

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

21743/2010

5 **DATE:**

9 DECEMBER 2010

In the matter between:

ABSA BANK LIMITED

Applicant

and

10 **CURTAIN WAREHOUSE FRANCHISE (PTY) LTD** Respondent**J U D G M E N T**15 **LOUW, J:**

This application for the provisional winding up of the respondent is based on the statutory demand provided for in section 345(1)(a)(i) of the Companies Act 61 of 1973 ("the Act"), which was served by the sheriff on the respondent at its registered address on 28 July 2010 and was received by the respondent. The respondent is indebted to the applicant in respect of monies lent and advanced on a mortgage bond, in respect of which the outstanding balance as at 28 June 2010 stood at R4 399 081,90. The outstanding balance, I

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understand, is at this stage in the vicinity of R4,6 million.

The deeming provision in section 345(1)(a)(i) creates a rebuttable presumption that the respondent is unable to pay its
5 debts. The respondent was already in arrears with the payment of its mortgage debt and since it received the demand on 28 July 2010, the respondent has not made any payment to the applicant in respect of the indebtedness. In the papers there is a denial by the respondent that the aforesaid amount
10 was owing and there is also a denial that the respondent is insolvent. These assertions were not pursued in argument by Mr Elliott on behalf of the respondent. Suffice to say that the bald unsubstantiated statement in the answering papers to the effect that respondent is not insolvent, is not sufficient to rebut
15 the presumption of insolvency created by section 345(1)(a)(i) of the Act.

The application was launched on 5 October 2010. The respondent has, however, since this matter first came before
20 this Court on 21 October 2010, taken a different tack in supplementary affidavits, namely that the respondent has concluded a written deed of sale with the Donaldson Family Trust on 6 November 2010, in terms whereof the respondent sold the property that is bonded to the applicant, together with
25 an enterprise conducted by the respondent, for a purchase

price of R7,4 million. When the matter became before Desai, J on 11 November 2010, the respondent asked that the matter be postponed in order to allow for all the conditions of the sale to be fulfilled. Desai, J acceded to the request and postponed
5 the application for one week to 18 November 2010 to allow the respondent an opportunity "to indicate if/how/when the conditions contained in the deed of sale are to be complied with".

10 The sale relied upon by the respondent was, at the time, subject to two conditions relevant to these proceedings, (1) the approval of bond finance within seven days from the sale date, that is clause 4.1 and (2) the conditions set out in clause 1.1.7, defining the effective date of the sale as "the date upon
15 which all conditions referred to in clause 6 are fulfilled", and clause 6 which reads:

"It is recorded that the seller will provide to the purchaser copies of the title deed, municipal plans,
20 agreements of lease with terms and conditions, rental transactions, rent roles, municipal accounts, utility service accounts, service contracts, fixed asset register, list of prepaid and other expenses (refer clause 7.2.1) and the like, within 15 days of
25 the sale date."

The matter came before me in the Motion Court on the postponed date on 18 November. It then appeared that the bond clause had not been complied with. In a further
5 supplementary affidavit, it was revealed, however, that on that very morning, the morning of 18 November 2010, the parties to the sale had concluded a further sale agreement on the same terms, save that this time the sale was without the suspensive condition relating to bond finance.

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Relying on the provisions of section 347(1) of the Act, which affords the Court a discretion to grant or dismiss any application under section 346 or to adjourn the hearing thereof conditionally or unconditionally, or to make any interim order
15 or any other order it may deem just, Mr Elliott, on behalf of the respondent, submitted that the matter should once more be postponed to 6 December 2010. This, he submitted, would allow for the fulfilment of the condition set out in clause 6. He stated that the condition will be fulfilled by 3 December 2010,
20 being 15 days from the sale date, resulting in the sale going through, the applicant's debt being paid from the proceeds and the bond being cancelled.

Mr Vivier, who appeared on behalf of the applicant on this
25 occasion, strenuously opposed a further postponement and

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submitted that a provisional order should be made. He submitted that this is a clear case where the applicant has a claim which the respondent cannot pay and that the applicant is *ex debito justitiae* entitled to a winding up order and the Court's discretion to make any other order, is limited and narrow. He, therefore, urged me to make a provisional order of winding up. I then reserved judgment.

The position was that I was ready to deliver judgment in this matter on the respondent's application to postpone or whether a provisional order should be made on 25 November. A further postponement of the matter was at the last moment sought by the respondent. I heard argument and on 26 November 2010 made an order that certain further affidavits by Mr Wille, the respondent's attorney and Ms Wiggett, be admitted as evidence and that the respondent pay the costs associated with those affidavits and also that the main application be postponed to today's date, that is 9 December 2010 for hearing. At the same time, the respondent was granted leave to supplement its papers solely in regard to the outcome of the contract of sale by no later than 12 noon Tuesday 7 December 2010, and the applicant was given leave to reply to such papers by no later than 3 p.m. on Wednesday 8 December.

