
SOUTH AFRICA / JUDGMENT

Visnenza NO and Another v Partners Consolidated Investments (Pty) Limited (15/37237) [2017] ZAGPJHC 429 (13 December 2017) [2017] ZAGPJHC 429

COURT

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba

CASE / FILE NUMBER

15/37237

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 15/37237
Not
reportable
Not
of interest to other judges
Revised.
13/12/2017
In the matter

between: VISNENZA, FRANCO CARLO N.O.
In his capacity as a trustee of
The Visnenza Family
Trust First
Applicant
DANNHAUSER, JOHANN N.O.
The Visnenza Family
Trust Second
Applicant
and
PARTNERS CONSOLIDATED INVESTMENTS
(PTY) LIMITED

Registration No: 2006/016602/23 Respondent

JUDGMENT

MODIBA, J:

- [1] This is an opposed application for the winding-up of the respondent in terms of section 345 of the Companies Act 61 of 1973 (the Act). Unless otherwise specified, reference to statutory provisions is to this Act.
- [2] Initially, the applicant sought to place the respondent under business rescue in terms of section 131 of the Companies Act 131 of 2008 and to appoint a business rescue practitioner for the respondent. It sought the relief set out in paragraph 1 above in the alternative. It no longer persists with the main relief it initially sought. It seeks the order set out in paragraph 1 above.
- [3] The circumstances that led to this change are as follows: during November 2016, after the replying affidavit was delivered, the applicants discovered that the respondent was evicted from its principal place of business, being premises rented by its subsidiary PCI Properties (Pty) Limited (PCI Properties Ltd). In its answer to the applicants' supplementary affidavit disclosing these facts, the respondent does not disclose where it is operating from. The applicants seek an inference drawn from this non-disclosure that the respondent is no longer trading.
- [4] The assets of PCI Properties were attached and sold in execution. Judgment in the amount of approximately R600 000, 00 has been obtained against PCI Properties. The judgment has not been satisfied. PCI Properties is the respondent's primary subsidiary from which it earns dividends. The respondent has not received dividends from this or its other subsidiaries and has not paid loans to shareholders despite having made undertakings to do so.
- [5] These revelations caused the applicants to realize that there are no longer prospects of the respondent being rescued. They seek leave to supplement their papers to place this information before court. They contend that the facts contained in the supplementary affidavit were not within their knowledge at the time of launching the application or delivery

of the replying affidavit, and that the new facts are relevant for the determination of this matter in that they reveal the precarious financial position of the respondent and its subsidiaries. This request is not opposed. The respondent has not placed information before the court demonstrating how granting this request will be prejudicial to it. Given that it has answered the applicants' supplementary affidavit, it stands to suffer no prejudice if the supplementary affidavit is admitted. The court is satisfied that the new information is relevant for the determination of this application. The leave sought is therefore granted.

- [6] One of the debts the applicants allege the respondent is unable to pay debts is a loan by Visnenza Family Trust (the trust). The respondent denies that the trust loan is due and payable. It also denies that it is unable to pay its debts. The following issues stand to be determined:

6.1 whether the amount due by the respondent to the Visnenza Family Trust is due and payable;

6.2 whether the respondent is unable to pay its debts within the meaning of section 344(4) read with 345(1) (c) of the Companies Act, 1973.

- [7] The respondent agrees that it was in financial distress. It contends that there has been a remarkable improvement in the financial performance of its subsidiary which had a positive impact on its financial performance. It has since been able to pay its debts. It uses a payment of R38,396.21 to Swanepoel Van Zyl Incorporated in respect of a taxed bill of costs relating to the wasted costs of a postponement in December 2016, as well as an amount of R250 000,00 paid to Nicolas Johannes Landman (Landman) in May 2017 in respect of a shareholder's loan as proof of its changed financial position.

- [8] The applicants contend that the respondent remains in financial distress and unable to pay its debts. It delayed to comply with an order by Van Oosten J granted on 22 March 2017 to disclose its latest financial position. When it eventually filed a supplementary affidavit with this information, it attached bank statements that reflect no income received between January and May 2017, several returned debit orders and bank charges levied in respect of these debit orders. The payments it made in respect of the taxed bill of costs and to Landman were not made from the respondent's bank account. Proof of payments attached to the supplementary affidavit indicate that the funds were paid from the bank account of its attorney of record. The respondent does not take the court into its confidence regarding who the funds utilized to make these payments belong to.

- [9] The respondent has not compiled detailed management accounts for the period 2015 to 2017. To the supplementary affidavit it attached a balance sheet for this period. The reluctance of its auditors to get involved with the respondent, on the respondent's explanation to mitigate risks attendant upon this application, can never be an excuse for not producing management accounts. Management accounts are prepared internally and presented weekly, fortnightly and monthly for the purpose of managing the company.

