

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN**

**REPUBLIC OF SOUTH AFRICA**

**CASE NO.10927/2012**

**In the matter between:**

**ABSA BANK LIMITED**

**APPLICANT**

**and**

**BLUE BEACON INVESTMENTS 23 (PTY) LTD**

**RESPONDENT**

**and**

**WILLOW PARKS CIVILS CC**

**INTERVENING CREDITOR**

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**JUDGMENT**

Delivered on 17 July 2013

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**MBATHA J**

[1] The Applicant applied for the liquidation of the Respondent and in the absence of any opposition to the application a provisional winding-up order was granted on 18 December 2012 in the usual terms with a rule *nisi* calling upon the Respondent to show cause why the provisional order should not be made final. The usual publication of the order in a newspaper and the Government Gazette and proper service on all concerned took place and had there not been the complication of the present application by the Intervening Creditor, the final liquidation order would have been granted as the papers otherwise appear to be in order.

[2] In the application for the liquidation of the Respondent the Applicant based its application on the fact that it had advanced monies to the Respondent in terms of two (2) written loan agreements and as security for the loans caused to be registered in its favour a mortgage bond over an immovable property described as Erf 4729 Reservoir Hills, Registration Division FT. Province of KwaZulu-Natal, in extent 3,0351 hectares ("the property") in the total sum of R17 300 000.00 and the additional amount of R3 460 000.00. It was alleged that the Respondent had defaulted on its monthly repayment obligations and that the last instalments in respect of the two loan accounts were paid by the Respondent on 4 October 2010 and 4 November 2011 respectively.

[3] It was also alleged that in terms of the mortgage bond all amounts owing in terms of the loan agreements would become due and payable in the event of the default by the Respondent and that a certificate by any manager of the Applicant would be *prima facie* proof of the extent of the indebtedness by the Respondent to the Applicant. Two such certificates were attached to the papers indicating the amounts owed by the Respondent to the applicant as at 1 August 2012 as being the sums of R16 117 512.98 and R1 389 542.62 respectively with interest accruing on these amounts at 10.5% per annum from 2 August 2012.

[4] The averment was made that it became apparent to the Applicant that the Respondent is simply factually unable to pay its debts entitling it to the winding-up of the Respondent.

[5] The Intervening Creditor brought an application to be granted leave to intervene as a creditor in the application before the final liquidation order could be considered and sought leave to serve a notice in terms of Rule 35(12) and/or 35(14) read with rule 35(13) and a direction that it delivers any application for the business rescue of the Respondent on a date to be determined should the application be granted.

[6] The sub-rules to Rule 35 referred to by the Intervening Creditor relates to the discovery of documents and the reference to business rescue to an application in terms of section 131 of the Companies Act 71 of 2008. (“the Act”). The concept of a “business rescue” is something of a novelty and came into operation on 1 May 2011 and is provided for in Chapter 6 of the Act.

[7] Section 128(1) (b) of the Act<sup>1</sup> defines a “business rescue” as “...*proceedings to facilitate the rehabilitation of a company that is financially distressed*” and a court is enjoined to grant such an application if in the words of section 131 (4) (iii) “...*it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company...*”

[8] It is apparent from the orders being sought by the Intervening Creditor that at present, apart from being granted leave to intervene as a creditor, nothing more is

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<sup>1</sup> Companies Act 71 of 2008.

required than an adjournment of the application itself with leave to it to bring the application in terms of section 131 of the Act within a stipulated time period once it has availed itself of the procedures in Rule 35 to obtain documents from the Applicant, the contents of which may then influence its decision on whether or not to bring such an application at all. Essentially this application as presently framed is a request to delay the final winding-up of the Respondent pending an application that may not be forthcoming.

[9] The papers in this application dealt fully with the intended business rescue in terms of section 131 of the Act and the effect that the omission of the relevant documents sought to be obtained may have on the intended business rescue. If any useful purpose will be served by the adjournment of the matter the application should be granted. To determine this question I am obliged to consider the merits of the business rescue plan as formulated in the affidavits filed by the Intervening Creditor and that filed on behalf of the Applicant and give due regard to the contents of documents that the Intervening Creditor complains is absent or those that are said to be misleading.

[10] There have been several decisions in the High Court dealing with the provisions of the Act relating to business rescue, but only recently did the Supreme Court of Appeal happen to consider these provisions of the Act in ***Oakdene Square Properties (Pty)Ltd v Farm Bothasfontein (Kyalami) (Pty)Ltd***<sup>2</sup>. I have had careful regard to *the nature of a court's discretion under section 131(4) of the Act in*

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<sup>2</sup> (609/2012) [2013] ZASCA 68.

paragraphs (18) to (21) of this judgment and the meaning of *rescuing the company* in paragraphs (22) to (28) thereof.

[11] The essence of the case of the Intervening Creditor is that it disputes the extent of the Respondent's indebtedness to the Applicant and is of the view that by concluding an agreement of lease of the sectional title units on the property the Respondent can be rescued provided that the Applicant's claim is not to the extent that it claims it to be. In this regard it is stated in paragraph 5 of the affidavit filed on behalf of the Intervening Creditor:

*"The nature and extent of the Respondent's indebtedness to the Applicant also needs to be verified so as to establish the basis for a Business Rescue. If the Applicant's claim is not the R17 million contended for, then Business Rescue will have more than a reasonable prospect of success."*

