

SOUTH AFRICA / JUDGMENT

Lipton and Others v Activate Telecoms (Pty) Ltd (2022/018723) [2024] ZAGPJHC 853 (29 August 2024) [2024] ZAGPJHC 853

COURT

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

2022/018723

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Numbers: 2022-018723

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

In

the matter between:

In

the application between: DAVID
IAN LIPTON N.O. (in his representative capacity as trustee for
the time being of the Power Trust 134 with Masters reference
number IT10984/98(T))
First
Applicant
BRUCE
LAURENCE LIPTON N.O. (in his representative capacity as
trustee for the time being of the Power Trust 134
with
Masters reference number IT10984/98 (T))
Second
Applicant
JASON
MEYER LAWRENCE BEIRA N.O. (in his representative capacity as
trustee for the time being of the Power Trust 134 with Masters
reference number IT10984/98
(T))
Third
Applicant
and
ACTIVATE
TELECOMS (PTY) LTD
(Registration
Number: 2007/025253/07)
Respondent

JUDGMENT

SENYATSI J

Introduction

[1] This is an opposed application for the winding up of the respondent, Activate Telecoms(“Active”), who is alleged to have been unable to pay its debts when they fell due. The application for winding up is sought in terms of Sections 344(f) and (h) as well as 345(1) (c) of the Companies Act, 61 of 1973 (the “Old Act”) which relate to the respondent who is unable to pay its debts and (Section 344(f) as read with Section 345(1)(c) of the Old Act) and/or Section 163(2)(b) of the Companies Act, 71 of 2008 (the “New Act”), which relates to winding up on the grounds of alleged oppressive behaviour of a member of a company by other members.

Background

[2] The Power Trust is a shareholder in the respondent and alleges that it is a creditor of the respondent by virtue of a loan made to

the respondent and/or a cession of Amakhosi Satellite Corporation (Pty) Ltd (“Amakhosi”) and claimed against the respondent. Amakhosi’s rights, title and interest in its claim against the respondent, so avers the applicant, was ceded to the Power Trust on 18 April 2022. This cession is not disputed by the respondent. The loan, so avers the applicant, which amounts to R5 842 893.68 was made to the respondent from 2009 on a when needed by the respondent basis. The applicants claim that according to the latest financial statements of the respondent the last of which is dated February 2016, an amount of R1 400 093.00 is owed by the respondent to Power Trust. The applicants base their contention about the loan on the minutes of the board meeting dated 26 November 2009 in terms of which it was recorded that a historic loan by Amakhosi which is a related entity of Lipton, to the respondent in the sum of R 6.8 million. It was agreed that the repayment of the loan will be made by way of 20% of the nett profit annually prior to the payment of dividends. The minutes were signed by Mr. David Lipton (“Lipton”), Mr. Wimpie Westcott (“Westcott”) and Mr Mark Ritchie (“Ritchie”) who were the directors of the respondent. The respondent was previously known as Activate Equipment (Pty) Ltd, and it later changed its name to the current one. The financials are all reflected in the previous name of the respondent. I have omitted from this judgment, all the facts that are not relevant for the relief sought by the applicant.

The loan

- [3] In the financial statements for the years 2015 and 2016, a record of non-current liabilities related to loans by associated companies and shareholders as well as current liabilities related to loans from shareholders. It should be noted that the financials were signed off by all the directors of the respondent. In the 2015 item 4 of the notes to the financial under the non-current liabilities, the respondent is said to be owing Wildlook P2, an associated company the sum of R15 521.00 with no fixed terms of repayment at 0% interest. Amakhosi is reflected to be owed the sum of R 2 523 593.00 during the same year of reporting. The note states that the loan will be repaid as stipulated in the loan agreement at 10.5 % interest for 2015 and 10.5% in 2014.
- [4] In the 2016 item 4 of the notes to the financials under the non-current liabilities the respondent is said to be owed by Wildlook P2 an associated company, the sum of R6 426.00 with no fixed terms of repayment at 0% interest. Amakhosi is reflected to be owed the sum of R 3 026 794.00 during the same year of reporting. The note states that the loan will be repaid as stipulated in the loan agreement at 10.5 % interest for 2016 and 10.5% in 2015.
- [5] During 2013, two additional independent directors were appointed to the respondent’s board. There were Mr Njifor (“Njifor”) and Mr Mahlalela (“Mahlalela”). The latter served as a board chairperson. During April 2015, Lipton, who was always the managing director of the respondent, resigned from his position so he could dedicate sufficient time to the respondent due to his frequent international travels involving the projects of one of his companies but remained as a non-executive director of the board of the respondent. Mahlalela was appointed as a managing director temporarily with the view to finding a permanent replacement managing director. The replacement managing director was never

found and Mahlalela remained in the position until his untimely demise during 2021 due to Covid-19 complications.

