

Applicant

REPORTABLE

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No: 8744/13

In the matter between

Anthony Richard Pinfold and Others

Applicants

and

Edge to Edge Global Investments Limited

Respondent

JUDGMENT

Delivered on: 27 September 2013

STEYN J

- [1] On 13 September 2013 the applicants applied for leave as required by section 81(1)(e) of the new Companies Act, 71 of 2008 (hereinafter referred to as 'the Act'). After hearing all submissions and a consideration of the papers filed, I was satisfied that an order should be granted without delay and accordingly granted the order as per prayers 2 and 3 of the notice of motion and informed the parties that my reasons will follow. Hereunder are the reasons for my order:

[2] The application highlighted the duties¹ of directors and focussed intently on the conduct of the directors of the respondent company. The directors *in casu* appear to have lost sight of their role in managing the public company, namely to act as agents of the shareholders and act in the interest of the shareholders and shareholders' investments and to act in the best interest of the company. The complaints of the shareholders *in casu* were that the directors acted fraudulently, illegally and misapplied the assets of the company and failed to account to the shareholders.

[3] Section 81(1)(e) of the Act reads as follows:

'A court may order a solvent Company to be wound up if - ... a shareholder has applied, with leave of the Court, for an order to wind up the company on the grounds that –

(i) The directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) The company's assets are being misapplied or wasted.'

[4] Mr Parker, appearing on behalf of the respondents, submitted in his written heads that since the matter served before the

¹ See section 76 of the Act for the principal duties of directors and section 77 for the liability of directors.

court as an application the ordinary principles and rules relating to applications should apply. Therefore, so it was argued, mere allegations of misconduct are insufficient for the purposes of section 81. The Court was invited to take into account the defences raised by the respondents and in light thereof, was asked to dismiss the application or refer it for oral evidence. Mr Harpur SC, appearing on behalf of the applicants, submitted that the evidence against the directors of the respondent is overwhelming. Furthermore, that the court need not make a definite finding regarding the grounds that are required in terms of section 81(1)(e) all that is required is that the court be satisfied that there is *prima facie* evidence that supports the allegations. He submitted that the directors failed to make a full and proper disclosure as demanded of them and that innocent members of the public remain at risk should the court not grant the permission applied for.

[5] Since the provision refers to fraudulent conduct² it is necessary to consider what would constitute fraudulent

² See also the approach followed by the English Court of Appeal in *R v Grantham* [1984] QB 675 (CCA) as cited by Zulman JA in *Heneways Freight Services (Pty) Ltd v Grogar* 2007 (2) SA 561 (SCA), and *In Re: South African*

conduct. Fraud is defined in our common law as: “unlawfully making, with the intent to defraud a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.³ Although the aforesaid definition finds application in the context of criminal law, it remains relevant in the corporate context.

- [6] In my view section 81 of the Act serves as a safeguard to prevent solvent companies from being faced with frivolous applications to be liquidated on either or both of the grounds listed in section 81(1)(e) of the Act. It grants protection to solvent companies by requiring that a court should first grant leave. Where applications are brought *male fide* or without substance leave ought not to be granted. A solvent company is afforded an opportunity to set forth whatever submissions it wishes to make to a court and show that the application is without substance. Essentially the provision fulfils a filtering function.

Co-Operative Livestock Company, Ltd (in Liquidation) Beachy-Head and Others v The Master 1911 TPD 1013. Cf. *Estate Nochomovitz v The Victory Shirt Co, Ltd* 1923 CPD 467 at 468.

³ See Burchell *'Principles of Criminal Law'* 3rd ed Juta (2005) at 833.

[7] In my view the discretion to be exercised in terms of s 81 is a very broad discretion and the *onus* of satisfying the Court that the directors acted fraudulently or illegally is an evidential *onus* that requires an applicant to place sufficient evidence before a court that the grounds exist. Reading the section it appears that *prima facie* proof would suffice in showing the existence of the grounds listed. I base this view on the ordinary literal interpretation of the provision. The test, in my view is no higher than showing a *bona fide* triable ground. If that is established then a court ought to grant permission.

[8] In interpreting section 81(1)(e) I have been mindful of the obligations resting upon this court in interpreting legislation. Section 39 of the Constitution of the Republic of South Africa, 1996, provides as follows:

(2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'*

[9] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*: In

Re Hyundai Motors Distributors (Pty) Ltd and Others v Smit

NO and Others,⁴Justice Langa, as he then was, stated:

'[A]ccordingly judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. [At para 23].

[10] Section 61 of the Act regulates shareholders meetings and places a duty on a company to convene a meeting of its shareholders. Section 61(7) provides as follows:

- '(7) A public company must convene an annual general meeting of its shareholders –*
- (a) initially, no more than 18 months after the company's date of incorporation; and*
 - (b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.'*

(My emphasis)

The procedure that should be followed at such meeting is prescribed in terms of s 61(8) which reads:

- '(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted –*

⁴ 2001 (1) SA 545 (CC).

- (a) *Presentation of –*
 - (i) *The directors' report;*
 - (ii) *Audited financial statements for the immediately preceding financial year; and*
 - (iii) *An audit report;*
- (b) *Election of directors, to the extent required by this Act or the company's Memorandum of Incorporation;*
- (c) *Appointment of –*
 - (i) *An auditor for the ensuing financial year; and*
 - (ii) *An audit committee; and*
- (d) *Any matters raised by shareholders, with or without advance notice to the company.'*

(My emphasis)

[11] There should be no doubt that a financial statement of a company is vitally important to everyone with an interest in that company. The Act compels companies to prepare annual financial statements within six months of each financial year.⁵ The directors *in casu* contravened various provisions in not submitting statements, i.e. Section 28 (Accounting Records); Section 29 (Financial Statements); Section 30 (Annual Financial Statements). Section 30 should however be read together with Sections 26 and 28 of the Regulations. In my view, the financial statements would have served as cogent

⁵ See section 30 of the Act.

proof of the assets of the respondent, its debts and its expenditure.