[12] The Intervening Creditor also alleges that the loan agreements concluded between the Applicant and the Respondent were for the purchase of the property as well as the subsequent lending of monies for the development that was to take place on the property. Accordingly, although the bond was registered as alleged over the property, the money was being retained by the Applicant and would only be paid out on progress of work done as authorised by the Applicant's assessors. According to Seelan Govender ("Govender") the deponent to the Intervening Creditor's affidavit, when the agreement between the Intervening Creditor was concluded with the Respondent to complete the work to the sectional title units he and his quantity

surveyors established that the amount of work which had been performed on the site amounted only to a value of between R3 and 4 million. Govender sums up the position as follows in paragraph 24 of his affidavit:

*"I have subsequently come to learn that there had been draw-downs on the development bond roughly to the value of R9 million. The exact amount is unknown to me but this is the reason for me asking for a complete disclosure of the full transaction history of the loan agreements which form the subject matter of the Applicant's liquidation. As I need to investigate this, a Rule 35(12), (13) and (14) notice has been prepared and the leave of the Court is sought to serve that notice."*

[13] After the conclusion of the agreement between the Intervening Creditor and the Respondent, the former completed the project at the agreed price of R6 953 253.30. However, the total amount of work done was in excess of the fixed price contract and in addition to that work further work amounting in total to R3 655 320.00 was done. According to Govender the additional work done was over and above the amount fixed in the written contract and constitutes an improvement lien which the Intervening Creditor has in respect of the buildings on the property. Since completing the work, so Govender asserts, the Intervening Creditor has retained security at the premises and will continue to do so in order to maintain its improvement lien over the property. Govender is also at pains to explain that the improvement lien ranks above the Applicant's secured claim in terms of any bond over the property.

[14] Govender probably correctly sums up the position of the Intervening Creditor in paragraph 33 of his affidavit where he states as follows:

*“In effect the Respondent got the Intervening Creditor to fund the completion of the project. If the funds were being duly advanced and paid out by the Applicant, then it was being paid out to the Respondent in circumstances where the Respondent was not paying the Intervening Creditor for the actual building work which was being performed.”*

[15] During 2009 the Intervening Creditor realised that it was not going to be paid by the Respondent and various means were devised to recoup this loss including a plan by Govender to arrange for the taking over of the shareholding of the Respondent by another entity by the name of Willow Park Transport & Projects CC (“PROJECTS”). All these plans failed but PROJECTS as the intended shareholder concluded an agreement firstly with the Respondent and then with the University of KwaZulu-Natal (“UKZN”) in terms of which the units on the property were leased to students. This lease agreement has run its course but Govender is of the firm view that the Respondent *“can be saved by concluding a further lease agreement with UKZN for student housing”*

[16] What is somewhat perplexing is that Govender did not indicate the amount that the lease agreement between PROJECTS and UKZN generated per month to enable a court to assess whether any business rescue plan will be workable if implemented. I fully understand that the present application is not the actual business rescue plan but in order to assess the application to delay the final winding up of the Respondent a court cannot allow itself to be side tracked by any proposed scheme that does not have the slightest hope of ever being sanctioned.

[17] In its answering affidavit the Applicant pointed out that Govender is not only the member of the Intervening Creditor but also the member of PROJECTS and that the latter still currently leases the units on the property to UKZN and in this way generates approximately R300 000.00 per month. The allegation is made in paragraph 44.3 of the answering affidavit that Govender has appropriated approximately R4 million in rental from this unlawful agreement between PROJECTS and UKZN. The submission is then made that it is reasonable to infer that the Intervening Creditor is simply trying to secure a situation where it can continue taking rent on the property, to the exclusion of the Respondent, the liquidators and creditors.

[18] Govender did not respond to paragraph 44 of the Applicant's affidavit by denying the allegation that he is using PROJECTS to appropriate the current income that the property is capable of generating. He refrained from providing any information about the money that the proposed business rescue plan would be able to generate and about the rental agreement with UKZN merely says "*... I am advised that legal argument will be raised as regards the tacit relocation of the lease*", whatever that may mean.

[19] There is an obvious dispute between the Applicant and the Intervening Creditor about the extent of the amount due to the Applicant by the Respondent in terms of the two (2) loan agreements. The Intervening Creditor has queried a

number of documents put up by the Applicant purportedly to show the exact amount it is alleged that is due to it by the Respondent. Some of the criticism addressed at the manner in which these amounts were calculated may well be valid. All I know is that even at the lowest level the amount due to the Applicant by the Respondent runs into the millions and if to it is added the claim by the Intervening Creditor, any potential business rescue plan seems an unlikely prospect. I had to learn from the Applicant's answering affidavit that the rental of the property generates approximately R300 000.00 per month and that Govender or his *alter ego*, PROJECTS has been and still is the recipient of these monthly windfalls. Govender seems to have his own agenda to delay the final winding-up of the Respondent and the application to prolong this diversion ought not to be allowed.

[20] In view of the disputes, what is urgently required is for a liquidator to take charge of the situation and deal with the claims and more urgently with the property.

[21] It has been suggested by Mr Stokes SC who appeared on behalf of the Applicant that a final winding up order is no bar to a business rescue in terms of the Act<sup>3</sup>. I am not sure if this submission is sound but would like to make it absolutely clear that I assume for the purpose of this judgment that the order that I grant will put an end to the Intervening Creditor's intentions to bring such an application. My refusal to entertain the application to have the application for the final winding-up order delayed is based entirely on the fact that the proposed application for a business rescue is not *bona fide* and intended to delay the final winding-up order.

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<sup>3</sup> Companies Act 71 of 2008.

[22] I therefore make the following orders:

(a) The application by the Intervening Creditor is dismissed with costs, including the costs of two (2) counsel.

(b) The rule nisi granted on 18 December 2012 is confirmed. (A final liquidation order is granted.)

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**MBATHA J**

Date of hearing: 20 June 2013  
Date of Judgment: 17 July 2013  
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