldenhuys that Ms Mabe has a bank card of the banking account of Cross Point and is entitled to the bank statements.

- [15] In the founding affidavit Ms Mabe says:

“12.

The following projects are still to be completed by the respondent: Remainder of the C-Max contract and other Cell C towers.”

[16] The answering affidavit by Mrs Geldenhuys records that no further contracts exist for Cross Point to complete, and refers to the affidavit of Pieter Gouws, who is the project manager in the employ of Keren Kula Construction (Pty) Ltd, and he states:

“There are no projects whatsoever to which the second respondent is entitled in respect of the C-Max prison project.”

He says annexure F7, attached to the founding affidavit, is not a subcontract. That statement is correct. Further Gouws says that no contracts totalling R13 million, as contended by Ms Mabe in the founding affidavit, have at any stage been awarded to Cross Point. He says Cross Point has no right to additional construction works whatsoever.

THE LAW ON BUSINESS RESCUE APPLICATIONS

[17] A number of reported cases deal with business rescue applications. In spite of the fact that all the judgments make it clear that the test for granting a business rescue application is lighter than was the case with judicial management, none of the applications for business rescue in the reported cases I have read was successful.

(i) SWART v BEAGLES RUN INVESTMENTS 25 (PTY) LTD (FOUR CREDITORS INTERVENING) 2011 (5) SA 422 (GNP)

Makgoba J held that the test is whether a case has been made out (1) that the company will be able to carry on business on a solvent basis and/or (2) that the granting of business rescue will result in creditors being in a better position than under liquidation (par [37]).

SOUTHERN PALACE INVESTMENTS 265 (PTY) LTD v MIDNIGHT STORM INVESTMENTS 386 LTD 2012 (2) SA 423 (WCC). Eloff AJ pointed out that the business rescue application must address the cause of the demise or failure of the company’s business, and offer a remedy therefor that has a reasonable prospect of being sustainable (par [24]).

OAKDENE SQUARE PROPERTIES (PTY) LTD AND OTHERS v FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD AND OTHERS 2012 (3) SA 273 (GSJ). Claasen J says that the applicant must place facts before the court to indicate that creditors will get a better return than under liquidation. He also points out that liquidation is more appropriate in the case of deadlock. Where there are many disputes, mediation by a business practitioner will not be appropriate (289D – G).

(iv) PROSPEC INVESTMENTS (PTY) LTD v PACIFIC COAST INVESTMENTS 97 LTD AND ANOTHER (Free State case 5000/2011, judgment by Van der Merwe, J on 28 June 2012). Vague averments and speculative suggestions will not be sufficient for a court to grant an application for business rescue (par [117]). The applicant did not show a reasonable prospect of a better return than would be the case in liquidation (par [27]).

ONUS

- [18] Before granting a business rescue application, the court must be satisfied that there is a reasonable prospect for rescuing the company (section 131(4)(a)(iii), apart from the other requirements listed in section 131(4)(a)). It has been held that a prospect here means an expectation, which in turn signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable – per Van der Merwe J, in *PROSPEC INVESTMENTS (PTY) LTD AND ANOTHER v PACIFIC COAST INVESTMENTS 97 LTD*, (supra) par [12].

EMPLOYEES

- [19] The interest of employees is prominently featured as an object of business rescue proceedings. The rights of employees are secured by business rescue proceedings. Payments due to employees are given super-preference rights (section 135(1) and 135(3)(a); ANNELI LOUBSER, “The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)” (2010) TSAR 501 at 509 – 510). In response to the repeated statement that Cross Point has no employees, in the very last affidavit which was filed in these proceedings, the replying affidavit of Ms Mabe to the business rescue application, deposed to on 10 August 2012, she says “There are still employees for the Cross Point. ‘See annexure 10’”. There is no annexure 10 to the replying affidavit.
- [20] One fact which is common cause is that there is a deadlock between the directors – be that the nominal Ms Mabe and Mrs Geldenhuys, or the persons doing the work, Mr Mabe and Mr Geldenhuys. In the case of deadlock liquidation is more appropriate than business rescue (OAKDENE supra 289E – F).
- [21] A serious problem with the business rescue application is that no concrete plan is put forward. Mr Mabe’s view is that the business rescue practitioner will deal with the specific contracts and decide on a way forward. The answer to this argument is that, should there be a liquidation, the liquidator would be able to consider the particular contracts and determine what to do.

NAMING OF A PRACTITIONER

- [22] Section 131(5) provides that, when granting a business rescue application, the court may appoint an interim business rescue practitioner. LOUBSER, (supra) at 513 points out that in practice the court will have to appoint such person, because there is no provision for the temporary custody of the company’s assets (unlike the proceedings for an interim judicial management order). In *SWART v BEAGLES RUN INVESTMENTS 25 (PTY) LTD (FOUR CREDITORS INTERVENING)* 2011 (5) SA 422 (GNP) the applicant named a person to be appointed as interim practitioner in its Notice of Motion (par [1]). In this matter, Ms Mabe asks that the Companies and Intellectual Property Commission be ordered to appoint an interim business rescue practitioner. During argument Mr Mabe informed the court that he has been to the offices of the Commission, and the officials there indicated to him that they would be able to give him the particulars of a suitable person who could be appointed in this case, should this

court grant the order.

[23] Mr Tsangarakis says that Cross Point is factually and commercially insolvent. It has not done business since May 2012. Mr Mabe contends that the claim upon which Lidino bases its application is not a proper one. On these papers, the claim is *prima facie* in order. Upon investigation, a liquidator may find that Lidino has not proved a claim. Cross Point is a company, and all that needs to be established is commercial insolvency, being an inability to pay its day-to-day expenses. The allegations of commercial insolvency in the founding papers have not been rebutted on substantial grounds.