- [6] During 2017, Mr Mahlalela bought shares in the respondent to help the respondent overcome its liquidity challenges and he also became a director. For his investment, he would eventually end up owning 40% equity in the respondent from May 2019 upon acquiring additional 5% shares from each shareholder. The dilution of the other shareholders resulted in Power Trust equity in the respondent reducing from 33% to 25%. So was the case with Westcott and Ritchie's dilutions. The payment for the subscription of shares was made by Mahlalela during 2017 and during May 2019 in accordance with the agreement.
- [7] In support of its application, the applicant has, through its trustees, attached annual financial statements, which have been referred to, and the acknowledgement of loans recorded in the board meetings going as far back as 2012. It is not evident from the minutes recorded what the terms around the quantum of the loans to Amakhosi or the applicant were, except for the reference as to how the interest rate and repayment without the specific rate of the repayment. In other words, it is unclear what the full repayment terms are and when the loans referred to in the minutes are due and payable.

Oppression

- [8] Mahlalela's offer of additional cash injections of R6 million to acquire more shares was supposed to pay inter alia, the various liabilities inclusive of the loan owed to Lipton and this was communicated to the shareholders in accordance with the proposed share structure in 2019. However, the deal did not materialise. During July 2019, so avers the applicant, it came to Lipton's attention that Westcott and Ritchie had been blacklisted. He demanded their resignation from the board as he felt this would put the respondent's credit profile at risk. The two directors refused to resign.
- [9] Njifor addressed an email to all the shareholders during October 2019 in which she raised her concerns about the state of the respondent and that she was going to call for an investigation of the affairs of the respondent and the removal of all the directors and replacement thereof by independent directors. Ultimately, during February 2020, it was decided that Lipton, Westcott, Ritchie and Mahlalela would resign from the board and that they would be replaced by the independent directors. Only Lipton resigned and the other directors did not and claimed that no replacement directors could be identified. Lipton contends that he would not have resigned if he knew that the other directors would renege on the agreement to resign.

- [10] In order to enforce the repayment of the loan to the applicant, Lipton insisted that Wescott and Richie transfer their entire shareholding to the applicant, which demand was ignored. Since his resignation, so contends Lipton, he has been completely locked out of the business of the respondent and this so he argues, amounts to oppression as envisaged in section 163 of the new Act. He does not get the financial statements of the respondent anymore as he used to get them when he was a director.
- [11] The applicant also relies on the acknowledgement of debt that the respondent concluded with Liquid Telecom ("Liquid"), a division of Neotel during March 2021 in terms of which the respondent acknowledged its indebtedness of R2.8 million which consists of capital plus penalty interest, as another ground it alleges the respondent is unable to pay its debts. To this averment, the

respondent contends that whilst it admits the indebtedness, it is meeting its obligation of repaying Liquid in accordance with the acknowledgement of debt. The respondent avers that the allegation by the applicant is not a basis for the applicant to rely on as a ground to wind up the respondent.

- [12] The respondent furthermore, through the mouth of Ritchie who provided the affidavit, denies the existence of a historic loan of R6.8 million. He contends on behalf of the respondent that when he met Lipton in 1997, Lipton through one of his companies had an arrangement with Motorola regarding mobile phones which were held in a bonded warehouse in United Kingdom and that the mobile phones would be supplied to Lipton on consignment. This meant that Lipton would receive the consignment without paying for it and only be required to pay when his company sold the units. However, due to the weakening of the rand against the foreign currencies at the time as well as increased competition in the supply of mobile phones in South Africa, the phones were never delivered and accordingly no historic loan involving the respondent ever existed.

Issues

- [13] The legal issues to be determined in this application are the following:
- (a) Whether the applicant has succeeded to prove the debt by relying on the contract and if so, if the respondent is unable to pay its debts as envisaged by sections 344(f) and (h), 345(1)(c) of the Companies Act, 61 of 1973 (the "Old Act") and whether shareholder oppression has been established as envisaged by and/or Section 163(2)(b) of the Companies Act, 71 of 2008 (the "New Act");
 - (b) Whether a case has been made for winding as envisaged by section 163 of the New Act.