A further flurry of affidavits were filed pursuant to that order

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and it now turns out that the sale is not free of any condition relating to bond finance, but that in fact the Trust purchaser, although it had paid the deposit of R740 000,00, was still dependent on being granted a bond by Nedbank for the
5 balance of the purchase price. Now this, of course, is again a different tack which has been taken by the respondent.

In an affidavit on behalf of the respondent, by Mr Abrahams, which was filed on 7 December, he says that the bond finance
10 referred to in paragraph 4.1 of the original contract of sale is in place and that he is advised by Nedbank that the guarantee will be issued in accordance with paragraph 4.4 of the sale agreement on 8 December 2010.

15 He enclosed a copy of the bond approval by Nedbank Limited, which advised that a loan had been approved in the name of the bond applicant, that is, the Donaldson Family Trust, upon certain conditions being complied with. He further confirmed that the seller had complied with the conditions set out in
20 Clause 6 of the sale agreement.

Mr Sanderberg - the attorney on behalf of the applicant, filed an affidavit in response to this affidavit by Mr Abrahams - and expressed the view that it is highly unlikely that Nedbank
25 would issue an unconditional guarantee as suggested in the

affidavit. He drew attention to the fact that on the previous occasion, the Court was persuaded not to grant a provisional liquidation order on the basis that an unconditional contract of sale had been concluded. Now, as I pointed out earlier, there
5 again is a condition that the purchase price be raised by way of a bond being registered over the property, being the very property over which the applicant's bond is registered and also the simultaneous cancellation of the applicant's mortgage bond.

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Mr Sanderberg pointed out that he had made it clear to the respondent at all times, that it would require an acceptable guarantee for payment of the capital due to the bank and the costs incurred in the liquidation application, before it would
15 consent to the cancellation of its mortgage bond. He refers to an e-mail he addressed to the respondent's conveyance who would handle the transfer pursuant to the sale on 9 November 2010, which sets out that attitude. He points out that on 30 November, he invited the conveyancer to respond to the e-mail
20 and that on 2 December he addressed a further e-mail to the conveyancer in which he stated that he had noted that the conveyancer had failed to respond to the condition referred to in the earlier e-mail. The conveyancer then responded on 2 December 2010 and stated that she had asked Mr Wille to
25 respond to the query as her mandate was limited to the
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registration of the transfer. Mr Wille then responded in the following terms:

5 "Please note that our client requires any and all legal costs to be taxed by the taxing master of the High Court."

Now as pointed out by Mr Sanderberg, it is clear that while the respondent is entitled to insist on taxation of whatever fees it is obliged to pay, those costs are secured by the mortgage bond in favour of the applicant and that the applicant will not consent to the cancellation of its mortgage bond until such time as both the capital and the costs have been paid. He further points out that taxation delays in this division of the court, are substantial and in his experience, are in excess of six months. He further points out that a bill is still to be prepared and that the period between 15 December and 15 January, in general adds to the normal delays in getting a taxation of costs.

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Finally he states, on behalf of the applicant, that it is not prepared to abandon its position as secured creditor with regard to unpaid and still to be taxed costs. He, therefore, submitted that the respondent's sale of its property did not provide sufficient certainty that the mortgage bond and legal

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costs payable by the respondent, would be paid in a satisfactory manner and submitted that the respondent should be liquidated.

5 In response thereto, Mr Wille filed two further affidavits on 8 December and in the first of those, he annexed a copy of a guarantee which had been issued by Nedbank Limited and submitted that the guarantee secures and compounds the alleged debt due to the applicant in accordance with section
10 345(a) of the Act. The Nedbank guarantee, to which reference is made, advises that the bank held, at the disposal of the purchaser of the property, R6,6 million which would be paid on condition that written confirmation of registration be faxed to Nedbank before noon and that there exist certain further
15 conditions to the guarantee which are listed on the second page, namely,

“1. Registering a covering mortgage bond of R8 million over erf 107555, Retreat and erf 107549,
20 Retreat, Cape Town.”

So the first condition is that two mortgage bonds be registered, one over the property here concerned (erf 107549) and the other over another property (erf 107555).

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"2. Cancellation of all existing bonds in favour of Investec over erf 107555, Retreat, Cape Town.

3. Cancellation of all existing bonds in favour of Absa Limited and Hamsa Abrahams Trust over erf
5 107549, Retreat, Cape Town."

