

SOUTH AFRICA / JUDGMENT

Sedgewick NO and Others v Printworks Textile Printers (Pty) Ltd [2011] ZAWCHC 284; ; 5504/2011 (25 May 2011) [2011] ZAWCHC 284

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

5504/2011

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN
CAPE HIGH COURT, CAPE TOWN)
CASE

NUMBER:	5504/2011
DATE:	25 MAY 2011
	In
the matter between:	NIGEL BRUCE SEDGWICK N.O.1st Applicant CHARLES STUART MAC KAY-DAVIDSON N.O.2nd Applicant PATRICK DAVID H AMILTON-RUSSEL N.O.3rd Applicant MARK FINLAYSON N.O.4th Applicant PETER GEORGEU N.O.5th

Applicant
and
PRINTWORKS
TEXTILE PRINTERS (PTY) LTD
.....Respondent

JUDGMENT

LE GRANGE. J:

Before making the order in this matter, I would like to make the following brief remarks. This is an application for the winding up of the respondent on the basis that he is unable to pay his debts as contemplated in terms of the provisions of the Companies Act 61 of 1973 that is opposed.

The jurisdictional facts establishing the applicants being members of the Old Mill Trust ("the Trust"), as a creditor of the respondent is not in dispute. The rental amount due and owing as at March 2011 is in the amount of R1 629 880,68 by the respondent is also not in dispute.

The respondent's main contention is the application is misconceived and a pressure tactic in order to circumvent a dispute. Moreover, the guarantee in the amount of R5 000 000,00 provided by the respondent to the Trust in discharge of its financial obligations that may arise during the lease agreement, is sufficient to satisfy the rental amount due and payable. The nub of the applicants' case that the guarantee procured by the respondent is in discharge of its financial and other obligations in terms of the lease agreement, which includes respondent's obligation to repair any damages caused to the premises during the lease period. Furthermore, clause 8.1 and 8.6 of the lease agreement, obliges the respondent to pay the monthly rental to the trust in advance on or before the first day of each succeeding month without deduction or set off. Moreover, the financial statements put up by the respondent discloses that of a partnership whose business was sold as a going concern on the last day of the financial year being 30 June 2010, including all assets and only had cash on hand in the amount of R12 795.00. Furthermore, the fixed assets of the partnership as at 30 June 2010 had a nil value. According to the Trust, the respondent failed to reveal the present state of its financial position or at the time of launching these proceedings and is this a clear indication that the respondent is unable to pay its debts. In terms of the lease agreement, a guarantee from BOE Private Bank, in the amount of R5 000 000,00, in the name of Tumado Investments (Pty) Limited, was provided by the respondent to the Trust. The Trust did, in August 2010, drawn down on the guarantee in order to obtain payment of rental. It did so. after respondent failed to pay its rental timeously. According to the respondent, unbeknown to it and before it paid the trust the arrear rental in the sum of R629 645,20 on 16 August 2010. the Trust received payment of that sum by drawing down on the guarantee in that amount. As a result of the draw down, a dispute arose between the parties whether the Trust was entitled to draw down on the guarantee before the breach period expired: and whether the Trust was obliged to refund the amount of R629 645,20 overpayment by "topping up" the guarantee or furnishing the respondent with a rental credit. According to the respondent, it accepted the view of the Trust that it does not have to place the respondent in breach before it may draw down on

the guarantee in respect of the unpaid rental. The respondent continued to pay its rental for the months of September to December 2010, but thereafter taken the view that the Trust may draw down on the guarantee in respect of unpaid rental and has advised the Trust that it may utilise the guarantee for rental due until the lease expires on 31 August 2011. According to the respondent the guarantee, together with the amount of R629 425,20 retained by the Trust, is sufficient to cover the respondent's obligation in this regard as the respondent continues to pay for the services utilised. There appears to be an honest belief by the Trust that the respondent, having regard to its financial statements filed of record, trades in insolvent circumstances and are unable to pay its debt. Moreover, the guarantee provided was primary to cater for the concerns of the Trust in regarding the anticipated damage to the property on the termination of the lease and not for the rental due by the respondents. The respondents on the other hand, believes that the guarantee is sufficient to cover the rental amount due and payable to the Trust, including a reasonable amount on termination of the lease to cover damages that may be proven. Whatever the genuine belief of the respective parties, one of the primary questions which needs to be determined, having regard to all the facts, is whether or not the respondent has liquid assets or readily realisable assets available to meet its liabilities as they fall due in the ordinary course of business and thereafter in a position to carry on normal trading. In other words to borrow from *Absa Bank Limited v Rhebokskloof (Pty) Limited & Others* 1993

