

SOUTH AFRICA / JUDGMENT

Torre NO and Others v Tarazona and Others (12304/06 , 12304/06) [2006] ZAGPHC 40 (30 April 2006) [2006] ZAGPHC 40

COURT

High Courts - Gauteng

BEFORE

J C W van Rooyen

CASE / FILE NUMBER

12304/2006

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THE HIGH COURT OF SOUTH AFRICA

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SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

(

TRANSVAAL

PROVINCIAL DIVISION)

REPORTABLE Date: 26,28,29,30 April 2006 Case No.: 12304/2006

REPORTABLE

Date: 26,28,29,30 April 2006

Case No.: 12304/2006

In the Ex parte Application of

Philippus Giovanni Torre NO and Eleven Others

Applicants

and

Hector Paredes Tarazona

Inveritas Global Holdings (Pty) Ltd

Intervening Respondents

Micromega Holdings Ltd

Intervening Contractor

010009000003bb00000006001c00000000000400000003010800050000000b0200000000050000000c021d00c306040000002e0118001c000000fb021000070000000000bc02000000000102022253797374656d0000c3060000c09c0000d43a120026e28239304b17000c020000040000002d01000004000000020101001c00000fb02ceff0000000000009001000000000440001254696d6573204e657720526f6d616e000000000000000000000000000000040000002d010100050000000902000000020d000000320a2d000000010004000000000c3061c0020801600030000001e0007000000fc0200009d9da1000000040000002d01020008000000fa02050000000000ffff00040000002d0103000e000000240305000000ffff00001a00c2061a00c206ffff0000ffff08000000fa020000000000000000000000040000002d01040007000000fc020000ffff000000040000002d010500040000002701ffff040000002d0100000300000000000

Companies Act

61

of

1973 -

application in terms of section

386(5)

for the authorization of contract between liquidators and third party, with which it is in pending litigation

-

higher offer by intervening party on substantially the same terms and indemnity to liquidators

as

to costs of litigation. Application dismissed: liquidators should have the opportunity of considering the new offer.

Van RooyenAJ

Van Rooyen

AJ

[1] This an application by the eight joint liquidators of NOSA International (Pty) Ltd (in liquidation) and the three joint liquidators of National Occupational Safety Association (in liquidation) for an order in terms of section 386(5) of the Companies Act 61 of 1973 for the authorizing of a sale concluded between the liquidators and Micromega Holdings Ltd of whatever right, title and interest the applicants may have in and to the assets defined in the

contract for R3,9 million. The Court's approval has to be granted at the latest, today, on the 30th April 2006.[2]When the matter was called on the unopposed roll on the 26th, the intervening respondents applied for a postponement to the 28th so that the Court could consider the second respondent's offer for the same assets at a price of R6 million and also, accordingly, consider whether the contract should be approved in terms of section 386(5). Part of the application was also that the Court should approve of the offer if the liquidators were to accept it. Although it was not clear on the initial papers whether the offer was also irrevocable for a certain time, this was made clear in an amended offer which was made available to me on Saturday the 29th. The offer also stated that the R6 million was paid into trust with the attorney of the intervening respondents and that it was earmarked to be paid in terms of the contract which would follow if accepted by the liquidators. The offer would be open and irrevocable up to the Friday the 12th May and would also be subject to the condition that the High Court authorizes the contract, if concluded, on or before 15 May 2006.[3]An important clause of the contract is that two pending court cases in which Micromega Holdings Ltd and the liquidators were involved would be withdrawn. So as to address the fact that such litigation would, if the offer is accepted, probably continue, the offer reads as follows:

- [1] This an application by the eight joint liquidators of NOSA International (Pty) Ltd (in liquidation) and the three joint liquidators of National Occupational Safety Association (in liquidation) for an order in terms of section 386(5) of the Companies Act 61 of 1973 for the authorizing of a sale concluded between the liquidators and Micromega Holdings Ltd of whatever right, title and interest the applicants may have in and to the assets defined in the contract for R3,9 million. The Court's approval has to be granted at the latest, today, on the 30th April 2006.