The guarantee further states that the bank reserves the right to cancel the guarantee at any time prior to registration, by giving 14 days written notice to that effect and finally that the
10 guarantee will expire on 8 June 2011, after which the bank's obligation will cease to exist and the guarantee will be regarded as null and void. The second affidavit which was deposited to on 8 December by Mr Wille, attaches an e-mail from the transferring attorney, stating the following:

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"Obviously transfer will never be registered and the guarantee will never pay out if the bond over the property is not cancelled. I have asked for cancellation figures and cancellation instructions to
20 be issued on several occasions unsuccessfully. Now that the purchase price is secure, it is in everybody's interest to get the transfer registered as soon as possible. We can agree an amount to be retained in trust pending confirmation of the cost by
25 way of taxation or agreement."

So, the transferring attorney indicated that a further amount will be retained in order to cover any costs that are taxed or agreed in future.

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This morning Mr Elliott, who appears on behalf of the respondent, asked for a further affidavit to be received by Mr Abrahams on behalf of the respondent. He confirms that the guarantee given by Nedbank was acceptable to the
10 respondent, and further annexes a copy of a telefax addressed by the transferring attorney to Mr Sanderberg, the applicant's attorney, today, 9 December, which reads as follows:

15 "We refer to the above matter and confirm that we are in receipt of a deposit of R740 000,00 and a guarantee in the sum of R6,6 million in favour of the payment of the balance of the purchase price. We hereby irrevocably undertake to pay Absa Bank Limited, subject to the conditions referred to in
20 Annexure A attached and below, the sum of R4,399 million plus interest at 9% per annum capitalised monthly from 29 June 2010 to date of payment, limited to the amount of R7,4 million, both days included. We further undertake to pay your agreed
25 or taxed costs on date of registration of the above

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transfer in the matter between Absa Bank and
Curtain Warehouse Franchise Holdings (Pty) Limited
(this particular application) including costs of
cancellation of the bond registered over the above
5 property, limited to the sum of R3 million, less
interest at 9% per annum, capitalised from 9 June
2010 to date of payment. Our undertaking, as
aforesaid, shall be irrevocable except in the
following instances in respect of which we reserve
10 the right to withdraw or revoke this undertaking
upon notice to yourselves:

- (a) Should the registration of the above
transaction be unreasonably delayed or not
proceeded with, or;
- 15 (b) We cease to control the funds in the
transaction, or:
- (c) We are, by the operation of law, prevented
from doing so, or:
- (d) Should it appear that the transaction and the
20 proceeds emanating from the sale are subject to
any preferent claim by the Commissioner of Inland
Revenue or any obligation on us as agent for the
said commissioner in terms of section 99 of Income
Tax Act as amended."

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Annexure A thereto is the conditions upon which Nedbank was prepared to guarantee the payment to which I referred to earlier and which is subject to the registration, as I indicated earlier, of covering a mortgage bond of eight million over the
5 two erven referred to earlier and also the cancellation of the existing Investec, Absa Bank and Hamsa Abrahams Trust bonds.

Mr Vivier, on behalf of the applicant, again urged that the
10 Court not grant a further postponement of the matter or give further leeway to the respondent who, in the person of Mr Elliott, has asked for this application, either to be postponed *sine die* in order for the proceeds of the sale to be used to pay the applicant's bond and thus to remove the *locus standi* of the
15 applicant, or a further postponement to allow the respondent to provide the applicant with an unconditional guarantee as to the payment of its costs.

Mr Vivier, as I have said, stressed that this application must
20 now come to an end. As indicated earlier, it first came before this Court in October this year, some two months ago, and on each occasion thereafter, it was postponed at the instance of the respondent, who has, on various occasions, obtained a postponement on the bases that I have indicated earlier on.

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Mr Elliott relied, and Mr Vivier also referred to the judgment of Williamson, JP in Realisation Limited v Agar 1961(4) SA 10 (D) at 12, where the court dealt with the question whether or not a moratorium should be given to a respondent in sequestration proceedings. Mr Elliott submitted that a postponement would in fact be more advantageous to the applicant, who will be paid his full costs and also the debt covered by the bond, if a postponement is granted. Now the court in that case had the following to say:

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“A Court in a sequestration matter is not entitled to give a debtor a moratorium if the result would be to deprive the creditors of the prospect of an early dividend. A discretion, of course, must be exercised in the light of all the circumstances and the fact that there may be no prejudice to creditors and if an order is not granted, because there is a substantial prospect of early payment, is a matter which is relevant and a matter which I should and have considered in this case. But before I in effect grant a moratorium by refusing a sequestration order, I would have to be satisfied, quite clearly, that the creditors do in fact stand to lose nothing, that they will be paid fully, or certainly paid not less than they would have if they obtained a

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sequestration order at this stage and that any such payment would be made substantially at the time when a dividend would have been expected in insolvency."