Facts

[12] The applicants, who are all shareholders, claim that R60 to R70 million had been invested into the respondent on the strength of representations that were made to them. Investigations by the shareholders have led them to believe that the directors have either misapplied the monies belonging to the company or have wasted the monies. Most importantly the applicants contend, and this was not disputed, that the respondent had failed to issue financial statements in respect of the years ending February 2012 and February 2013. The directors of the respondent who were faced with these serious allegations elected to challenge the applicants' *locus standi*, rather than answering to the allegations against them. They, however, admit that they have not issued financial statements for the years 2012 and 2013. They further admit that R31 million had been received by the company and do not dispute the fact that there were on-going attempts to market the company.

[13] **Response of the directors**

As stated earlier the directors admit that no financial statements for the year ending 2012 and 2013 had been issued, and that the company had received R31 million. A careful analysis of the answers given by the directors, show that they have not directly responded to the allegations nor have they proffered reasonable explanations to the allegations against them. For example to blame the delay of issuing the financial statements on Ms Etchells is a dereliction of their own duties and the facts are not in support of their contention. Ms Etchells has left their service in March 2013⁶ and the company had ample time to obtain the services of an independent auditor and show to their shareholders that everything is in order with the finances of the company. In considering the management of assets owned by the company, the directors once more tried to shift the blame of managing its assets on Mr Stassen. Mr Stassen, however, has left the company in November 2012 and no attempt was made by the respondent to track down its assets and to protect and maintain them.

⁶ See page 508 of papers.

- [13.1] The directors most certainly made a misrepresentation to their investors when they claimed that Blue Gold Water and Chemicals (Pty) Ltd is owned by the Respondent when it does not own 50% in Blue Gold Water and Chemicals (Pty) Ltd. This is the company that holds the patent in respect of the water purifying component of ISCP.⁷
- [13.2] The directors failed to show that the respondent registered patent holder of ISCP. The true status of the patent is that the Respondent had applied for the registration in June 2013, but that objections were lodged and the decision on the objections are still pending.⁸ There is a vast difference between lodging a registration and owning the patent, and to hold out that you are the patent holder in instances where you are not. Such conduct is misleading and potentially prejudicial to investors who rely on such a representation.

⁷ The *Imuniti Nutritional Supplement Combo Pack*. See page 221 for a more detailed description of the pack.

⁸ See page 963 and 964 of papers.

[14] The Private Placement Memorandum⁹ which was aimed at persuading investors to invest in the company,¹⁰ stipulates that:

- (i) ISCP enjoys protection worldwide since 24 June 2010;¹¹ and
- (ii) The company owns the trademark 'Imuniti Nutrition for Life' 2005/27020 class 35 and 2005/27019 class 5 to the product and that such trademark is registered in South Africa and that the company owns the manufacturing marketing and distribution rights to the product globally;¹² and
- (iii) Blue Gold One Drop is a water sterilizing agent manufactured for the respondent and that the product has been successfully tested.¹³ The applicants aver that various other claims have been made in the memorandum and that a large number of their claims are untrue or incorrect.

⁹ See page 168 *et seq.*

¹⁰ See para 31 of founding affidavit at page 13.

¹¹ See B205 of papers.

¹² See B205 of papers.

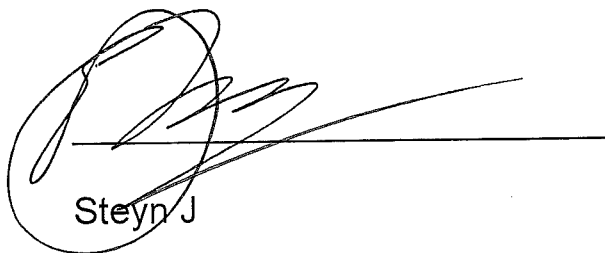
¹³ See B207 of papers.

[15] In addition to the above the applicants averred that both Ellis and Louw, who are directors of the company, failed to disclose to them that Ellis has a previous conviction for fraud and that Louw has a civil judgment against him.¹⁴ It has been argued that their *ommissio* to declare the aforesaid facts constituted fraudulent non-disclosure. The applicants claimed that it is unlikely that they would ever have invested in the respondent had all the facts been revealed.

[16] Having considered all the allegations and the responses of the directors of the respondent I was satisfied that in a number of instances misrepresentations were made and that there is a real likelihood that the investors relied on these misrepresentations when they invested. Given the said circumstances of this case, it is likely that these misrepresentations could have caused prejudice to those acting upon it. Accordingly, I was satisfied that the applicants had shown that they were entitled to an order i.t.o. section 81(1)(e) of the Act.

¹⁴ See Case No: 25878/01 dated 29/05/2002 where summary judgment was granted against Louw for payment of R160 million, plus compounded interest and costs.

[17] In my view there was no genuine dispute of fact,¹⁵ as the version averred by the respondents was untenable when compared with the version of the applicants. I accordingly accepted the version of the applicants and granted the order as applied for.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line extending to the right. The signature is written over a horizontal line.

Steyn J

¹⁵ See *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA).

Date of Hearing:	13 September 2013
Date of Judgment:	27 September 2013
Counsel for the applicant:	Adv Harpur SC
Instructed by:	Halstead Paola Attorneys
Counsel for the respondent:	Mr GM Parker
Instructed by:	GM Parker Attorneys