[2]

When the matter was called on the unopposed roll on the 26th, the intervening respondents applied for a postponement to the 28th so that the Court could consider

the second respondent's offer for the same assets at a price of R6 million and also, accordingly, consider whether the contract should be approved in terms of section 386(5). Part of the application was also that the Court should approve of the offer if the liquidators were to accept it. Although it was not clear on the initial papers whether the offer was also irrevocable for a certain time, this was made clear in an amended offer which was made available to me on Saturday the 29th. The offer also stated that the R6 million was paid into trust with the attorney of the intervening respondents and that it was earmarked to be paid in terms of the contract which would follow if accepted by the liquidators. The offer would be open and irrevocable up to the Friday the 1

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May and would also be subject to the condition that the High Court authorizes the contract, if concluded, on or before 15 May 2006.

[3]

An important clause of the contract is that two pending court cases in which Micromega Holdings Ltd and the liquidators were involved would be withdrawn. So as to address the fact that such litigation would, if the offer is accepted, probably continue, the offer reads as follows:

"Clauses 12,13 and 14 of (the contract) are deleted. A clause 3.3 is inserted, being the following: 'the sellers will not oppose any Application by Inveritas Global Holdings (Pty) Ltd to intervene in the applications pending in the Transvaal Provincial Division of the High Court under case numbers 26509/2005 and 12132/2005. Inveritas Global Holdings (Pty) Ltd hereby indemnifies and hold the joint liquidators harmless against any and all costs which may be awarded against them arising out of the aforementioned applications and any costs incurred by the joint liquidators in both the said applications. We also hereby indemnify and hold the joint liquidators harmless against all other loss of whatsoever nature which may result from the joint liquidators accepting this offer. We undertake to pay all amounts for which we are liable in terms of this indemnity upon written demand."

"

Clauses 12,13 and 14 of (the contract) are deleted. A clause 3.3 is inserted, being the following: 'the sellers will not oppose any Application by Inveritas Global Holdings (Pty) Ltd to intervene in the applications pending in the Transvaal Provincial Division of the High Court under case numbers 26509/2005 and 12132/2005. Inveritas Global Holdings (Pty) Ltd hereby indemnifies and hold the joint liquidators harmless against any and all costs which may be awarded against them arising out of the aforementioned applications and any costs incurred by the joint liquidators in both the said applications. We also hereby indemnify and hold the joint liquidators harmless against all other loss of whatsoever nature which may result from the joint liquidators accepting this offer. We undertake to pay all amounts for which we are liable in terms of this indemnity upon written demand."

[4] Mr DeBruyn, for the applicants, argued the case for the applicants with diligence. He submitted that the matter was not that straight forward. Of course the liquidators would be pleased to have R2 million more in their coffers, but the contract with Micromega Holdings Ltd had painstakingly been negotiated and the R3,9 million was at least a certainty. The offer did not take care of the litigation sufficiently. Although the offer did undertake to indemnify the liquidators against costs in the litigation, which would on acceptance of the offer probably proceed, there was no guarantee as to such costs. Furthermore, why did the Respondents wait until the 26th April 2006 to make this offer; they had known about the availability of these assets since May 2005, when the assets were advertised. The very late offer from the respondents justified the inference that, as competitors in the market, they

