

SOUTH AFRICA / JUDGMENT

Routemaster (Pty) Ltd v Retro Active CC (SJP Intervening) (WCC16646/2022) [2024] ZAWCHC 265 (13 September 2024) [2024] ZAWCHC 265

COURT

Western Cape High Court, Cape Town

BEFORE

Paschke AJ

CASE / FILE NUMBER

WCC16646/2022

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HIGH

COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case WCC 16646/2022

In the matter between:

ROUTEMASTER
(PTY) LTD
Applicant
and
RETRO
ACTIVE CC
Respondent
SJP
INVESTMENTS CC
Intervening
Party

Coram:

Paschke
AJ
Heard

on:

6
March 2024
Decided

on:

13
September 2024, delivered electronically
ORDER
The following order is

made:

1.
Retro Active CC (Registration 2005/150681/23) is placed under final winding up.
2.
The costs of the application are to be costs in the liquidation, to be recovered by the applicant (Routemaster (Pty) Ltd) and the intervening party (SJP Investments CC) on a scale as between attorney and client.
3.
The costs of Retro Active CC in opposing the application are disallowed as costs in the liquidation.
4.
The Registrar is directed to refer this matter to the Director of Public Prosecutions to investigate Mr Boolay, the member of Retro Active CC, for the offence of perjury.

JUDGMENT

Paschke AJ:

Introduction

- [1] This is the return date of a provisional order of winding-up of the respondent, Retro Active CC (Retro Active), handed down on 17 August 2023 by Allie J.
- [2] The application is made by Routemaster (Pty) Ltd (Routemaster), supported by the intervening party, SJP Investments CC (SJP) and opposed by Retro Active. The standing of Routemaster and intervention by SJP are undisputed.

Facts

- [3] Routemaster relies on a series of written loan agreements with Retro Active. Under an initial agreement in September 2019, Routemaster advanced R12,5 million. This was for Retro Active to undertake Phase 1 of a property development known as the Rylands 4 Retro Active Estate. Under a further agreement, Routemaster advanced a further amount of R9,057,289.25. for other business interests of Retro Active. Routemaster provided Retro Active with a total capital amount of R21,557,289.25. The loans are unsecured.
- [4] The repayment terms of the initial agreement required Retro Active to pay Routemaster a 'minimum profit of 35% on completion and sale of said units'. The agreement recorded that the 'anticipated maximum completion of 24 units' in Phase 1 of the development would be 12 months (i.e. by September 2020), and provided that the units would be 'sold based on demand'. The parties later agreed to extend the time for completion to 1 March 2022. The further agreement had the same repayment duty.

- [5] During April and June of 2021, Retro Active made two repayments to Routemaster, totalling R230,000. Retro Active's indebtedness was further reduced when Routemaster credited it R728,000 for a separate property transaction. The parties also agreed to reduce the return on the loan from 35% to 30% per annum.
- [6] Accounting for the repayments and the agreed reduction in return, Routemaster's profit and loss statement shows that Retro Active owes it R29,493,130.09. In a series of emails and a draft agreement to consolidate their transaction, Retro Active's sole member, Mr Boolay, accepted the accuracy of Routemaster's calculation of the amount owing. While the consolidation agreement was not concluded, the draft terms are an admission by Mr Boolay of Retro Active's liability for R29,493,130.09, which was payable by December 2022.
- [7] By May 2022, relations soured, with Retro Active refusing to repay anything but the capital and refusing to sign the consolidation agreement.

Retro Active's defences

- [8] Retro Active's defence to its winding up has shifted. In an initial opposing affidavit, Mr Boolay denied that anything was due, owing and payable to Routemaster. Retro Active argued that Routemaster's payments were an investment rather than a loan, any profit to be paid to Routemaster was at risk, and that Routemaster was only a contingent creditor. Later he said that only the amount of the original capital amount of R12,5 million was owing. Mr Boolay denied that Retro Active was insolvent, contending that it 'is in good standing with its creditors, and able to pay its debts when they are due, owing and payable.' Retro Active's first affidavit did not detail its financial position. It failed to mention two secured creditors (SJP and another) which had claims of more than R73 million secured by bonds registered over Retro Active's immovable property.
- [9] In a subsequent affidavit, Mr Boolay backtracks on those claims. He concedes that his original answering affidavit was untruthful and apologises for what he refers to as 'numerous factual inconsistencies' in his earlier affidavit. He now accepts that Routemaster's loans were not at risk, that Retro Active owes Routemaster R21,557,189.25 and that he had earlier falsely claimed that Retro Active is solvent. Mr Boolay admits the existence of two secured creditors with claims of more than R73 million and reveals a third, Josjorja Property Holdings (Pty) Ltd, which has a secured claim of R60 million.
- [10] Unfortunately, Mr Boolay's subsequent affidavit compounds his dishonesty with implausible excuses and yet more falsehoods. For example, he claims that the amount Retro Active owes to SJP 'does not represent an actual debt'. In fact, SJP's uncontested claim is that it lent Retro Active R90 million, of which R59,396,918 is secured, and that the debt is 'due, owing and payable'. Mr Boolay also stated that SJP intends to intervene on the return date to oppose the winding up of Retro Active. In fact, SJP intervened to seek a final order of winding-up against Retro Active if Routemaster's provisional order is not

made final.