- [10] The disclosed management account reveal a decline in the respondent's net asset value from R62,3 million in 2014 to R17,6 million as at 28 February 2017 and a reduction in the respondent's investments from R73,8 million to R35,5 million over the same period. They also reflect expenses incurred in 2017 in the amount of R2, 917,423.00 when no income is generated. These expenses are nonsensical in the face of the respondent's contention that it is a non-trading entity. If anything incurring expenses when no income is generated explains the reduction in the respondent's net asset value. The disclosed information reflects the respondent's illiquid position. It provides an explanation for its inability to pay its debts.
- [11] The respondent challenges the applicants' locus standi on the basis that the trust loan is not due and payable. It is irrelevant whether the amount due to the trust is repayable or not for the purposes of the applicants' locus standi. Section 346(1) (b) of the Companies Act specifically vests a contingent or prospective creditor with locus standi.
- [12] In any event, on the respondent's own version, the trust loan falls within the purview of clause 12 of the shareholders agreement and is accordingly only repayable in terms of that clause. Clause 12.2.7 of the shareholders agreement provides that any loan advanced in accordance with clause 12 would "be repaid as and when determined by the Board ..." Clause 12.2.5 of the shareholders agreement provides that the loan under clause 12 would be repayable to the shareholders simultaneously and proportionately.
- [13] The loan is repayable because the respondent agreed at the AGM on 30 July 2013 that shareholders loans (both interest free and interest bearing) would be repaid. It envisaged that repayment of the shareholders' loans would take place within two years i.e. before 30 July 2015. The respondent generated insufficient cash to commence repaying the loan accounts. At the AGM held on 26 November 2014 a resolution was passed offering shareholders the right to convert their loans into shares at a discounted value of 15%. On 29 April 2015, the shareholders were invited to participate in a rights issue to assist the company to raise funding to repay loans and fund potential investments. The rights issue and loan conversion scheme was devised by the respondent
- to enable it to repay certain of the equity loans without the necessity of utilising cash resources.
- [14] On 1 July 2015, the directors addressed a letter to shareholders setting out the company's position after the rights issue. The decision to repay certain of the shareholders pursuant to the right issue was a clear decision on the part of the Board and the shareholders to repay the shareholders' loans. The Trust's loan was, in accordance with clause 12 of the shareholders agreement repayable simultaneously and proportionately with the repayment of the other shareholders loans. It became repayable upon the implementation of the rights issue. In the light of the fact that no dividends had been paid to the respondent by its subsidiaries (being its sole source of income), it is not surprising that the respondent was unable to commence repayment of the loans. By having repaid certain of the equity loans (by means of the rights issue and loan conversion scheme), it is erroneous for the respondent to contend that it is not liable to repay the amounts due to other shareholders.

- [15] The following facts further demonstrate the respondent's inability to pay its debts. On its own admission the respondent does not generate cash income and relies on dividends from its subsidiaries. The respondent has been evicted from its principal place of business as a result of PCI Properties (Pty) Limited and PCI Rentals (Pty) Limited having failed to make payment of the rent in respect thereof. Despite delivering an answer to the supplementary affidavit, the respondent does not take the court into its confidence by disclosing where it has now relocated to. The reasonable inference to be drawn is that the respondent has been evicted from its offices and is no longer operating.
- [16] The respondent has entered into compromise agreements with creditors. The respondent had compromised a claim from a settlement with Preasidium to repay an amount of R20 million in settlement of an initial loan of R42 million from that entity. The respondent was in the process of finding investors in order to raise capital to repay the amounts due to creditors. It also suggests that its only liabilities relate to the repayment of loans, investments and/or loan accounts. However the management accounts record that the respondent's overdraft facility has increased and stood at R30 990, 00 as at 28 February 2015. The company made a loss of R50 203, 00 in the financial year ending February 2015.
- [17] In the letter addressed to the shareholders dated 1 July 2015, the Executive Committee recorded details of the company's position and from that letter the following emerges: of the total loans of R131, 5 million, R59 million was converted into equity, leaving a balance due on loans in an amount of R72, 5 million. The realisable assets of the company amount to R2, 7 million. After a cash injection of R38, 5 million from an investor, the total amount of R24, 3 million was required to repay loans.
- [18] These disclosures evidence a company experiencing severe financial difficulty. It is apparent that the only means by which it intended to settle its creditors was by raising funds in the form of loans or investments from third parties. Nowhere is it suggested or anticipated that the respondent would be in a position to trade its way out of its financial difficulties within the short term or that it would utilize income from dividends to improve its financial position.
- [19] On the authority in *Gap Merchant Recycling CC v Goal Reach Trading*[1] it is evident that the respondent meets the test for commercial insolvency as it cannot pay its debts as and when they fall due.

Despite various attempts to raise income to repay the loan accounts, the respondent has been unable to do so. Despite a lapse of almost four years since the AGM of 30 July 2013, the respondent has been unable to raise any funds to repay the shareholders' loans.

- [20] For the reasons set out above, it is apparent that the respondent is unable to pay its debts within the meaning of section 345(1) (c) read with section 344(f). In addition, the respondent, despite having been served with a notice in terms of section 345(1)(a) at its registered office, has neglected to pay the amount claimed, or to secure or compound for it to the reasonable satisfaction of Dr Haydon Smith for a period of three weeks after delivery

of same. The respondent is accordingly deemed to be unable to pay its debts within the meaning of section 344(f) read with section 345(1) (a).

[21] In the premises I am satisfied that the applicants have established a case on a balance of probabilities for the provisional winding-up of the respondent.

[22] Therefore the following order is made:

ORDER

The application succeeds.

The respondent is placed under provisional winding-up in terms of section 345 of the Companies Act 61 of 1973. This order is returnable on 16 April 2018 when interested parties shall establish why the winding up order should not be made final.

L T MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES:

Applicants' Counsel: N.P.G. Redman SC

Instructed by: Le Roux Vivier Attorneys

Respondent's Counsel: F Geyer

Instructed by: Swanepoel van Zyl Attorneys

Date heard: 31 October 2017

Date delivered: 13 December 2017

[1][1] 55 CC 2016 (1) SA 261 at para 53.

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