planned to scupper the deal for their own purposes and did not plan to conclude the contract. Mr Michau, for Micromega Holdings Ltd, also argued that a substantial benefit for the liquidators was the settlement of the litigation as part of the contract. Mr Greyling, for the Respondents, however, argued that the offer was clearly in the interests of the creditors. His clients had only on the 24th April had the opportunity to peruse the contract at their attorneys' offices, after the contract had reached their attorneys on the 20th April. Mr Tarazona's attorney had been in correspondence with the liquidators since 27th January this year; the correspondence raised concerns about the litigation with Micromega Holdings Ltd. and Mr Tarazona was not satisfied with their answers, as appears from a letter directed at the liquidators and dated 17 February 2006. Hereafter Mr Tarazona found out that a contract had been concluded and that the High Court would be approached in this connection. His attorney then addressed a letter, dated 6th April 2006, to the liquidators in which a copy of the contract was requested; a contract which he only saw on the 24th April, as pointed out above. Mr Greyling argued that the late intervention was perfectly understandable. Although the offer initially stated that it was "unconditional" and it was argued that that meant that it was also irrevocable, the offer was amended as the matter before the Court proceeded and ultimately it is clear that the offer is irrevocable, for a certain period, the purchase price guaranteed and the liquidators indemnified against litigation costs. In so far as the Master is concerned, Mr Krige, an Assistant Master of the High Court, reported that the Master would abide the decision of the Court. At that stage the Master could, however, not have been aware of the intervention. Given the urgency of the matter, the matter could, unfortunately, not be referred to the Master again before this Court reaches its decision today.[5] Mr De Bruyn also argued that the Court could, only on the application of a liquidator, act in terms of section 386(5) and not, as in the present case, do so on the application of a creditor of the estate, in casu Mr Tarazona, who is a director of Inveritas Global Holdings. Mr Tarazona has proved a claim for R3,5 million against the estate. The Court could, accordingly, not approve of the offer at this stage and hold that if it were to be accepted, it could be regarded as having been authorized by this Court in terms of section 386(5).[6] I agree with the view that only a liquidator may approach a Court in terms of section 386(5). I am indebted to Mr De Bruyn for having referred me to the authorities for this view: Ex Parte Patterson, NO: In Re Goodearth Estates (Pty) Ltd 1974(4) SA 281 (E); Turnover Holdings (pty) Ltd v Saphi (pty) Ltd 1997(1) SA 263 (T).

[7] Mr Greyling, however, contended that section 387(4) is wide enough for a Court to make an order so as to rectify the act of a liquidator about which a creditor was aggrieved. Section 387(4) reads as follows:

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for the applicants, argued the case for the applicants with diligence. He submitted that the matter was not that straight forward. Of course the liquidators would be pleased to have R2 million more in their coffers, but the contract with Micromega Holdings Ltd had painstakingly been negotiated

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[5]

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I agree with the view that only a liquidator may approach a Court in terms of section 386(5). I am indebted to Mr De

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In Re Goodearth Estates (Pty) Ltd

1974(4) SA 281 (E);

Turnover Holdings (pty) Ltd v Saphi(pty) Ltd

1997(1) SA 263(T).

[7]

however, contended that section 387(4) is wide enough for a Court to make an order so as to rectify the act of a liquidator about which a creditor was aggrieved. Section 387(4) reads as follows:

'Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.'

In *LL Mining Corporation Ltd v Namco(Pty) Ltd (In liquidation) and Others* 2003(3) SA 407(C) Davis J said the following in regard to the subsection at 414-5:

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LL Mining Corporation Ltd v Namco(Pty) Ltd (In liquidation) and Others

2003(3) SA 407(C) Davis J said the following in regard to the subsection at 414

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"A 'person aggrieved' in terms of s 387(4) has been canvassed in a number of cases thus. Of relevance is the judgment in *Attorney-General of Gambia v N'Jie* [1961] AC 617 ([1961] 2 All ER 504) at 634 (AC) and 511 B (All ER), where Lord Denning said that the words 'include a person who has a genuine grievance because an order has been made which prejudicially affects his interests'. It has been held that the words include a person who has a genuine grievance because an order has been made which prejudicially affects his interests, it being simply a question of looking at the facts and asking whether the person who is making the application has a genuine interest in maintaining it. (See the case cited in *Blackman et al* at 14 - 511.) In *Francis George Hill Family Trust v Southern African Reserve Bank and Others* 1992 (3) SA 91(A) at 101 F - G and 102C - 0 Hoexter JA said: 'With deference to Lord Denning [in the *N'Jie* case supra], it seems to me that his further statement that "a person aggrieved" would include a person who has a genuine grievance because an order has been made which prejudicially affects his interests may be rather too widely stated. . . . Leaving aside the significant statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words "person aggrieved" signifies someone whose legal rights have been infringed - a person harbouring a legal grievance.'