- (3) SA 436 (CPD) at 440f: "Can the company meet current demands on it and remain buoyant? It matters not that the company assets fairly valued far exceeds its liabilities. Once the court finds that it cannot do this, it follows that it is entitled to do and should hold that company is unable to pay its debts within the meaning of section 345(1)(c) as read with section 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up/" The dictum in the matter of *Rosenberg & Company (Pty) Limited v Singh's Bazaar (Pty) Limited* 1962
- (4) SA 593 (D) at 597E-F is also apposite in this instance: "If the company is in fact solvent in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding up order. The circumstances particularly to be taken into consideration against the making of an order, are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts." Notwithstanding this, a court has a discretion to refuse a winding up order in these circumstances, but it is one which is limited where a creditor has a debt which the company cannot pay, in such a case the creditor is entitled *ex debito justitiae* to a winding up order. In the present instance, the respondent's financial statements that were put up, do project a rather dismal state of affairs. The respondent avers that its overdraft is doubly met by its debtors and that it has a cash deposit of three million which serves to guarantee a portion of the five million put up by Tumado Investments (Pty) Limited. The financial statements by the respondent do not support these averments. In fact they show negative equity and excess of liabilities far exceeding its assets and a rather small figure in respect of cash and cash equivalents of R12 795,00 at hand. Moreover events after the reporting period of the financial statements, indicate that the business of the partnership was sold as a going concern on the last day of the financial year being 30 June

2010, including all the assets. In fact, the fixed assets of the partnership as at 30 June 2010 are reflected as a nil value. On these available facts, there can be little doubt that the respondent has no liquid assets or realisable assets available out of which it can pay its debts. The respondent advanced the argument that it admitted non-payment of its rental obligation raises a dispute to the purpose of the guarantee which it was obliged to put up in terms of the lease agreement. The respondent alleges that this dispute needs to be determined first through mediation and then arbitration (in terms of the provisions of the Lease Terms and Conditions), as the purpose of such guarantee does not relate to the respondent's remedial and restorative obligations in respect of the premises, but only in respect of financial obligations arising in respect of the rental charges due, and is there no reason why the trust should not simply extract payment in respect of these obligations due from the respondent by drawing down on the guarantee. The further contention by the respondent is that the Trust made itself an unpaid creditor by not drawing down upon the bank guarantee in respect of rental, since it done so once before. In my view, there is no obligation upon the Trust to draw down upon the bank guarantee which the respondent has provided by an entity known as Tumado Investments (Pty) Limited in terms of the lease agreement. Moreover, in the present instance the court is not faced with payment of an admitted indebtedness by a third party in considering whether the respondent is unable to pay its debts. The terms of the lease agreement are clear. The respondent had numerous and separate obligations. It must pay rental without deduction or set-off. It must do so monthly in advance, on or before the first day of each and every month and if it fails to do so, interest shall accrue. It must maintain the condition of the premises and make good and repair damage there. It

was obliged to issue a bank guarantee for R5 000 000,00. Such guarantee was to remain in full force and effect for the duration of the lease period. Any variation in respect of these principle obligations was required to be in writing and signed by the

respective parties. There has been no such variation. There has been no alteration to respondent's obligation to pay the monthly rental as stipulated, nor has there been any alteration to its obligation to maintain a guarantee for R5 000 000,00. Any dispute as to the purpose of the guarantee, cannot detract from the respondent's obligation to pay the outstanding rental. The stance adopted by the respondent that it is not obliged to pay the outstanding rental is, in my view, not based upon substantial grounds. On a conspectus of all the evidence in this matter, I am satisfied that the Trust is entitled to relief sought. It follows that the application must succeed. In the result, the following order is made:-

