IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA CASE NO. 7277/2011

In the matter between:

NEDBANK LIMITED

(Registration No. 1951/000009/06) APPLICANT

and

ROYAL VILLA MARINA INVESTMENTS (PTY) LTD

Registration No. 2005/025804/07 RESPONDENT

J U D G M E N T

BOOYENS AJ

This is an application for the provisional winding-up of the respondent in terms of the provisions of section 344(f), as read with section 345(i)(a) and 345(i)(c) of the Companies Act 61 of 1973. Mr van Rooyen moved for the order set out above, Mr Tobias who represented the respondent opposed the application on a variety of reasons.

The respondent is indebted to the applicant on the applicant's case in an amount of R3,662,485-49. There are some disputes between the parties as to the calculation of interest. However, even if the issue of interest is left completely aside, it is clear that the respondent is indebted to the applicant in the amount of R3,503,000-00.

The amount of indebtedness arose as a result of several loans that were advanced by applicant to the respondent all payable after the expiry of twelve months, the twelve months in respect of each loan has expired, no further extension has been agreed upon between the parties. It thus follows that the amounts are currently due, owing and payable by the respondent to the applicant.

Mr Tobias in essence argued that the applicant has not complied with the provisions of section 346 of the Act. He firstly argued that at the time of the issuing of the notice of motion, to wit 26 July 2011, no certificate of security as required by section 346(3) of the Act was in existence. Such certificate of security is date stamped by the Master of this Court on 22 August 2011. From a perusal of the papers in this matter, it is apparent that the matter was set down to be heard on 31 August 2011. That application was then removed from the roll resulting from the respondent's notice of opposition dated 23 August 2011. I have considered the decision of *Court v Standard Bank of SA Ltd; Court v Bester NO and Others* 1995 (3) SA 123 (A). In that matter the Appellate Division referred to the decision by Leon J in *RSA Factors Ltd vs Hanson* 1983 (4) SA 873 (D) and quotes with approval at page 130 paragraph C the following passage:

> "Where, as here, a *nulla bona* return is relied upon, there was thus no need in terms of the Natal practice for the application to be served upon the respondent at all before a provisional order of sequestration was obtained. And in the case of such an application the long-standing practice of the Natal Provincial Division is that the security certificate need not be lodged with the Court when the petition is filed: it is sufficient if the security certificate (which must not be stale) is lodged before the hearing."

In this instance it is clear that once the matter had been set down the security certificate dated 24 August 2011 had been filed for the matter which was due to be heard on 31 August 2011 and it was thus not stale.

It should be added that it is apparent from the *Court v Standard Bank judgment (supra)* that the Natal practice was approved at 131E where Vivier J is quoted as stating the following:

> "I am accordingly of the view that s 9(3)(b) of the Act does not require the security certificate to accompany the application either when it is filed with the Registrar or when it is served on the respondent and that the practice in the Court *a quo*, followed in the present case, does not conflict with the provisions of the subsection. The point taken by

> the appellant that the application was fatally defective for want of compliance with the subsection cannot therefore succeed."

It thus seems to me that the argument by Mr Tobias in this regard is without merit and that there has been compliance in this matter with the requirements of the section.

In the respondent's opposing affidavit in paragraph 2 the deponent one Paruk states the following:

> "I am a director of the respondent, a property owning company. I am duty authorized to the extent that it may be necessary to depose to this affidavit in opposition."

I emphasize the statement that the respondent is a property owning company. Mr Tobias argued that there was noncompliance with the provisions of subsection 4A(a) which requires services upon trade unions and the employees. The section reads as follows:

> "When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –
>
> i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
>
> ii) to the employees themselves –
>
> (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or
>
> (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;"

The papers in this matter were served at the company's registered address where an employee could provide no information about the employees. However, of significance is where the sheriff states that he served the affidavit and annexures on one Cheryl Van Dyk receptionist for the Chartered Accountants, "there there are no employees of the respondent company and she was unable to provide information about the trade union". In a further service, at the chosen *domicilii citandi et executandi* at 18A Grace Avenue, Westville, the sheriff states that he effected service in the following matter:

> "By proper service of a copy of the abovementioned process upon Pume, the maid, a responsible employee of the respondent, at its *domicilium citandi et executandi* at the above address after explaining the nature and contents thereof to the said person served."