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Blackman et al comment as follows on this position (at 14 - 511):

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'Clearly while. . . it is certain that a person is aggrieved when it can be seen that he will suffer or may well suffer financial loss, it is, on the other hand, certain that the words "person aggrieved" would never include "a busybody who is interfering in things which do not concern him"; nor a man who is disappointed of a benefit which he might have received if some other order had been made.' Assuming in favour of the fourth respondent that there was a person so aggrieved, the further question arises as to whether the fourth respondent can be said to have been aggrieved by a decision of the liquidators. Assuming that the failure of the liquidators to act in order to ensure the prosecution in this application constitutes a decision in terms of the section, the further difficulty arises as to the absence of any formal application by fourth respondent as to precisely what is required of the liquidators, which would in turn justify some refusal on their part to act insofar as this application is concerned. The facts of this case indicate that no separate application was brought by fourth respondent insofar as the decision or lack thereof of the liquidators is concerned. To some extent Ms DeSwardt sought to circumvent this problem by a reference to *Western Bank Ltd v Thome NO and Others* NNO1973 (3) SA 661(C) at 665F - H where Van Winsen J said: 'It seems, therefore, that it is only from the Court that the liquidators can get the authority, in so far as it may be necessary. . . to bring or defend legal proceedings in the name of the company in liquidation. The power in the Court to confer such authority derives either from the terms of s 130(3) or s 142(3) of the Companies Act. Furthermore, since the respondents were in any event before the Court in opposition to the granting of the relief sought by applicant on notice of motion, it presented them with the appropriate opportunity to seek the authorisation they needed. To have brought a separate substantive application for such purpose would have involved the estate in unnecessary additional costs.' That may well have been the case in *Thome* (supra). But in this case there was no clarity at all as to precisely what fourth respondent required of the liquidators and, indeed, when the matter was debated before this Court questions were put to Ms DeSwardt as to the exact nature of the relief in the event that an application was successful. The questions notwithstanding, there was no clarity as to the nature of such relief. In itself this illustrates the importance of the requirement of notification as contained in the section. For this reason, it does not appear that an application by fourth respondent has been properly brought in terms of s 387(4) of the Act."

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LL Mining

matter:

"The Court has an unrestricted discretion to make any order it considers that justice requires should be made... subject, it is submitted, to the consideration that it cannot interfere with rights bona fide and lawfully acquired by third parties (cf Craigiebyres Farming Enterprises (Pty) Ltd v Kurz NO1979(2) PH E6(N); in this case the Court considered obiter that it was doubtful whether under s 387(4) it could set aside an agreement otherwise validly concluded by which the liquidators sold immovable property of the company for a price allegedly far below the market value: with respect, the Court's doubt was well founded). The Court will not lightly interfere with an act bona fide done or a decision bona fide taken by the liquidator; where there is no lack of bona fide the question is whether in the circumstances the liquidator has acted in a way in which no reasonable liquidator could have acted, having regard to the objects of winding-up and a liquidator's duties in general."

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the question is whether in the circumstances the liquidator has acted in a way in which no reasonable liquidator could have acted, having regard to the objects of winding- up and a liquidator's duties in general."

