

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 1100/2008

In the matter between :

Business Partners Ltd

Applicant

and

Westville Manor House (Pty) Ltd

Respondent

Case No : 10402/2010

In the matter between :

Auction Alliance KwaZulu-Natal(Pty) Ltd

Applicant

and

Lot 1213 Westville (Pty) Ltd

1st Respondent

Business Partners Ltd

2nd Respondent

The Standard Bank of South Africa Ltd

3rd Respondent

Judgment

Lopes J

[1] On the 11th August 2011 Koen J in this court granted provisional liquidation orders against Westville Manor House (Pty) Ltd (the respondent) under case number 1100/2008, and against Lot 1213 Westville (Pty) Ltd (the first respondent) under case number 10402/2010.

[2] The two matters are closely related because Westville Manor House runs the business of a boutique hotel and conference centre from premises which are partly owned by Lot 1213 Westville and partly by Dr Willem Andries Augustinus Gouws, a director of both companies and the driving force and controlling mind behind the companies and the entire business operation.

[3] The debts upon which the liquidation proceedings were based are :-

- a) in the case of Westville Manor House, that it stood surety for the debts of Dr Gouws to Business Partners Ltd (the applicant under case number 1100/2008). Dr Gouws owes that company in excess of R5 700 000 in respect of a loan agreement concluded with him and royalties payable by him to Business Partners;
- b) in the case of Lot 1213 Westville, it is indebted to Auction Alliance KwaZulu-Natal (Pty) Ltd (the applicant under case number 10402/2010) in the sum of approximately R700 000. In addition, Lot 1213 Westville registered a mortgage bond over its immovable property in favour of Standard Bank as surety for the indebtedness of Dr Gouws to Standard Bank.

[4] The application for the provisional liquidation of Westville Manor House was issued in January of 2008 and the application for the provisional liquidation of Lot 1213 Westville in April of 2011. The applications have been strenuously opposed at every stage, but what is clear is that the respondents in both cases cannot discharge their indebtedness to the respective applicants. This is despite repeated undertakings that they could, and would, do so. I shall refer to the parties herein as 'Business Partners', 'Westville Manor House' (or the applicants) and 'Auction Alliance' and 'Lot 1213 Westville' (or the companies).

[5] The approach in assessing the solvency or otherwise of companies is set out in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (CPD) at 443 D – F, where Berman J stated :-

'Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the *onus* resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose

of the *prima facie* case which the creditor is required to initially make out. It is then for the debtor to rebut this *prima facie* case and show that his assets have a value exceeding the sum total of his liabilities. ...'

[6] There can be no doubt that the orders of Koen J placing both companies into provisional liquidation on the 11th August 2011 were correctly granted. Very strong *prima facie* cases were made out. No real defences were put up and assurances were given that the debts would be paid by way of financial assistance imminently forthcoming. Indeed, the then counsel for Westville Manor House and Lot 1213 Westville agreed in a previous order, that if the claims were not satisfied, those companies would consent to the grant of the provisional orders. Accordingly it is now for Westville Manor House and Lot 1213 Westville to persuade me that the *prima facie* cases established by the applicants should not be confirmed.

[7] Dr Gouws on behalf of the companies has filed further affidavits subsequent to the provisional orders in order to attempt to demonstrate that the companies are not in fact insolvent. Mr *Jefferys* SC who appeared for both Westville Manor House and Lot 1213 Westville raised two defences in opposition to the grant of a final order against Westville Manor House. Those defences are :-

- a) on the 19th September 2008 Dr Gouws concluded a settlement agreement with Business Partners which novated the original cause of

action which Business Partners had against Westville Manor House. The submission is that any breach of that settlement agreement requires that Business Partners, as against Dr Gouws qua principal debtor, must be dealt with in accordance with the breach provisions of that settlement agreement. That has not been done by Business Partners and it is accordingly not entitled to enforce the suretyship agreement given in favour of it by Westville Manor House for the debts of Dr Gouws;

- b) with regard to the alleged inability of Westville Manor House to pay its debts, Dr Gouws in his affidavit deposed to after grant of the provisional liquidation order attempts to show that Westville Manor House has assets available to it which exceed its liabilities and, given time to realise those assets, it will be able to pay its debts. In this regard Mr *Jefferys* made reference to the fact that Dr Gouws had disputed in a number of letters the calculations made by Business Partners on which the balance alleged to be outstanding was calculated. His submission was that as Business Partners had failed to deal with those letters in any way, the allegations therein stood and Business Partners had not demonstrated on a balance of probabilities that Westville Manor House was unable to pay its debts or was insolvent.