In an attempt to effect service on the employees, the further return of service by the sheriff Mr Singh states the following:

> "Manner of service – execution. Party served: The employees of Royal Villa Marina Investments (Pty) Ltd. Attempted service on: 01.08.11 at 15h22. There are no employees at the given address as the given address is a private residence of Mr Hoosen."

An effort to serve on the trade union representing the employees met a similar fate at the said address. In an affidavit dated 8 February 2012 the deputy sheriff Sanjith Singh states, in paragraph 4, that on 1 August 2011 at the registered address of the company, Cheryl Van Dyk, receptionist for the chartered accountants, informed him that there are no employees of the respondent company.

In the applicant's founding affidavit deposed to by Mark Gregory Croxford on 22 July 2011, he stated that the applicant shall ensure that there will be compliance with the provisions of section 346 of the Act insofar as service on the employees and a trade union is concerned. In the respondent's opposing affidavit deposed to by Mohammed Salim Dawood Paruk the deponent does not refer at all to the affidavit of the applicant referring to the employees and the trade union. It is in my view apparent that the issue of employees of what is described as a property owning company, had never been raised before it was argued in this court. I am in any event satisfied that all reasonable efforts were made by the applicant to serve on the employees and a trade union.

I would have expected Mr Paruk to have dealt with the affidavits by the sheriffs relating to employees and trade unions if there were any employees. I am satisfied that the applicant had done all it could to find out whether there were employees. Such indications, as there were, were to the contrary. Therefore I am satisfied that the argument by Mr Tobias relating to non-service on the employees and the trade union does not hold water. I have also considered the judgment of *Hendriks NO and Others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (W).

Mr Tobias further argued that in my discretion I should not liquidate the respondent in that the applicants could have followed, as he called it, cheaper procedure, by simply issuing summons and executing against the respondent. Mr Tobias relied in this regard on the decision *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (NPD). I have considered that judgment but find that in the unique circumstances prevailing in that case, it does not provide any authority for Mr Tobias' submission. The decision dealt with the situation where there was an application for the sequestration of a partnership with the consequential sequestrations of all the partners' estates. Didcott J who gave the judgment, ultimately found that there were not sufficient allegations to indicate that there are advantages to creditors in the matter, and made the remark obiter, in my opinion, that the issuing of summons and execution is sometimes a cheaper remedy than liquidation.

In my view the applicants are entitled to approach this court for an order liquidating the respondent. It is clear from a reading of the papers that notwithstanding several efforts, the respondent has been unsuccessful in selling the immovable property and for that reason it seems to me to be desirable that a liquidator should henceforth deal with the matter.

The following order is made:

1. That Royal Villa Marina Investments (Pty) Ltd (Registration No. 205/025804/07) be and is hereby placed under provisional liquidation in the hands of the Master of the KwaZulu Natal High Court, Pietermaritzburg.

2. That a *rule nisi* do hereby issue calling on the respondent and all other interested persons to show cause, if any, to this Court on the 3rd day of May 2012 at 09h30 why the respondent company should not be finally wound up.

3. That this order be served on the respondent company at its registered office situated at 2nd Floor, 12 Palm Boulevard, Gateway, KwaZulu Natal, and that the order be published on or before the 30th day of April 2012, once in the Government Gazette and once in the Witness newspaper.

4. That the costs of this application be costs in the winding-up of the respondent company.

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BOOYENS AJ

Application heard on :	14 March 2012
Counsel for the applicant :	Mr R M van Rooyen
Instructed by :	Lynn & Main Incorporated
Counsel for the respondent :	Mr D G Tobias
Instructed by :	Omar & Associates
Judgment delivered on :	22 March 2012