

SOUTH AFRICA / JUDGMENT

Nedbank Ltd v Zonnekus Mansions (Pty) Ltd (7562/2011) [2012] ZAWCHC 135 (22 February 2012) [2012] ZAWCHC 135

COURT

Western Cape High Court, Cape Town

BEFORE

N Saba

CASE / FILE NUMBER

7562/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 7562/2011

In the matter between:

NEDBANK LIMITEDApplicant

and

ZONNEKUS MANSIONS (PTY) LIMITEDRespondent

(Registration number: 1999/024520/07)

Judgment delivered on 22 February 2012

SABA, AJ Introduction

- [1] This is an opposed application for a provisional winding-up of the respondent company on the grounds that it is unable to pay its debts. The applicant's case is based on the failure of the respondent to make its monthly repayments or to skip its monthly repayments to the bank. Mr Jonker appeared for the applicant and Mr Kantor appeared for the respondent.
- [2] The applicant is a registered bank, duly registered as a public company and incorporated with limited liability in accordance with the banking and company laws of the Republic of South Africa. The respondent is a company with limited liability, duly registered in accordance with the laws of the Republic of South Africa.

Factual Background

- [3] On or about 12 April 1999 and at Cape Town, the Cape of Good Hope Bank Ltd ("Good Hope Bank") and the respondent concluded a written loan agreement. In terms of the agreement Good Hope Bank agreed to grant respondent an access loan facility in the sum of R4 million subject to the terms and conditions contained in their agreement ("JP3"). On or about 16 February 2001, Good Hope Bank and respondent concluded a further loan agreement ("the consolidated agreement") in terms of which Good Hope Bank agreed to grant respondent an additional loan facility of R800 000,00. The latter facility was later incorporated into the first liability, thereby providing a total access loan facility of R4 800 000, 00. In terms of the two loan agreements, and as security for the indebtedness of respondent to Good Hope Bank, respondent registered mortgage bond number B11886/1999 on 1 April for R5 million and mortgage number B6296/2001 on 7 February 2001 for R2,5 million, over Erf 13898 Milnerton.
- [4] It is the applicant's case that it acquired the assets and liabilities of Good Hope Bank - including the agreements and the bonds concluded with respondent, with effect from 1 January 2003. In her founding affidavit, Thozama Maneli, on behalf of applicant, alleged that the respondent has been unable to pay its debts and on 1 January it was in arrears of R1 132 650.
76. Respondent, on the other hand, averred that it was ahead of its payments before the applicant unilaterally amended the period of the bond from 15 to 20 years.
- [5] The following facts are in dispute:
- 4.1. that the applicant has locus standi to bring this application
 - 4.2. that the respondent is indebted to the applicant.
 - 4.3. that the respondent is unable to pay its debts.
- [6] The court has to determine whether the applicant has locus standi to bring this application; whether the respondent is indebted to the applicant in the sum of R 4 939 302, 73 and whether the respondent is unable to pay its debts.
- [7] When asked to decide an opposed application on the affidavits, the approach to adopt is set out in *Plascon Evans Paints v Van Riebeeck Paints (Pty Ltd)* [1984] ZASCA 51; 1984 (3) SA 623 A at 634H to 635C:
- "...where in proceedings on Notice of Motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order".

Legal Position

- [8] In *Henochsberg on the Companies Act* 5th edition vol 1 at 693-4 the following is stated:

"Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds...."

Where prima facie the indebtedness exists the onus is on the company to show that it is bona fide disputed on reasonable grounds (Meyer NO v Bree Holdings (Pty) (Ltd) 1972

(3) SA 353 (T) at 354-5; Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd 1978

(1) SA 70 (D) at 72;....

It is submitted that where a debt is disputed, and hence the applicant's locus standi as a creditor, the application will be dismissed...."

[9] In Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A), Corbett JA (as he then was), said the following:

"In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company.

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 the winding-up order. The onus on 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".

[10] In Hulse-Reuter v Heg Consulting Enterprises (Pty) (Ltd) 1998

(2) SA 208 CPD at 219G-I, relied upon by Mr Kantor the following is stated:

"All that they have to satisfy me is that the grounds which they advance for their and the company's disputing these claims are not unreasonable. To do that I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they rely at such trial. This is not an application for summary judgment in which, in terms of Supreme Court Rule 32(3), a defendant who resists such an application by delivering an affidavit or affidavits must satisfy the court that he has a bona fide defence to the action but in terms of the Rule must also disclose fully in his affidavit or affidavits 'the material facts relied upon therefor'...It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, to allege facts which, proved at trial, would constitute a good defence to the claims made against the company". (See also Robson v Wax Works (Pty) Ltd 2001

(3) SA 1117(C) para 14

[11] Mr Jonker's submission that the applicant obtained the assets and liabilities of Good Hope Bank is based on the following facts:

11.1. a consent of the Minister of Finance (as envisaged in section 54 (1) of the Banks Act, 1990 (Act No. 84 of 1990) to the transfer Of assets and liabilities of Good Hope Bank;

11.2. the Chief Registrar's circular evidencing the endorsement registered as BC3/2003 by virtue of section 54 of the Bank's Act 4 of 1990 ("the Act").

[12] The relevant terms of the Minister's consent are as follows:

"6.1 Consent is granted, with effect from 1 January 2003, in terms of section 54 (1) of the Banks Act, 1990 (Act No. 94 of 1990), for the transfer of all assets and liabilities of Cape of Good Hope Bank Limited to Nedcor Bank Limited.