- [11] SJP recounts other misrepresentations by Mr Boolay. After the provisional liquidation order had been granted, the joint liquidators of Retro Active applied to the Master of the High Court for an extension of their powers to proceed with certain incomplete sales of immovable property. As a prerequisite to consenting to the transfers in the absence of a final order, the Master requested Mr Boolay to confirm that Retro Active will not oppose a final order. On 1 November 2023, Mr Boolay gave the Master written confirmation that Retro Active will not oppose the granting of the final order. That undertaking was false. Two days earlier, on 30 October 2023, Mr Boolay had filed an opposing affidavit in this application. At the hearing, on 6 March 2024, Retro Active's attorney continued to argue in opposition to a final order.
- [12] In his subsequent affidavit, Mr Boolay blames his former attorneys for the falsehoods in his first affidavit. That attempt to evade his responsibility for his false statements is rejected. Mr Boolay would have known his statements under oath were false. It also undermines the sincerity of Mr Boolay's apologies to the court.
- [13] Perjury is the unlawful and intentional making of a false statement by a person who has taken the oath or made an affirmation in a judicial proceeding. It is a serious offence against the administration of justice and undermines the court's truth-seeking function. Accordingly, the order in this matter directs the Registrar to refer this matter to the Director of Public Prosecutions to investigate Mr Boolay for the offence of perjury.
- [14] At the hearing, Retro Active opposed a final winding-up on three grounds: (a) that there is a bona fide dispute about whether Retro Active is indebted Routemaster; (b) that Retro Active is solvent; and (c) that the court should exercise its discretion to refuse a final winding-up order.

Bona fide dispute defence

- [15] Retro Active does not dispute its indebtedness. Rather, it seeks to avoid a final winding-up order by arguing that the debt is only prospective and is not yet due, and that Retro Active will be able to pay when it becomes due. That is an appeal to the court's discretion, which I will consider later.

Retro Active's insolvency

- [16] Retro Active says it can pay its debts when they become due. It denies that its debt to Routemaster is not owing. However, Routemaster has established that Retro Active's admitted indebtedness for the capital of R21,557,189.25 has been owing since the end of December 2022. I find that it is not a contingent liability.
- [17] The failure of a debtor to pay an admitted debt is sufficient to demonstrate the insolvency of the respondent, such failure being
prima facie proof of an inability to pay its debts.[1]

- [18] Even Retro Active's own management accounts show its inability to pay its debts. The claimed value of the stock and inventories (R134,856,799) is less than Retro Active's admitted indebtedness to its creditors and would be insufficient to pay its admitted debts.
- [19] Retro Active has not provided credible evidence that it can pay its debts. To the contrary, Retro Active states that 'it is exceedingly difficult' for a construction company to establish factual solvency, and at the stage that Retro Active finds itself, 'a construction company's liabilities initially exceed their assets'. Mr Boolay has said that if Retro Active is wound-up, 'there is a serious danger that [Routemaster] will receive cents to [the] rand'.
- [20] Nonetheless, Retro Active claims to be factually solvent, relying on its management accounts for the year ending 28 February 2023 and for the six months ending 31 August 2023. The 31 August 2023 accounts purport to show assets of R800,158,893, current and non-current liabilities of R434,655,258 and capital and reserves amounting to R365,503,635.
- [21] However, Retro Active's management accounts are unsubstantiated and inconsistent with facts before the court. None of the claimed asset values are supported by an independent valuation. They appear inflated. For instance, Mr Boolay claims the property purchased from SJP is currently worth R90 million. But SJP states that the property's current market value is no more than R35 million. The management accounts also fail to mention the admitted or undisputed claims of Routemaster, SJP, Josjorja and Prevalance Capital. Given Mr Boolay's propensity for falsehoods, not much store can be placed in the management accounts.
- [22] In *Boschpoort Ondernemings*,^[2] the SCA explained the difficulty of adjudicating a winding up application based on unproven asset valuations, and by contrast, the utility of the commercial insolvency test:
- 'That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money
- and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets.
- [23] For those reasons, I do not intend to decide this matter based on the contested claims of factual insolvency.