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As indicated earlier, we now know that the transfer of this property and the proceeds of the sale will only be forthcoming if a bond is in fact given by a bank, which in this case is Nedbank. There is no unconditional guarantee before this Court, for the payment of the mortgage debt and the costs. The guarantee, provided by Nedbank, is subject to the conditions to which I referred to earlier. In regard to the uncertainty as to whether or not the money will be forthcoming from Nedbank, there is the further issue that, and it is common cause, it is not known what the Investec debt amounts to, i.e. will the proceeds be sufficient to pay the Investec debt and leave sufficient to pay the applicant's claims for capital and costs in this matter. We simply do not know what is owed to Investec. The same applies also, to a certain extent, to the secured debt owed to the Hamsa Abrahams Trust. The bond is included in the papers and is for R2 million. There is also an affidavit by a Mr Abrahams, speaking on behalf of that Trust. He states that as at 6 November 2010, the indebtedness amounted to the R2 million. So there is the uncertainty as to those two debts.

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There is the further point that the applicant has insisted for a long time in the context of this application, that it be given an unconditional security for its costs in this application which is
5 said to be substantial. The respondent has said that they wanted those costs taxed before they are to be paid. The point, however, is that the applicant's bond will not be cancelled and, therefore, one of the condition upon which Nedbank will advance the money, will not be fulfilled until the
10 costs are paid, which will only take place when those costs are taxed. The applicant is entitled to its claim for costs which is secured by the bond and, therefore, will not, they tell me, consent to the cancellation until they know that their costs, which are secured by that bond, are in fact paid or there is a
15 unconditional guarantee for its payment.

There is an undertaking, as I have indicated earlier, by the transferring attorneys and that undertaking is subject to a number of conditions, two of which is that they receive the
20 money from Nedbank and that the transfer is not unreasonably delayed. Now we know that the delay is likely to be at least six months, the amount of time it will take to get the applicant's costs in this application to be taxed, because that is the earliest date upon which the costs will be paid and that
25 is the earliest date upon which Absa will consent to the

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cancellation of its bond.

The position is, therefore, that we today, after quite some time, sit with uncertainties as to whether or not the applicant
5 will in fact be paid its claim substantially at the time when the dividend could be expected upon winding up. The history of this matter shows that the applicant is not unduly harsh in insisting upon a winding up. This matter started off with a statutory demand which was served upon the respondent on 28
10 July 2010. The bringing of the application was then delayed for almost two months until 5 October, because of promises that were made that the property would be sold in the meantime to pay the debt. All of these promises came to naught and the application was brought.

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A further postponement will further increase the costs and will cause a practical inconvenience to the applicant. The payment of the debt will be delayed and it will escalate with interest and costs. The question is whether, in a case like this where the
20 respondent which is on the papers clearly commercially and probably factually insolvent, should be entitled to conduct, what is in effect a private liquidation, and why the applicant should not be entitled to insist on and be granted a proper liquidation in terms of the Act. An order of winding up, if
25 granted, will not prohibit the liquidator from electing to

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continue with the sale. In any event, if the sale should go through, the respondent can request the liquidator to apply in terms of section 354 of the Act, for of the winding up to be set aside on the basis that the continued liquidation is in fact
5 unnecessary.

In the circumstances I am now satisfied that I should not exercise the narrow discretion open to me in this case in favour of a further postponement of this application.

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It, therefore, follows that a provisional order should and is here by made in the following terms:

1. The respondent is placed under provisional
15 liquidation in the hands of the Master of the High Court, Cape Provincial Division, in terms of Act 61 of 1973 as amended.

2. A *rule nisi* is issued, calling upon the respondent
20 and all other interested parties to show cause, if any, to this Court on Wednesday 26 January 2011.

Why:

25 (i) The respondent's estate should not be placed under

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final liquidation.

- (ii) The cost of this application not be cost in the liquidation.

5 3. The order shall be served as follows:

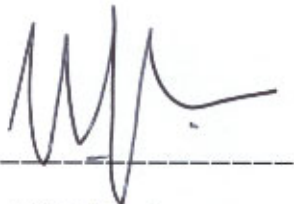
10 (a) By the Sheriff of the High Court on the respondent at its registered address being Suite 4, Constantia House, Steenberg, Office Park, Constantia.

(b) By the Sheriff of the High Court on the South African Revenue Services.

15 (c) Publication of this order in one publication, each of Die Burger and Cape Times newspapers.

(d) On the employees of the respondent, if applicable, and all trade unions representing such employees.

20 That is then the order.



LOUW, J