1. The respondent is placed under provisional liquidation. 2. A Rule nisi is issued calling upon all persons interested to show cause on 28 June 2011:- why the respondent should not be placed under final liquidation; and

why the cost of this application should not be cost in the liquidation. 3. That the service of this order is to be effected:-

- a) by one publication in each of The Cape Times and Die Burger newspapers; b) by the service on the South African Revenue Service at 22 Hans Strijdom Avenue, Cape Town, Western Cape; by service on the registered office of the respondent at 13 Upper Camp Road, Maitland, Cape Town; by the service of the employees of the respondent at Leo Road, Deep River;

by the service of all registered trade unions, if any; and

by service on all creditors with a claim in excess of R10 000,00. LE GRANGE, J

The respondent's main contention is the application is misconceived and a pressure tactic in order to circumvent a dispute. Moreover, the guarantee in the amount of R5 000 000,00 provided by the respondent to the Trust in discharge of its financial obligations that may arise during the lease agreement, is sufficient to satisfy the rental amount due and payable.

The nub of the applicants' case that the guarantee procured by the respondent is in discharge of its financial and other obligations in terms of the lease agreement, which includes respondent's obligation to repair any damages caused to the premises during the lease period

Furthermore, clause 8.1 and 8.6 of the lease agreement, obliges the respondent to pay the monthly rental to the trust in advance on or before the first day of each succeeding month without deduction or set off. Moreover, the financial statements put up by the respondent discloses that of a partnership whose business was sold as a going concern on the last day of the financial year being 30 June 2010, including all assets and only had cash on hand in the amount of R12 795.00 Furthermore, the fixed assets of the partnership as at 30 June 2010 had a nil value. According to the Trust, the respondent failed to reveal the present state of its financial position or at the time of launching these proceedings and is this a clear indication that the respondent is unable to pay its debts.

In terms of the lease agreement, a guarantee from BOE Private Bank, in the amount of R5 000 000,00, in the name of Tumado Investments (Pty) Limited, was provided by the respondent to the Trust. The Trust did, in August 2010, drawn down on the guarantee in order to obtain payment of rental It did so. after respondent failed to pay its rental timeously. According to the respondent, unbeknown to it and before it paid the trust the arrear rental in the sum of R629 645,20 on 16 August 2010. the Trust received payment of that sum by drawing down on the guarantee in that amount As a result of the draw down, a dispute arose between the parties whether the Trust was entitled to draw down on the guarantee before the breach period expired: and whether the Trust was obliged to refund the amount of R629 645,20 overpayment by "topping up" the guarantee or furnishing the respondent with a rental credit.

According to the respondent, it accepted the view of the Trust that it does not have to place the respondent in breach before it may draw down on the guarantee in respect of the unpaid rental. The respondent continued to pay its rental for the months of September to December 2010, but thereafter taken the view that the Trust may draw down on the guarantee in respect of unpaid rental and has advised the Trust that it may utilise the guarantee for rental due until the lease

expires on 31 August 2011. According to the respondent the guarantee, together with the amount of R629 425,20 retained by the Trust, is sufficient to cover the respondent's obligation in this regard as the respondent continues to pay for the services utilised.

There appears to be an honest belief by the Trust that the respondent, having regard to its financial statements filed of record, trades in insolvent circumstances and are unable to pay its debt. Moreover, the guarantee provided was primary to cater for the concerns of the Trust in regarding the anticipated damage to the property on the termination of the lease and not for the rental due by the respondents. The respondents on the other hand, believes that the guarantee is sufficient to cover the rental amount due and payable to the Trust, including a reasonable amount on termination of the lease to cover damages that may be proven.