The legal principles

- [14] The general requirements for Section 81 (1)(c) (ii) of the New Act which deals with winding up of solvent companies, states that :-

“ A court may order a solvent company to be wound up if—

- (c) one or more of the company’s creditors have applied to the court for an order to wind up the company on the grounds that—

(ii) it is otherwise just and equitable for the company to be wound up;”

[15] Apart from the circumstances contemplated in section 81, Chapter XIV of the Old Act continues to apply with respect to the winding-up of a company as if that Act had not been repealed [1], save that sections 343, 344, 346 and 348 to 353 of the Old Act do not apply to the winding-up as a solvent company—except to the extent necessary to give full effect of the provisions dealing with winding-up and deregistration of solvent companies in Part G of Chapter 2 of the New Act.[2]

[16] The application for winding up must contain evidence of the facts upon which the Court is able to form the opinion that prima facie the elements of the cause of action for sequestration have been proven. Where the application contains no or insufficient evidence in this regard, the Court should dismiss it unless, in the circumstances, it is disposed to permit it to be supplemented.[3] In *Pearson v Magrep Investments (Pty)Ltd and Others*[4], in emphasising the dismissal of the application where no prima facie case was made the Court held as follows:

“ At the hearing Mr. Curlewis , for the respondents, took two objection in limine and applied for striking out of large portions of the applicant’s replying affidavit. In the view that I take of the matter it is only necessary to deal with one of the objections, namely that the founding affidavits do not make out a prima facie case for the relief claimed. It is open to the respondents to apply for the dismissal of the application on this ground notwithstanding they have delivered affidavits dealing with the merits of the application. The approach to this decision of this objection is similar to that adopted in deciding an exception to a pleading in that (a) the founding affidavits alone fall to be considered and (b) the averments contained in those affidavits must be accepted as being true. (see Taylor v Welkom Theatres (Pty)Ltd and Others 1954(3) S.A. 339(O) at p 345; Bader and Another v Weston and Another, 1967 (1) S.A. 134(C) at p.136; Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others, 1968(1) SA 517 (C) at p. 519; Hart v Pinetown Drive-in Cinema (Pty) Ltd ,1972(1) S.A. 464 (D) at p.465).”

[17] The Court also may refuse to make an order on application where the material evidence is inadmissible.[5] The onus is on the applicant to establish the requisites for the granting of winding up application irrespective of whether or not the application is opposed.[6] Where the application is opposed as in the instant case, the issue is whether on the papers there is a balance of probabilities in favour of the applicant in respect of the facts upon which he relies as providing the basis for the Court to reach the relevant opinion.[7]

[18] In order to successfully obtain the relief of winding up of the respondent, the applicant must prove that it is owed and that the respondent is unable to pay its debts. However, our law does not permit that the winding process should be embarked upon where the debt is disputed on valid grounds such as prescription or that the debt is not due. In such

circumstances, the normal litigation process of approaching the Court to recover the debt should be considered by the creditor whose debt is disputed. Where there are factual disputes, the approach in *Kalil v Decotex (Pty) Ltd*[8] was summarised in *Payslip Investments Holdings CC v Y2K TEC Ltd*

[9] as follows:

“ According to these guidelines a distinction is to be drawn between a dispute regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospect of viva voce evidence tipping the scales in favour of the applicant. With reference to the disputes regarding their respondent's indebtedness, the test is whether it appeared on papers that the applicant's claim is disputed by the respondent unreasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities.”

[19] Where the balance of probabilities is in favour of the applicant, the court should not hear the viva voce evidence at the stage of the proceedings for the purposes of disturbing such balance unless there are exceptional circumstances

for doing so[10]; for instance, where the facts in dispute related to whether an alleged act of insolvency has been committed in the dentist financial

position is such that there may be serious prejudice both to him and to the general body of his creditors if he is in a state where to be provisionally sequestrated, for example, in the absence of a sequestration, he is able to continue with lucrative employment which would enable him to discharge all his debts within a reasonable time. The same will apply for instance where a company that is supposed to be wound up has consistent contract which will enable it to pay creditors if it will not be liquidated.