[8] With regard to the settlement agreement concluded between Dr Gouws

and Business Partners, the following aspects are relevant :-

- a) Dr Gouws admits having breached the original agreement he concluded with Business Partners;
- b) Business Partners was entitled to have instituted action against him and Business Partners was entitled to the relief claimed by it in its action;
- c) Dr Gouws confessed in whole to the judgment sought by Business Partners in accordance with a confession to judgment annexed to the settlement agreement;
- d) Business Partners undertook not to lodge the confession to judgment provided that Dr Gouws made timeous payments of stipulated amounts to Business Partners beginning on the 28th August 2008 and extending monthly for a further period of two years;
- e) in the event of Dr Gouws failing to make any payment timeously, the entire amount due to Business Partners would become immediately due and payable. Dr Gouws would be obliged to pay that amount without demand;
- f) Business Partners would abandon the judgment it had already obtained in the action against Dr Gouws on the basis that Dr Gouws had given Business Partners a confession to judgment;
- g) the winding-up application against Westville Manor House would be adjourned sine die;
- h) in the event that Dr Gouws failed to discharge his obligations, Business

Partners was entitled, in its sole and unfettered discretion, to cancel the agreement without notice and proceed on its original cause of action which remained fully reserved. If it needed to do so, Business Partners could lodge the confession to judgment;

- i) Dr Gouws confirmed that in the event of him failing to make timeous payment in terms of the agreement, Business Partners would be entitled to sell the immovable property owned by him. Dr Gouws gave Business Partners a power of attorney to enable it to do so.

[9] It is common cause that Dr Gouws did not make timeous payment of all amounts in terms of the settlement agreement. It is clear from the correspondence annexed to the affidavits filed by Dr Gouws after the provisional liquidation order, that he was unable to abide by the terms of the settlement agreement and that he did not timeously make all the payments due in terms thereof. Given the reservation of its rights, which Business Partners included in the settlement agreement, there is no doubt that it was entitled to proceed against Dr Gouws, inter alia, by selling his immovable property.

[10] The clauses contained at the end of the settlement agreement make it clear that any variation thereof would only be valid if recorded in an addendum to the settlement agreement and signed by the parties. Any concession, condonation or indulgence or any breach of any terms of the settlement agreement would in no way operate as a waiver of any rights accruing to

Business Partners in terms of the settlement agreement, or constitute a novation thereof.

[11] The breach clause in the settlement agreement does no more than reiterate the acceleration of the requirement for payment in the event that any payments are not made timeously, and records the legal rights available to Business Partners to cancel the agreement without notice, obtain judgment, apply to court for an enforcement of the agreement and other legal relief available to it. Nowhere does the breach clause provide for a course of conduct which Business Partners was obliged to follow which would have precluded it from continuing with the liquidation proceedings or selling the immovable property of Dr Gouws. Indeed, it is clear from the general tenor of the settlement agreement and the adjournment of the liquidation proceedings, that the contrary was the intention of the parties. I accordingly find that the first defence has no merit.

[12] With regard to the second defence raised by Mr *Jefferys* – i.e. that Dr Gouws was not in fact indebted to Business Partners and accordingly it has no right to proceed against him and Westville Manor House, the facts disclosed in the affidavits appear to indicate the contrary. The overriding suggestion in the opposing affidavits is that given time, Dr Gouws would be able to sell his own property (or raise funds) to enable him to settle his indebtedness to Business Partners.

[13] Mr *Jefferys* pointed to the analysis put up by Dr Gouws as evidence of the fact that Westville Manor House was not insolvent, and that if he, as principal debtor, sold certain assets, together with other assets which could be obtained, Westville Manor House could pay its debts. I do not believe it is necessary for me to go into the details of all the allegations and correspondence. Suffice it to say that admissions made by Dr Gouws throughout the papers, together with the vague and generalised statements regarding various assets and their alleged value and ownership by various entities, do not in any way demonstrate the solvency of Westville Manor House. The liquidation application for Westville Manor House was issued in January of 2008. Three and a half years have elapsed since the application was initially brought. If there was any possibility that Westville Manor House could have paid the debts owed by it as a result of its suretyship obligation for the debts of Dr Gouws, that would have been done long ago.

[14] Mr *Jefferys* submitted in argument that the applicants have had every opportunity properly to value the assets belonging to various parties which could have been used to settle outstanding indebtedness. In this regard I refer to *Mackay v Cah*i 1962 (4) SA 192 (OPD) at 206A where the learned acting judge stated the following :-

‘A respondent in an application for provisional sequestration who seeks by means of a statement of his assets and liabilities to rebut the *prima facie*

evidence of insolvency furnished by inferential evidence of the nature contained in the applicant's petition should state what the assets are and the values he places on each asset. If he fails to place a value on any particular asset he runs the risk of that asset being ignored for the purpose of determining his solvency. Should a respondent fail to value a particular asset the applicant can hardly be expected to do so.'