[24] The purpose of a business rescue is to grant an essential breathing space while a business rescue plan is being implemented (SOUTHERN PALACE par [3]). In this case there is no question of a breathing space needed or the implementation of a business plan. There is no need for a breathing space – nothing is happening. In this case a business plan will simply prolong the agony (SOUTHERN PALACE par [24]). There is no indication of the likely cost of the business rescue, and where the money to pay the business rescue practitioner

will come from. No concrete reasons are suggested as to why the business rescue plan has a reasonable prospect of success (SOUTHERN PALACE par [24]). A liquidator's fees are subject to taxation (OAKDENE 290D-E). The two directors of Cross Point, Ms Mabe and Mrs Geldenhuys are at loggerheads as to the need for a business rescue practitioner. In such circumstances it is difficult to see how any business rescue plan can succeed (OAKDENE 290G- H).

[25] Cross Point was formed to do contract work. The initial disputes have led to a state of dormancy. Having regard to the letter by Gouws of Keren Kula Construction that there is no contract for further work to Cross Point, the state of dormancy of Cross Point at this stage has no prospect of coming to an end. To try and establish that there is a future for Cross Point, Mr Mabe handed in a letter dated 8 August 2012, addressed to Mercfang Facade CC (NB: not to Cross Point) stating the availability of sub-contract work. Cross Point was formed for a specific purpose, namely to do contract work. That purpose can, on these papers, no longer be achieved. (See APCO AFRICA (PTY) LTD AND ANOTHER v APCO WORLDWIDE INC [2008] ZASCA 64; 2008 (5) SA 615 (SCA) par [20]).

[26] Mr Mabe contends that Lidino is hijacking the work which belongs to Cross Point. He says the workers who work for the two entities are the same people. He says, as appears from Cross Point's papers, that initially Lidino helped to get Cross Point's work done; then instead of giving the work over to Cross Point, Lidino kept the work. This may be so, although there is no evidence on the papers thereof. A liquidator is the obviously correct person to get to the bottom of such allegations and to determine what is to be done.

[27] Looking at the requirement of it being just and equitable to liquidate a company – as the court has to do in all cases under the 2008 Companies Act (see HBT CONSTRUCTION AND PLANT HIRE CC v UNIPLANT HIRE CC 2012 (5) SA 197 (FB) par [6] (viii)):

- [28] Categories of circumstances where it will be just and equitable to wind up a company are set out in the leading case of *RAND AIR (PTY) LTD v RAY BESTER INVESTMENTS (PTY) LTD* 1985 (2) SA 345 (W) at 350C – H. The first is the disappearance of the company’s substratum, where the company was set up for a particular purpose and that purpose can no longer be achieved. In this case Cross Point was set up to do contract work, and that can no longer be done due to lack of co-operation and trust between the directors. The second point refers to illegality of the objects of the company. Here both Mrs Geldenhuys and Ms Mabe say that it was important to create a company with a favourable BEE profile. It appears that to date that profile has not been needed or used, but the point remains that the company was created with that aim. The third category is a deadlock which results in the management of the company’s affairs being so divided as not to be able to do proper business. Here the two directors are hopelessly at loggerheads, litigating against each other. The authorities are clear that in a deadlock situation liquidation is the correct and proper remedy. The fourth category mentioned is the grounds analogous to the dissolution of a partnership. Cross Point is essentially a partnership between the Geldenhuyses and the Mabe. Each contributed R50 000, as one would expect of a partnership. Had Cross Point been a partnership, there is no doubt that it would have to be terminated. The fifth category mentioned in the *RAND AIR* - case is oppression. Interestingly Mr Mabe referred in argument to section 163 of the 2008 Companies Act, dealing with oppression. He feels he and his daughter are being oppressed by the Geldenhuyses. According to the *RAND AIR*-case, oppression is one of the grounds upon which it will be just and equitable to issue a winding up order.
- [29] In this case one is essentially dealing with a dispute between Mr Mabe and Mr Geldenhuys. They started Cross Point with the intent to make money out of ventures they would jointly do through the vehicle of Cross Point. Somewhere along the line their relationship soured, and in November 2011 Geldenhuys wanted to terminate the relationship. Mr Mabe feels there is value in Cross Point and wants to continue. What is clear is that the parties are hopelessly at loggerheads, and that there is no current or definite future business. Mr Mabe feels that Mr and Mrs Geldenhuys have through Lidino taken money paid by clients for the benefit of Cross Point, and used that money, through Lidino for their own benefit. The liquidator will investigate those claims and the costs pertaining to them, if need be, by means of an insolvency inquiry, and ensure that Mr Mabe (Cross Point) gets what is due. The liquidator has the ability to consider invoices and payments, and to follow paper trails and other evidence as to where funds originated and where the money ended up. On the facts the business rescue application has to fail, and a provisional liquidation order is to be issued.

ORDER

1. Leave is granted to Elizabeth Geldenhuys and Lidino Trading 580CC to intervene in the business rescue application brought by Tshegofatso Prudence Mabe against Cross Point Trading 315 (Pty) Ltd.

2. The application of Tshegofatso Prudence Mabe to place Cross Point Trading 315 (Pty) Ltd under business rescue as contemplated in section 131 of the Companies Act 71 of 2009 is dismissed.
3. Cross Point Trading 315 (Pty) Ltd is placed in provisional liquidation in the hands of the Master of the High Court with the return date 27 September 2012.
4. The costs of the liquidation application, and the costs of the business rescue application are costs in the liquidation.

KRUGER, J

On behalf of the applicants: Adv. S. Tsangarakis

(Lidino Trading 580 CC) Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of Ms T.S. Mabe: Mr O.D. Mabe in person

(Applicant in the

Business Rescue Application)

/EB/wm

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