[20] In addition to its statutory discretion when asked to grant a liquidation order[11], the Court has an inherent jurisdiction to prevent abuse of its process. For instance, although a case for liquidation may be capable of being established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than a bona fide achievement of show liquidation of the estate for its own sake for example, the enforcement of debt bona fide disputed.[12] It is for instance, also an abuse of process to use sequestration proceedings to enforce payment of a debt, the existence of which is disputed bona fide by the debtor on reasonable grounds (the onus being on the debtor to establish such a dispute).[13] Where is a genuine and bona fide dispute regarding the respondent's indebtedness to the applicant the Court should as a general rule dismiss the application.[14]

[21] In *Ithala Development Finance Corporation Ltd v Conrescore Vehicle Repair Specialist Pty Ltd*[15] the Court held as follows:

“I accept without hesitation that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by a respondent company. In regard to the requirement of a defence to a liquidation application, I refer to the dicta of Corbett JA in Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 980 B -C as follows : ‘Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant : it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.’

[22] In the instant case, as already stated, the applicant relies on the financial statements the last of which on papers are for the year February 2016. There is indeed reference to a loan to Amakhosi in the annual financial statements of that year. I have considered the contention by Wescott that as Lipton was the managing director of the respondent before he resigned, he excluded other directors from the financial activities of the respondent. I hold the view that this contention is without merit. I say so because both Wescott and Ritchie signed off the annual financial statements referenced to various loans including the loan from Amakhosi. However, this is not the end of the matter. The respondent raises a point that it was never put in mora in regard to the loan and that the loan has in any event prescribed. There may well be merit to this contention because if regard is had to the fact the loan goes as far back as 2009, absent any proof from the applicant that the prescription was interrupted, this is reasonable grounds of disputing the liability and as our Courts have held in the past, liquidation proceedings should not be used as a debts recovery process where a valid defence exists. Accordingly, it follows that the applicant has not succeeded to establish a case for liquidation of the respondent on the ground of an alleged debt and must fail on this point.

[23] I now consider whether it is in the interest of justice to wind up the respondent in terms of section 163 of the New Act. The section provides as follows:-

“ 163. (1) A shareholder or a director of a company may apply to a court for relief if—

- (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
- (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
- (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is

oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.”

This section, as the heading thereof indicates, is for relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company.

[24] In *Parry v Dunn-Blatch and Others*[16] the Supreme Court of appeal said the following in regards to shareholder oppression:

“[20] Case law on the meaning of the phrase ‘unfairly prejudicial’ in the context of s 252 of the Companies Act of 1973 (the 1973 Act) and the terms ‘oppressive’ in s 111bis of the Companies Act of 1926 (1926 Act) largely continues to apply to the s 163 remedy because of similarities in wording. However, s 163 now includes the unfair disregard of an applicant’s interests and is therefore widely couched than its predecessors. In terms of s 5(2) of the Companies Act, a South African court may take cognisance of foreign law in interpreting s 163.[17] It must also be borne in mind that the South African oppression remedy was originally based on the equivalent provisions in English law English decisions are accordingly relevant to the interpretation of s 163.

[21] It is clear from its text that through s 163 (also known as ‘the oppression remedy’), a shareholder or

director of a company is specifically accorded the right, and therefore has locus standi, to challenge oppressive or prejudicial or disregarding conduct, whether by that company or of a ‘related person’. The s 163 remedy may be granted if a shareholder or director of a company or of a related person is oppressive or unfairly prejudicial to the applicant or unfairly disregards his or her interests. An act of omission of a director may amount to an act or omission of the company where it is done in breach of a fiduciary duty of a company.

[22] In circumstances where the applicant complains under s 163(1)(a) of an act or omission of a company or related person, the focus is on the result of the act or omission. In terms of sub-sec 1(b), the right to challenge the impugned conduct is accorded if oppression or unfair prejudice or unfair disregard for the applicant’s interests has occurred as a result of the manner in which the business of the company (or a related person) has

been carried out. The term ‘business of the company’ is undefined in the Companies Act. It is significant that, in *Scottish Co-operative v Meyer and Another* (Scottish Co-operative), the English court, addressing itself to the phrase ‘oppression in the conduct of the business’ as envisaged in s 210 of that country’s Companies Act of 1948 (which is a provision equivalent to s 163 of our Companies Act), remarked that ‘oppression under section 210 may take various forms. It suggests, to my mind, . . . a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members’.”