6.2. Consent is hereby granted, with effect from 1 January 2003, in terms of section 54 (8A) of the Banks Act, 1990 (Act No. 84 of 1990), for the waiver of payment of duties, fees or charges that may be payable in respect of the transfer of all the assets and liabilities of Cape of Good Hope Bank Limited to Nedcor Bank Limited". (My emphasis)

[13] The relevant portion of the Chief Registrar's circular is as follows:

"TRANSFER OF ASSETS OF CAPE OF GOOD HOPE BANK LIMITED TO NEDBANK LIMITED.

1. All the assets of CAPE OF GOOD HOPE BANK LIMITED (No. 1958/000018/06) have been transferred to NEDBANK LIMITED (No. 1951/000009/06) in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990), with effect from 1 January 2003"

[14] Mr Kantor submitted that the documentation from the Registrar of Banks and Registrar of Deeds relates to permission or approval to transfer the assets and has nothing to do with the actual transaction of transfer. That in the absence of a transaction of the actual transfer of assets and liabilities from Good Hope Bank to it, the applicant has no locus standi. He referred this court to Amler's Precedents of Pleadings (Seventh Edition) at page 75 where the following is stated:

"Contract of cession: A party on a cession must allege and prove the contract of cession - that is, a contract in terms of which a personal (and not a real) right against a debtor is transferred from the creditor (cedent) to a new creditor (cessionary)".

[15] Mr Jonker submitted that the defence of locus standi raised by the respondent is not bona fide because as early as 2005, respondent has been making payments directly to the applicant. This aspect is not in dispute. I also find that the following correspondence (in the form of an email) which was sent by Gary van

der Merwe, a former director of the respondent, to a representative of the applicant, to be evidence to that effect:

"From: Gary van der Merwe {aary&.helibase. com} Sent: Friday, January 15, 2010 3:08 PM To: 'Small, A. (Anthea)'

Subject: RE: Nedbank bond over Erf 13898 Milnerton ino Zonnekus Mansion Pty Ltd Hi Anthea

I am in the process of updating the financials for Zonnekus which are going to take some time, there are three years to do and the

accountant has been requested to complete these ASAP, I will forward them with assets and liability statements as soon as same are in hand, in the interim as per my telephone conversation with you and your request that I communicate my concerns to you in writing I hereby raise the following discrepancies and concerns.

The Zonnekus bond was originally held by Cape of Good Hope Bank

The term was approved at 20 years with an access bond up to six million Rand

The access bond was unilaterally stopped by Nedbank

The term of payment appears to have been calculated at 15 years and not 20

Insurance is being debited to our bond account at some R50/60 thousand per year without consent and we are being charged interest on this

By the incorrect payment term being used and the access bond facility taken into account we are some R2 million in advance with payments and or available funds

Zonnekus therefore respectfully requests the following

The unauthorized insurance that has been charged on the Zonnekus bond account be refunded from the inception and credited against the bond account.

A recalculation of the payments be made on the basis of our agreed (sic) to bond and terms take place setting out the true position of the bond

The R6 million bond be re-instated with immediate effect

/ am not aware of or have any documentation in my possession signed with Nedbank for the bond, should there exist any please forward to me as a matter of urgency.

Anthea I hope this sets out some concerns, we are not complaining and are sure that these errors are due to an oversight and due to this being an old COGHB bond, we would like to have this rectified and are open to proposals regarding any form of restructuring, we also hope to extend the bond to some R10 million in order to facilitate the renovation of the property for the World Cup Rental purposes.

Please do not hesitate to call me should you wish to have further information or which to discuss any further issues.

Kind Regard

Gary van der Merwe

Evaluation

[16] It is so that the Minister gave the required consent to the transfer of assets and liabilities of Good Hope Bank (in terms of s 54 (1) of the Act). However, I am of view that the concerns raised, of unauthorised amendments of periods and terms of repayments of the bond as well as the allegations of unauthorised charging of insurance into the respondents account

(made by Van der Merwe in the email), are genuine. The applicant has not indicated how those concerns were addressed. In my view, these concerns would, if proved at a trial, constitute a good defence to the claims made against the respondent. (See *Hulse-Reuter v Heg Consulting Enterprises (Pty) Ltd supra*)

[17] It is my judgment that the evidence of an actual transaction of transfer of respondent's accounts to the applicant or a cession

agreement concluded between Good Hope Bank and applicant would have shed some light on the actual state of affairs regarding the concerns raised by Van der Merwe. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared from the papers that the applicant's claim is disputed on reasonable and bona fide grounds (See *Payslip Investment Holdings CC v Y2K Tec limited 2001*

(4) SA 781 (C).

Conclusion

[18] In the circumstances, I find that the respondent has satisfied me on a balance of probabilities that its indebtedness to the applicant is disputed on bona fide and reasonable grounds.

[19] The court's powers to grant an application for winding-up is discretionary, irrespective of the ground on which it is sought (See *Kyle & Others v Marais & Pieterse Inc [2002] 3 ALL SA 223 (T)*). I therefore find that it would not be just and equitable to exercise my discretion in the favour of the applicant.

[20] In the light of the conclusion to which I have come, it is not necessary to deal with other issues raised by the applicant in this application.

[21] In all circumstances of the case, the application for a provisional winding-up is dismissed with costs.

N SABA

Acting Judge of the High Court

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