[8]I will accept without deciding that the first respondent may well be regarded as a person aggrieved by the manner in which the liquidators acted. His rights to an optimal division of the estate could be said to have been infringed upon by the fact that the liquidators had not informed him earlier of the content of the contract. However, I do not believe that a case has been made out that the liquidators have not acted in a bona fide manner or in a manner otherwise than a reasonable liquidator would have acted. Furthermore, I agree with Meskin and the other in Craigie by rest that the Court cannot set aside (in *casu* disapprove of) a contract validly concluded with a third party (in *casu* Micromega Holdings Ltd) as a result of a section 387(4) complaint.[9]My conclusion is, accordingly, that I am not, in the circumstances, whether in terms of section 386(5) or 387(4), entitled to state that the offer by the second respondent is of such a nature that, if accepted by the liquidators, I would authorize the contract. The furthest I would go, however, is to state that had the respondents not intervened I would have had no problems in authorizing the contract concluded between the liquidators and Micromega Holdings Ltd.[10]The very real issue in this case is whether the best interests of the creditors will be served if the contract is authorized by the Court. The R2,1 million price difference is substantial. The offer ultimately made by the second respondent, except for the pending litigation, accords in essence with the contract concluded between the liquidators and Micromega Holdings Ltd. I might mention that it would be reasonable of the liquidators to expect that the indemnity be supported by a realistic guarantee as to costs. The absence of such a guarantee at this stage is not sufficient to reject the irrevocable offer of the second respondent as not being bona fide.[11]It is understandable that the liquidators have put up a *virilis defensio* against the respondents, since they were under a duty to do so in terms of the contract. I have also gained the impression that they bona fide believe that the deal with Micromega Holdings Ltd is in the best interests of the creditors. It is true that if I do not authorize this contract it will terminate at midnight. Yet, I cannot ignore their irrevocable offer which was ultimately made by the second respondent. I believe that it would be in the best interests of the creditors if the liquidators could be placed in the opportunity of considering the offer of the Second Respondent during the next 12 days. They have not had this opportunity before and it would be unreasonable towards the creditors if this is not done.

[8]

I will accept without deciding that the first respondent may well be regarded as a person aggrieved by the manner in which the liquidators acted. His rights to an optimal division of the estate could be said to have been infringed upon by the

fact that the liquidators had not informed him earlier of the content of the contract. However, I do not believe that a case has been made out that the liquidators have not acted in a manner or in a manner otherwise than a reasonable liquidator would have acted. Furthermore, I agree with Meskin and the in Craigiebyres that the Court cannot set aside (disapprove of) a contract validly concluded with a third party (Micromega Holdings Ltd) as a result of a section 387(4) complaint.

[9]

My conclusion is, accordingly, that I am not, in the circumstances, whether in terms of section 386(5) or 387(4), entitled to state that the offer by the second respondent is of such a nature that, if accepted by the liquidators, I would authorize the contract. The furthest I would go, however, is to state that had the respondents not intervened I would have had no problems in authorizing the contract concluded between the liquidators and Micromega Holdings Ltd.

[10]

The very real issue in this case is whether the best interests of the creditors will be served if the contract is authorized by the Court. The R2,1 million price difference is substantial. The offer ultimately made by the second respondent, except for the pending litigation, accords in essence with the contract concluded between the liquidators and Micromega Holdings Ltd. I might mention that it would be reasonable of the liquidators to expect that the indemnity be supported by a realistic

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stage is not sufficient to reject the irrevocable offer of the second respondent as

not being

bona fide.

[11]

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placed in the opportunity of considering the offer of the Second Respondent

during the next 12 days. They have not had this opportunity before and it would

be unreasonable towards the creditors if this is not done.

Order:

The application is dismissed and costs are costs in the liquidation in so far as all the parties, including Micromega Holdings Ltd and the Respondents, are concerned.

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parties, including Micromega Holdings Ltd and the Respondents, are

concerned.

If the offer leads to a contract with the second respondent I suggest that, since

I have read the documentation, it would save time to bring an application for authorization before me on an urgent basis.

I have read the documentation, it would save time to bring an application for

authorization before me on an urgent basis.

J C W van RooyenSigned on original at 20:20, 30 April 2006Acting Judge of the
High CourtFor the applicants: adv WJ De Bruyn instructed by Werksmans, SandownFor the
Respondents: adv J Greyling instructed by Oelofse Hefer & Wessels,Pretoria

J C W van Rooyen

Signed on original at 20:20, 30 April 2006

Acting Judge of the High Court

For the applicants: adv WJ De Bruyn instructed by Werksmans, Sandown

For the Respondents: adv J Greyling instructed by Oelofse Hefer & Wessels,

Pretoria

For Micromega Holdings Ltd :adv R Michau instructed by Routledges ModiseMoss Morris,
Sandton

For Micromega Holdings Ltd :adv R Michau instructed by Routledges Modise

Moss Morris, Sandton

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