[25] The onus is on the applicant to prove that the impugned conduct constitutes oppressive behavior as envisaged in s163 of the New Act. In *Parry v Dunn-Blatch* [18] the Court said the following:

*“[37] When considering an application premised on s 163, a court must satisfy itself about (a) the existence of the impugned conduct by way of a positive act or omission; and (b) that the relevant conduct was either oppressive, or unfairly prejudicial or unfairly disregards the interests of the applicant. In this matter, each shareholder holds 50% of the shares. It is notable that the predecessors of s 163 granted the oppression remedy as a mechanism for the protection of minority shareholders. However, in *Benjamin v Elysium Investments (Pty) Ltd and Another*, [19] the court granted relief to a shareholder who shared voting control equally with another shareholder. In my view, nothing precludes this Court from coming to the assistance of an aggrieved shareholder under similar circumstances.”*

[26] The impugned conduct which the applicant complains about, is the manner in which the respondent is being managed since his resignation as a director. The applicant claims that Lipton is being “stone walled and locked out” from the activities of the respondent. Lipton concedes that he still has access to the bank account of the respondent and complains about certain business transactions from the bank statements that are concerning to him. The question is whether the applicant is being “stone walled and locked-out” of the business of the respondent and whether the alleged conduct constitutes an oppressive conduct as envisaged in s163. The view I hold on the issue is that it does not, especially given that despite his resignation as a director, Lipton still has access to the bank account of the respondent and knows how the respondent is transacting its business. Accordingly, I am of the view that the winding up sought by the applicant is pursued for an ulterior motive. It follows that the relief sought for winding the respondent in terms of s163 cannot be justified under the circumstances.

Order

[27] The application is dismissed with costs.

ML SENYATSI

JUDGE OF THE HIGH COURT

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 29 August 2024.

Appearances:

For the applicants: Adv N Marshall

Instructed by Kirsch Africa Incorporated

For the first respondent: Adv W Davel

Instructed by Sven Pillay Attorneys

Date of Hearing: 13 February 2024

Date of Judgment: 29 August 2024

[1] Item 9 of Schedule 5 of the New Act.

[2] See Boraine et al, Insolvency Law, 1.3.2 p1-4 (1).

[3] Pearson v Magrep Investments (Pty) Ltd and Others 1975(1) SA 186(D) at 187-188; Israelson v Bernstein 1950

(2) SA 256 (W)

[4] See footnote 3 above.

[5] Trade Discount Co. v Steele 1949 (4) SA 121(O) at 123

[6] London Estates (Pty) Ltd v Nair 1957(3) SA 591(D) at 593

[7] Provincial Building Society of South Africa v Du Bois 1966(3) SA 76(W); Kalil v Decotex (Pty) Ltd and Another 1988(10) SA 943 (A); Lindhaven Meat Market CC v Reyneke 2001 (1) SA 454(W); Hannover Group Reinsurance (Pty) Ltd v Gungudoo

[2011] 1 All SA 549 (GSJ).

[8] See Footnote 7 above

[9] 2001(4) SA 781(C)

[10] See Provincial Building Society of South Africa v Du Bois above footnote 7 at paras 80-82

[11] Ex Parte Shmukler-Tshiko and Others

[2013] JOL 29999(GSJ)

[12] Commissioner for SARS v Hawker Aviation Services Partnership and Others

[200] 1 All SA 715 (T) where SARS sought a sequestration order in order to attach an aircraft to confirm jurisdiction.

[13] Badenhorst v Northern Construction Enterprises Ltd 1956 (2) SA 346 (T) at 347-348; World Focus 754 cc v Business Partners Limited [2013] JOL 30095 (KZP) at para 20

[14] Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig

[2012] 2 All SA 22 (SCA) para 11

[15]

[2013] JOL 30708(KZD) para 3.

[16] (394/2022) [2024] ZASCA 19 para

[17] Section 5(2) of the Companies Act provides that: ‘5. General interpretation of Act (1) . . . (2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law. (3) . . .’

[17] Section 5(2) of the Companies Act provides that:

‘5. General interpretation of Act

(1) . . .

(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.

(3) . . .’

[18] Footnote 17.

[19] Benjamin v Elysium Investments (Pty) Ltd and Another 1960

(3) SA 467 (E).

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