[15] In addition to that reasoning, I would add that where those assets are dispersed between various legal entities, it is incumbent upon a respondent to demonstrate not only the value of the assets, but the availability of those assets, belonging as they do to separate legal entities. In this regard Dr Gouws put up no independent valuation of the various immovable properties. With regard to the furniture and fittings which he stated are valued at between R8 000 000 and R10 000 000, he stated that some were owned by himself, some by his wife, and some by a company W A A Gouws Management Services (Pty) Ltd. No real distinction is made with supporting documentation between the various items of furniture which could evidence the value of the items or who owned what.

[16] In addition, I am in respectful agreement with the dicta of Caney J in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 C – F where the learned judge stated :-

'The proper approach in deciding the question whether a company should be wound up on this ground appears to me, in the light of what I have said, to be

that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency; ... If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts. ...'

Westville Manor House has failed to adduce evidence which would persuade me that the company has assets available to it which could be sold to satisfy its debts.

[17] Mr *Jefferys* submitted that in view of the letters written to Business Partners by Dr Gouws disputing the accuracy of the amounts owing to that company, I should accept that Dr Gouws was not in arrears of the payments he was obliged to make in terms of the settlement agreement. I cannot agree with this statement. The affidavits and the correspondence are littered with admissions made by Dr Gouws which make it clear that he could not pay timeously the debts he owed in terms of the settlement agreement. Even were I to accept that Business Partners had overcharged Dr Gouws by using an incorrect interest rate from time to time, and had failed to calculate the royalties

due entirely accurately, I am not satisfied that Dr Gouws has demonstrated circumstances which would show that he had not failed to make timeous payment of his admitted indebtedness to Business Partners. Indeed, the late raising of this defence together with the admissions he has made in the papers contradict this conclusion.

[18] In any event I would put the denials of insolvency by Dr Gouws in the category of those which do not raise a real, genuine or bona fide dispute of fact as envisaged in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634 I – 635B. In the circumstances I am not persuaded that the rule granted by Koen J in respect of Westville Manor House should not be confirmed.

[19] With regard to the provisional order granted in respect of Lot 1213 Westville, Mr *Jefferys* raised only one point. He submitted that it was unlawful in terms of s 34 of the Constitution of the Republic of South Africa, 1996 for Auction Alliance to have relied upon the power of attorney given to it by Dr Gouws to sell the immovable property which gave rise to the commission which formed the debt owed to it by Lot 1213 Westville.

[20] It was submitted on behalf of Lot 1213 Westville that there was nothing in the settlement agreement which indicated that Auction Alliance could sell the property without notice to Dr Gouws. Auction Alliance should have approached a court in the event that it wanted to sell the property and should not have sold the

property without such authority.

[21] S 34 of the Constitution of the Republic of South Africa, 1996 provides that :-

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

[22] With regard to the sale of the immovable property belonging to Dr Gouws :-

- a) he agreed in the settlement agreement that in the event of his failing timeously to make payment of the amounts due therein the defendant could realise his immovable property and apply the proceeds to the accelerated debt;
- b) when Business Partners attempted to realise the immovable property by public auction, Dr Gouws brought an application in the South Gauteng Division of the High Court for an interdict preventing Business Partners from proceeding with the sale;
- c) Business Partners then agreed not to proceed with that auction pending the outcome of what is described as the first interdict application which was eventually dismissed with costs;
- d) Business Partners then instructed Ian Wyles Auctioneers to proceed with another auction. At that sale a friend of Dr Gouws, one Harry

Fouche outbid all potential purchasers at the sale and then tendered a cheque in respect of the deposit, which was returned unpaid by his bank;

- e) when Ian Wyles Auctioneers had arranged to proceed with that auction, Dr Gouws sought a second interdict in the South Gauteng High Court which was summarily dismissed with costs;
- f) Auction Alliance was then instructed by Business Partners to again attempt to sell the property by public auction;
- g) Dr Gouws and Fouche then repeated their conduct at the subsequent auction and the property was again knocked down to Fouche;
- h) after that auction Fouche concluded an agreement of sale. A deed of nomination of Lot 1213 Westville as the purchaser was signed, and an acceptance of that nomination, together with deeds of suretyship in respect of the purchaser's obligations by Dr Gouws and Fouche were completed;
- i) in terms of the conditions of sale the purchaser was responsible for paying the auctioneer's commission at the rate of 10% of the purchase price plus VAT, which was earned upon the fall of the hammer, and payable immediately.

[23] Accordingly, Auction Alliance was owed the sum of R752 000 by Lot 1213 Westville, of which R50 000 only was paid.

