

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : PORT ELIZABETH**

CASE NO. 278/13

In the matter between”

ABSA BANK

Applicant

And

OPENSCOR TWENTY THREE CC

Respondent

JUDGMENT

GRIFFITHS, J.:

[1] The respondent has been placed under provisional liquidation at the instance of the applicant. On the extended return day of the rule nisi the respondent has appeared to show cause why it should not be placed under final liquidation.

[2] It being common cause that all the procedural requirements are in place for the granting of a final liquidation order, the respondent's opposition is based on a contention that it has since entered into an

agreement of sale of the farm which constitutes the sole asset of the respondent for an amount sufficient to settle its indebtedness to the applicant. The sale price, according to the written memorandum of agreement, is R6,000,000. On this basis, so the respondent further contends, it is in effect not unable to pay its debts and, furthermore, it is not just and equitable that it be wound up.

[3] Mr. Richards, who has appeared on behalf of the applicant in this matter, has submitted that these contentions of the respondent are misconceived for a number of reasons. The agreement was, according to its written content, concluded between the respondent as represented by its member, one Murray, and the purchaser, one Biggs, on 18 May 2013. This was subsequent to the respondent having been placed under provisional liquidation pursuant to which provisional liquidators were appointed to take charge of its assets and affairs. It is clear, therefore, that at the time when the contract was concluded, the respondent no longer had the capacity to conclude such a contract without the consent or ratification of the provisional liquidators. This much is conceded by Mr. Mullins, who has appeared for the respondent in these proceedings.

[4] The second flaw in the contention of the respondent is the fact that the sale was made subject to a suspensive condition, that being that the sale was subject to the purchaser obtaining a loan from a financial institution on or before 14 May 2013. According to the respondent's own version, the loan was only approved on 17 May 2013 at which stage, even if the agreement had been validly concluded, it would have lapsed due to the non-fulfilment of this suspension condition.

Furthermore, an examination of the approval of the loan which, ironically, was granted by the applicant itself, reveals that the approval of the loan application was subject to certain conditions including that the purchaser's father-in-law was to provide a deposit of R2,000,000 and that a trust known as the Colin Biggs Trust was to raise a bond on another immovable property owned by it in the sum of R1,500,000. No evidence has been placed before the court from either the trust or the purchaser's father-in-law indicating that they had indeed agreed to such conditions.

[5] The sale agreement includes a term to the effect that in addition to the farm itself, the sale would include certain movable assets valued at R1,500,000 which assets currently belong to a third party. It appears that it was contemplated that the respondent would in turn purchase these assets from the third party utilizing the proceeds of the sale of the farm so that they might in effect be included with the farm as assets purchased. The effect of this transaction would thus clearly be to reduce the potential gross proceeds from the sale to R4,500,000. On this basis, the applicant has demonstrated in its papers that the sale, even if it were to go ahead, would not produce sufficient funds to settle the respondent's indebtedness to the applicant and would result in a significant shortfall.

[6] Mr. Mullins, in response, fairly conceded that the respondent had serious difficulties with the sale agreement as contended by Mr. Richards. However, he argued that this court nonetheless retains a discretion to refuse a confirmation of the rule and referred me in this regard to the commentary in Henochsberg¹ at page 693. On this basis, Mr. Mullins argued that it would be preferable to discharge the rule and thus to allow the proposed sale of the immovable property to go ahead which would

¹ Henochsberg on the Companies Act, Volume 1

avoid the probable consequences of a "forced" sale in execution. In this regard, he pointed to the fact that, as alluded to earlier, the applicant itself had approved a loan pursuant to the purported agreement and, so he contended, this was an indication that the applicant must have concluded that this purported sale was indeed to the applicant's own benefit. In essence, therefore, he submitted that the applicant seeks to impeach its own approval.

[7] In response hereto to Mr. Richards pointed out that the approval of the loan was clearly subject to a number of conditions imposed by the applicant itself. But, apart from any other consideration, such approval was based on a valid legal sale existing between the parties to that agreement which clearly isn't so. Furthermore, the effect of the suspensive condition referred to earlier was such that by the time the approval had been given by the applicant, even if the sale had been valid *ab initio*, the relevant time period had come and gone rendering the sale in any event of no force and effect. Finally, the approval of the loan by the applicant was based on an application by the purported purchaser of the immovable property, Biggs, for a loan which had nothing directly to do with the position of the respondent.

[8] The net effect of Mr. Mullins' argument is that I am to exercise my discretion in this regard based on the *spes* that the purported purchaser, who at the most may be morally bound to do so and nothing more, would indeed proceed with the sale on the terms as contained in the purported written agreement thereby providing sufficient funds to repay the debt of the respondent. In my view, there is simply insufficient evidence before me to establish with any degree of certainty that this will happen, and

even if it did, that it will result in the liquidation of the full debt owed to the applicant.

[9] In all these circumstances, and for these reasons, I am not prepared to exercise my discretion in favour of the respondent.

[10] In the circumstances:

I grant a final winding up order in this matter.

JUDGE OF THE HIGH COURT

HEARD ON : 30 MAY 2013

DELIVERED ON : 20 JUNE 2013

COUNSEL FOR APPLICANT : Mr Richards

INSTRUCTED BY : McWilliams & Elliot Inc.

COUNSEL FOR RESPONDENT : Mr Mullins

INSTRUCTED BY : Gregory Clark & Ass.