- [24] The liquidation of a close corporation is governed by the relevant provisions of the Companies Act 61 of 1973.[3] Under s 344(f) of the 1973 Companies Act, a Court may wind up a close corporation if it is 'unable to pay its debts as described in s 345'. Under s 345(1)(c), a close corporation 'shall be deemed to be unable to pay its debts if ... it is proved to the satisfaction of the Court that the [close corporation] is unable to pay its debts.'
- [25] For purposes of s 345(1)(c), I am satisfied that it has been proved that Retro Active cannot pay its debts.

Discretion to refuse a final winding-up order

- [26] Retro Active asks the court to exercise its discretion to refuse its winding up. It contends that 'there is a genuine dispute concerning the [Routemaster's] claim [Retro Active] does not believe that the final winding up is in their best interest, nor is it an advantage to the body of creditors and most certainly will not be an advantage to [Routemaster] as an unsecured creditor ...'.
- [27] In Afgri Operations,[4] the SCA affirmed that 'an unpaid creditor has a right, ex debito justitiae, to a winding-up order against a company that has not discharged its debt'. In Imobrite,[5] the SCA reaffirmed that a court accordingly has narrow discretion to refuse a winding-up order.
- [28] An unsubstantiated and doubtful claim about the value of a corporation's assets in support of a claim of factual solvency does not invoke the court's narrow refusal discretion.
- [29] Retro Active argues that its creditors' best interests require a refusal of a final winding-up order. Those creditors, which are substantial commercial and financial institutions, are best placed to decide what is in their best interests. None asks this court to refuse a final order.
- [30] Therefore, I decline to exercise my discretion to refuse a final order of winding up.

SJP

- [31] SJP's uncontested evidence is that it sold certain properties to Retro Active for R90 million. On 11 November 2019, Retro Active caused a covering bond to be executed in the amount of R73,333,000 in favour of SJP to cover a portion of the purchase price of the properties. The parties agreed that Retro Active would replay SJP the entire loan, including any interest, within 6 months from the date of registration of the mortgage bond (11 November 2019). Retro Active has never disputed the debt or that it is due, owing and payable. However, despite several demands, Retro Active has failed to repay SJP. Accordingly, it is clear that Retro Active is unable to pay its debt to SJP.
- [32] SJP asks for a final order winding up Retro Active if the provisional order obtained by Routemaster is discharged. Given the conclusion I reach about Routemaster's application, SJP's conditional application does not arise. However, if I had refused Routemaster's application for a final winding-up order, I would have granted SJP's.

[33] I am persuaded that SJP's intervention was reasonably necessary to protect its interests and that it is entitled to a costs order.

Costs

[34] Routemaster and SJP submit that they should not be out of pocket in this application and should be awarded costs in the liquidation on an attorney-client scale. They also ask, so as to not erode the equity in the insolvent estate, that Retro Active's costs of opposing the application should not be costs in the liquidation.[6] Routemaster and SJP contended that such an award would be appropriate given that Retro Active persisted with untenable defences which are vexatious and frivolous to defeat a bona fide application for liquidation, and that the initial opposition was based on falsehoods.

[35] In answer to the requested cost order, Retro Active submitted that it fought the application for the sake of the creditors. However, I do not accept Retro Active's professed benevolence towards its creditors.

[36] I agree that the opposition is vexatious and frivolous. Of even more significant concern is that it is founded on serial dishonesty.

[37] I am persuaded to make the requested cost order.

Order

[38] The following order is made:

Paschke AJ

Appearances For Routemaster (Pty) Ltd (the applicant): Joseph Whitaker instructed by VDS Inc, per Nailah van der Schyff. For Retro Active CC (the respondent): Quintin Zimmerman (attorney) of Liddle and Associates. For SJP Investments CC (the intervening party) Zelek Sing instructed by Kassen and Associates.

[1] Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597.

[2] Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited [2014] 1 All SA 507 (SCA); 2014 (2) SA 518 (SCA) para 17.

[3] Section 66(1) of the Close Corporations Act 69 of 1984 read with item 9 of Schedule 5 to the Companies Act 71 of 2008. Section 66(1) of the Close Corporations Act states: 'The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.' Item 9(1) of Schedule 5 to the Companies Act 71 of 2008 states: 'Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).'

[3] Section 66(1) of the Close Corporations Act 69 of 1984 read with item 9 of Schedule 5 to the Companies Act 71 of 2008.

Section 66(1) of the Close Corporations Act states: ‘The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.’

Item 9(1) of Schedule 5 to the Companies Act 71 of 2008 states: ‘Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).’

[4] *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) para 12

[5] *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/20)

[2022] ZASCA 67 (May 2022) para 12.

[6] *Business Partners Ltd v Montache Villas (Pty) Ltd* (62454/2021)

[2023] ZAGPPHC 1053 (6 September 2023).

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