FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 820/2013

In the matter between:-

FREE STATE DEVELOPMENT CORPORATION Applicant

and

CROSS POINT TRADING 23 (PTY) LIMITED Respondent

HEARD ON: 18 APRIL 2013

JUDGMENT BY: KRUGER, J

DELIVERED ON: 25 APRIL 2013

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[1] This matter came before me in the unopposed motion court as an application for liquidation. The applicant in 2007 made loans to the respondent in excess of R3 million. No repayments were made. The respondent's debt to applicant is R4,8 million. According to the founding affidavit the respondent ceased trading in 2011. The notice of motion was issued on 5 April 2013. The only security of any value held by applicant is a bond for R2,2 million over respondent's immovable property. The R2,2 million loan is secured by a mortgage bond and the prescriptive period is 30 years. No mention is made of other creditors in the application.

[2] The respondent was, according to the Cipro report dated 17 April 2013 handed in by the applicant's legal representative, registered on 29 November 2006 and started business on that day. On 1 March 2007 it bought Erf 3460 in Bethlehem Extention 44, which is 23 Witteberg Street, Bethlehem, being the registered office of the respondent, and, according to the sheriff's return of service of 19 March 2013, the address is vacant land. It is not clear where the respondent conducted business.

[3] In the founding affidavit the respondent says that the property was bought for R2,2 million in 2009. According to the windeed report handed in by applicant's legal representative, the property is still registered in the applicant's name, having been purchased in 2007 for R650 000,00.

[4] The applicant attaches a loan agreement dated 6 March 2007 in terms whereof a loan of R2 229 321,00 was granted to the respondent, repayable over 10 years, interest free. According to the loan agreement the following securities were required: (i) special notarial bond; (ii) mortgage bond – Erf 3460, Bethlehem; (iii) Syretyships of M S Radebe and T A Moloi; (iv) cession of share certificate and shareholders loan account. The two bonds were registered. It does not appear from the papers whether the suretyships and cession were obtained by applicant.

[5] According to the windeed report handed in by applicant's legal representative, the purchase price of Erf 3460 on 1 March 2007 was R650 000,00. On 29 March 2007 a bond for R2 229 321,00 was registered over Erf 3460 in favour of applicant.

[6] On 6 March 2007 a "shareholders' agreement" was entered into between three entities: (1) the applicant; (2) the respondent (represented by a director, Thapelo Aubrey Moloi), and (3) Tribal Zone Trading 440 CC (represented by Mqhetheki Stanley Radebe, member). In that agreement the applicant is described as "FDC" and the respondent as "the company". The other party is "Tribal Zone". The agreement records that the applicant grants a "commercial loan" to the respondent and the applicant takes equity in the respondent and makes a "shareholders' loan" to the respondent. The agreement defines a shareholders' loan as any amount that the shareholders may lend or advance to the respondent, which amount is credited to the account of a shareholder in the books of the respondent. Paragraph 9.4 records that the applicant in its capacity as shareholder lends R737 756,00 to the respondent.

[7] No repayments were made by the respondent. It is not clear whether any demands for payment were made.

[8] According to the Cipro report dated 17 April 2013, the respondent has been finally deregistered. For that reason

Ms Brink, for applicant, asked that the matter be removed from the roll.

[9] The applicant deals with public funds. It is not clear whether the applicant complied with the provisions of the Public Finance Management Act 10 of 1999 and in particular section 38 thereof.

The following questions arise:

(i) Why did the applicant take out a R2,2 million bond on 27 March 2007 over property which had on 1 March 2007 been bought for R650 000,00 according to the windeed report?

(ii) Why does the deponent to the founding affidavit state (page 10, para 9.2) that the respondent bought the property for R2,2 million in 2009?

(iii) Where are the moveable assets listed in annexure "A" to the notarial bond (pages 55 – 56), and what is their value?

(iv) The deponent to the founding affidavit states that the respondent ceased trading in 2011. Why was this application only launched in February 2013?

(v) Were any demands ever sent to respondent? According to the founding affidavit the respondent has not paid any instalments to the applicant.

(vi) Were the suretyships mentioned in the loan agreement (MM4, page 57) ever signed? If yes, what steps were taken to hold the sureties liable?

(vii) The applicant attached a Cipro report dated 5 August 2008 to the application. Should a more recent report not have been attached?

(viii) According to the "shareholders agreement" (MM5, page 62) the applicant is apparently a shareholder of respondent. Should this fact not have been expressly stated in the application?

(ix) Why was summons not issued and default judgment taken, with execution against the mortgage bond rather than bringing a liquidation application?

(x) At what address was the respondent conducting its business? According to the sheriff's return (page 107) the respondent's registered address is vacant land.

The above points were not fully explained in court. The question arises whether this matter should not be investigated further.

ORDER

[10] 1. The matter is removed from the roll.

2. The registrar is requested to send a copy of this judgment and the contents of the court file to the Director of Public Prosecutions, Bloemfontein and the Public Protector for possible further investigation.

A. KRUGER, J

On behalf of applicant:	Ms L Brink Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of respondent:	No appearance

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