Whatever the genuine belief of the respective parties, one of the primary questions which needs to be determined, having regard to all the facts, is whether or not the respondent has liquid assets or readily realisable assets available to meet its liabilities as they fall due in the ordinary course of business and thereafter in a position to carry on normal trading. In other words to borrow from Absa Bank Limited v Rhebokskloof (Pty) Limited & Others 1993

(3) SA 436 (CPD) at 440f:

"Can the company meet current demands on it and remain buoyant? It matters not that the company assets fairly valued far exceeds its liabilities. Once the court finds that it cannot do this, it follows that it is entitled to do and should hold that company is unable to pay its debts within the meaning of section 345(1)(c) as read with section 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up/'

The dictum in the matter of Rosenberg & Company (Pty) Limited v Singh's Bazaar (Pty) Limited 1962

(4) SA 593 (D) at 597E-F is also apposite in this instance:

"If the company is in fact solvent in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding up order. The circumstances particularly to be taken into consideration against the making of an order, are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts."

Notwithstanding this, a court has a discretion to refuse a winding up order in these circumstances, but it is one which is limited where a creditor has a debt which the company cannot pay, in such a case the creditor is entitled *ex debito justitiae* to a winding up order

In the present instance, the respondent's financial statements that were put up, do project a rather dismal state of affairs. The respondent avers that its overdraft is doubly met by its debtors and that it has a cash deposit of three million which serves to guarantee a portion of the five million put up by Tumado Investments (Pty) Limited. The financial statements by the respondent do not support these averments. In fact they show negative equity and excess of liabilities far

exceeding its assets and a rather small figure in respect of cash and cash equivalents of R12 795,00 at hand.

Moreover events after the reporting period of the financial statements, indicate that the business of the partnership was sold as a going concern on the last day of the financial year being 30 June 2010, including all the assets. In fact, the fixed assets of the partnership as at 30 June 2010 are reflected as a nil value. On these available facts, there can be little doubt that the respondent has no liquid assets or realisable assets available out of which it can pay its debts.

The respondent advanced the argument that it admitted non-payment of its rental obligation raises a dispute to the purpose of the guarantee which it was obliged to put up in terms of the lease agreement. The respondent alleges that this dispute needs to be determined first through mediation and then arbitration (in terms of the provisions of the Lease Terms and Conditions), as the purpose of such guarantee does not relate to the respondent's remedial and restorative obligations in respect of the premises, but only in respect of financial obligations arising in respect of the rental charges due, and is there no reason why the trust should not simply extract payment in respect of these obligations due from the respondent by drawing down on the guarantee.

The further contention by the respondent is that the Trust made itself an unpaid creditor by not drawing down upon the bank guarantee in respect of rental, since it done so once before.

In my view, there is no obligation upon the Trust to draw down upon the bank guarantee which the respondent has provided by an entity known as Tumado Investments (Pty) Limited in terms of the lease agreement. Moreover, in the present instance the court is not faced with payment of an admitted indebtedness by a third party in considering whether the respondent is unable to pay its debts. The terms of the lease agreement are clear. The respondent had numerous and separate obligations. It must pay rental without deduction or set-off. It must do so monthly in advance, on or before the first day of each and every month and if it fails to do so, interest shall accrue. It must maintain the condition of the premises and make good and repair damage there. It

was obliged to issue a bank guarantee for R5 000 000,00. Such guarantee was to remain in full force and effect for the duration of the lease period. Any variation in respect of these principle obligations was required to be in writing and signed by the

respective parties.

There has been no such variation. There has been no alteration to respondent's obligation to pay the monthly rental as stipulated, nor has there been any alteration to its obligation to maintain a guarantee for R5 000 000,00. Any dispute as to the purpose of the guarantee, cannot detract from the respondent's obligation to pay the outstanding rental. The stance adopted by the respondent that it is not obliged to pay the outstanding rental is, in my view, not based upon substantial grounds.

On a conspectus of all the evidence in this matter, I am satisfied that the Trust is entitled to relief sought. It follows that the application must succeed.

In the result, the following order is made:-

1. The respondent is placed under provisional liquidation.
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by the service of all registered trade unions, if any; and

by service on all creditors with a claim in excess of R10 000,00.

LE GRANGE, J

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