

SOUTH AFRICA / JUDGMENT

Xu v Kilimanjaro Property (Pty) Ltd (40666/07) [2008] ZAGPHC 244 (2 June 2008) [2008] ZAGPHC 244

COURT

High Courts - Gauteng

BEFORE

Makgoka

CASE / FILE NUMBER

40666/07

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IN

THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL

PROVINCIAL DIVISION]

CASE

NO: 40666/07 2 JUNE 2008

In

the matter between :

YOU

QIANG XU APPLICANT

And

KILIMANJARO

PROPERTY (PTY) LTD

(Registration

Number: 2004/008687/07) RESPONDENT

JUDGEMENT

MAKGOKA AJ

- [1] The Applicant, a shareholder and director of the Respondent company, brings this application for the winding-up of the Respondent ["the company"] terms of section 344 (h) of the Companies Act, 61 of 1973 ("the Act"). Ancillary thereto, the Applicant seeks to wind-up the Respondent in terms of section 345 of the Act. In terms of section 344 (h), the court may wind-up a company if it is "just and equitable" to do so, while in terms of section 345, the court may wind-up a company if it is unable to pay its creditors.
- [2] The company was incorporated on 30 March 2004 and has seven shareholders, who are all directors thereof, including the Applicant with 18 % of the shares. The company's principal business is in property. Initially the Applicant was also the chairman of the board of directors. There is a dispute as to whether this is still the position. However, I am not called upon to decide on the aspect, and I will not do so.
- [3] It is common cause that the Applicant lent and advanced an amount of R3 600 000.00 to the company. There are no express terms as to when the loan is repayable to the Applicant, and the applicant holds no security for this loan amount.
- [4] The grounds upon which the application is brought are briefly the following: on 3 April 2007, one of the seven directors of the company, removed all files and documents from the company's main place of business in Midrand. All employees of the company were forced to leave. Since then the offices had remained closed, and the company has done no business. Two of the employees of the company are still being paid although they are not working. The third employee has resigned due to the events referred to above, and the projects the company is involved in, do not seem to be making progress. The applicant has not received his salary as a manger and the company accordingly owes the Applicant an amount of R108 000.00, calculated at R27 000.00 per month.
- [5] It is further alleged the company is also indebted to the South African Revenue Services [SARS], but the Applicant is not able to provide evidence regarding the exact amount. The company is also alleged to be dormant.
- [6] In response, it is stated on behalf of the company that: the deponent to the founding affidavit, Rhonda Boswell, was dismissed on 5 April 2007, while the Applicant was dismissed on 18 February 2007. Both were dismissed on the ground of colluding with the company's competitor. It also appears that the company's registered physical address had properly been changed with approval of the Registrar of Close Corporation to Suite 401, Waterkloof Gardens, 207 Main Street, Brooklyn, Pretoria.
- [7] It is further denied that the company is dormant or unable to pay its debts. In support thereof, financial statements of the Respondent for the year 2005 were attached, as well as the respondent's bank statement for the period 14 June - 3 October 2007, which reflect a credit balance of R2 494 767.39 on the latter date.

[8] Now when one has regard to the grounds relied upon for this application, and the answer thereto on behalf of the company, it is my view that this application cannot succeed. I say so for the following reasons:

it was alleged that the company has cased business and is dormant. The court has been provided with evidence that the company is still conducting business. And given the nature of the principal business of the company, one would not expect a flurry of business activities;

it was further alleged that the projects that the company is involved in, do not seem to be making progress. This is a contradiction in terms. The Applicant cannot on one hand, assert that the company is dormant, and then on the other, aver that the company is engaged in projects, although such projects do not seem to be making progress. In any event, it can hardly be a proper basis for winding-up of a company that its progress in its business activities, is slow.

as regards the loan of R3 600 000.00, it was argued by Mr. Smit on behalf of the company that there is no proof that the company has failed on demand to pay the debt which had become due. I agree. There are no facts averred upon which a conclusion could be arrived at that, if called upon, the company would be unable to meet the demand.

the Applicant further alleged that the company owes the South African Revenue Services. Again no facts are provided.

[9] As a result, I find that the Applicant has not established sufficient basis to justify the winding-up of the company. In the end result the application falls to fail.

[10] In the premises I make the following order:

[10.1] The application is dismissed with costs.

T M MAKGOKA ACTING JUDGE OF THE HIGH COURT.

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