[24] In my view the constitutional point cannot succeed in circumstances where :-

- a) Dr Gouws was aware at all material times of the pending sale;
- b) Dr Gouws took legal steps to prevent the sales taking place in the form of the two High Court interdicts which were dismissed;
- c) having been thwarted by the courts, Dr Gouws then apparently arranged to have the property knocked down to his friend who, it would seem on the papers, had no means to finalise either of the sales.

[25] Despite indulgences given to Lot 1213 Westville at the request of Dr Gouws, the debt has not been paid to Auction Alliance. This, despite numerous demands and undertakings to pay.

[26] Mr *Jefferys* relied on the decision in *SA Bank of Athens Ltd v van Zyl* 2005 (5) SA 93 (SCA) as authority for the proposition that the actions of Business Partners in seeking to sell the property of Dr Gouws were unconstitutional - i.e. - Those actions relate to the conduct of Business Partners in proceeding with the auction sale without resorting to judicial sanction for doing so.

[27] I do not believe that that is what is provided for in *S A Bank of Athens Ltd*. That case records that while parate executie may be permissible, stipulations in a contract which are unconscionable, illegal or immoral will have the result that a court will refuse to give effect thereto. In my view the provisions of the settlement

agreement are not such as would render them contrary to public policy. In this regard see *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004(5) SA 248 (SCA).

[28] In any event, in view of his conduct as a director of Lot 1213 Westville in accepting the nomination as purchaser of his property, and in providing a suretyship for that company's obligations as purchaser, Dr Gouws not only knew about the sales but conspired in seeking to use them to his own advantage. His further conduct in conspiring together with Fouche to have the properties purchased to the exclusion of anyone else in a manner which was at least questionable, in my view further precludes him from raising any question of the unconstitutional conduct of Business Partners in causing the property to be sold.

[29] In those circumstances I can see no reason why I should not confirm the rule granted by Koen J in respect of Lot 1213 Westville.

[30] There is one final matter upon which I feel constrained to comment. No heads of argument were filed by the companies in the two applications for final liquidation. At the hearing of the matter Mr *Jeffreys* sought to hand up a notice of motion condoning the late filing of the companys' heads of argument and the admission into evidence of a further supplementary affidavit by Dr Gouws purporting to deal with alleged new matter raised in the replying affidavits of Business Partners.

[31] The reasons given for late delivery of the companies' heads of argument were not acceptable. They were typical of the dilatory tactics adopted throughout these proceedings. In the normal course I would have refused the application for condonation and directed the companies to pay the costs of any adjournment occasioned by the failure to file the heads timeously. However, such a course of action would only have played into the hands of the companies and further frustrated the ability of the applicants to finalise the two applications. Mr *Harcourt* SC, who appeared for the applicants, did not wish me to adopt that course and I did not do so. I read and considered the heads of argument and the late supplementary affidavit. The affidavit, in my view, does not contribute in any way to the debate before me.

[32] However, I find it necessary to comment upon the conduct of the attorneys for Westville Manor House and Lot 1213 Westville. They knew well in advance of the hearing that heads of argument were required to be filed. If Dr Gouws was not in a position to advance funds for that to be done (as he has indicated in his affidavit he could not do), they should have considered their options more carefully. They could timeously have withdrawn from the matter. In my view it was unprofessional of them to wait until the very last moment, accepting a deposit from Dr Gouws and producing heads of argument for the first time at the hearing. The whole reason for supplying heads of argument in advance is to eliminate the element of surprise in the hearing and to give the opponents and

the judge proper and timeous notice of the issues in dispute. The attorneys have been on record for over three years. The papers in both matters ran to in excess of 1 200 pages. If no funds were available to continue at such a late stage, they had a duty to the court nonetheless to ensure that heads of argument were delivered. The attorneys themselves could have drafted the necessary heads. As officers of the court it was unprofessional and discourteous to the parties and the court to simply have left matters to the last.

[33] In the premises I make the following order :-

- a) the rule nisi granted by Koen J on the 11th August 2011 in the matter between Business Partners Ltd and Westville Manor House (Pty) Ltd under case number 1100/2008 is confirmed;
- b) the rule nisi granted by Koen J on the 11th August 2011 in the matter between Auction Alliance KwaZulu-Natal (Pty) Ltd and Lot 1213 Westville (Pty) Ltd and two others under case number 10402/2010 is confirmed.

Date of hearing : 16th November 2011

Date of judgment : 29th November 2011

Counsel for the Applicants : AWM Harcourt SC (instructed by Maharaj Attorneys)

Counsel for the Respondents : HP Jefferys SC (instructed by Du Toit Havemann)

& Lloyd)