

Judge Lomb



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

Case Number: D5007/2023

In the matter between:

TYRUS LIMITED

APPLICANT

and

AFFINITY ENTERPRISE CAPITAL (PTY) LTD

RESPONDENT

ORDER

The following order shall issue:

1. The rule nisi shall issue in terms of paragraphs 1 to 4 of the Notice of Motion.
 2. The rule is returnable on 7 October 2024.
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JUDGMENT

Z P NKOSI ADJP

[1] This is an application for the liquidation of the respondent company, based on the provisions of s 345(1)(c) and/or 344(h) of the Companies Act ("the old Companies

Act”),¹ as read with Item 9 Schedule 5 of the new Companies Act.² The application is premised on a written loan agreement between the applicant (as lender) and the respondent (as borrower) entered on 4 September 2019. The applicant first loaned an amount of R18 million to the respondent (“the Tyrus loan”) which was later followed by additional loans in the total amount of R31 million.

[2] The loan agreement was a sequel to a proposal (involving Messrs Hartsliel, Portmann and Gaynor) to establish a business in South Africa pertaining to debt management and the insolvency sector. The proposal was actioned, in terms of the agreement, by incorporation of Affinity Enterprise Capital (Pty) Ltd (“Affinity Capital”) and its subsidiaries Affinity Solutions (Pty) Ltd (“Affinity Solutions”) and Affinity Software (Pty) Ltd (“Affinity Software”) collectively referred to as “Affinity Group”. Affinity Capital was to be the holding company of the Affinity Group business in which a foreign entity known as Inception Limited (“Inception”) represented by Gaynor would be the 80 percent shareholder with Hartsliel and Portmann each being 10 percent shareholders.

[3] On 9 September 2019, an offshore company Barkol Limited (which is a holding company of several subsidiary companies, including Inception and the applicant) acting as a nominee for the applicant as lender, made payment to Affinity Capital in the amount of R5 million, which constituted the first drawdown on the Tyrus loan, as agreed. The drawdown was to be paid in tranches as operating capital for Affinity Capital to develop a software programme (known as CAMS) for the debt management and the insolvency sector business in South Africa.

[4] On 10 September 2019, Affinity Capital drawdown 277 805.56 GBP pursuant to the Tyrus loan. On 3 February 2020, Affinity Capital drawdown 204 984.00 GBP and the next drawdown of 216 700.00 GBP was done on 11 May 2020. This was followed by the drawdown of 174 928.00 GBP on 11 August 2020. And the last drawdown of 150 000.00 GBP was done on 23 November 2020.

¹ Companies Act 61 of 1973.

² Companies Act 71 of 2008.

[5] There were additional drawdowns made by Affinity Capital (additional loans) as follows:

- (a) drawdown of 80 000.00 GBP, on 7 January 2021;
- (b) drawdown of 80 000.00 GBP, on 1 February 2021;
- (c) drawdown of 80 000.00 GBP, on 23 February 2021;
- (d) drawdown of 50 000.00 GBP, on 24 March 2021;
- (e) drawdown of 130 000.00 GBP, on 20 April 2021; and
- (f) drawdown of 43 000.00 GBP, on 20 May 2021.

[6] It appears that the Affinity Group business was not developed as agreed. The applicant avers that Hartslief and Portmann, in breach of that agreement, did not establish Affinity Capital as the holding company with various wholly owned subsidiary companies. Instead, as it turned out, Affinity Capital has no subsidiaries, no assets of its own and is not a trading company.

[7] The applicant further avers that Hartslief and Portmann, in breach of the agreement and acting with mala fides, housed CAMS in Affinity Software as an entirely different entity, which is controlled by them and in which Inception has no interest whatsoever. The lion's share of the loaned funds which Affinity Capital received from Tyrus were on-lent to Affinity Software and some to Affinity Solutions.

[8] The applicant claims that Affinity Capital cannot repay the loan, which is due and payable. Affinity Capital is thus hopelessly insolvent and has not disclosed any cogent defence to the liquidation claim.

[9] In response, the respondent contends that:

- (a) the application has been instituted for an ulterior motive, namely to appropriate CAMS through liquidation for a price substantially lower than its value and is an abuse of process; and
- (b) the debt is not due as the respondent has not been placed in mora for the Tyrus loan; and no notice was issued in terms of s 345 of the old Companies Act. Furthermore, the additional loan was not loaned to the respondent but to Affinity Solutions.

[10] It appears that there are separate applications (main and counterapplication under Case No. 8046/2022) pending before this court, which have been referred to trial. These applications related to a dispute between the respondent and the applicant's sister companies – Inception and Clyne, who are all 100 percent owned by Barkol Limited. The respondent submits that it was only once it became apparent, to Inception and Clyne, that the dispute of fact in the aforementioned applications would necessitate a referral to trial, and the consequent delay in hearing it, that the winding-up application of the respondent was instituted by the applicant, as an alternative means of appropriating CAMS into the Barkol Group and wrestle it out of Hartsliel and Portmann's control.

[11] The respondent avers that although the initial loan of R18 million was paid directly to Affinity Capital, with the last payment on 13 August 2020, there was no request made for the repayment thereof because the true intention of the parties was that the Tyrus loan would be repaid when CAMS was sold – not on drawdown as alleged; and no further loan amounts were paid to the respondent but to Affinity Solutions (with no suggestion that it will be on the same terms as the Tyrus loan) who in turn extended it to Affinity Capital.

[12] The respondent claims that it would be able to repay the Tyrus loan if it were to be permitted by the applicant, Inception and Clyne to sell CAMS. The respondent avers that the applicant, together with Inception and Clyne is attempting to hold it hostage (in the applications mentioned above) by preventing the sale of CAMS to a third party so that they may acquire it at a low price once the respondent is liquidated.

[13] The respondent further submits that Affinity Solutions is a material creditor of Affinity Capital and believes that it is not in the best interest of the creditors to liquidate Affinity Capital until the trial (in the other applications) is heard before court because Affinity Capital would be able to repay the Tyrus loan (but not the additional loan) upon the sale of CAMS.

[14] The questions/issues live for determination are whether:

- (a) the respondent has raised a bona fide defence to the indebtedness. Put differently, does the respondent dispute the debt on reasonable grounds? If not;

- (b) is the application an abuse of process in that it has been instituted for an ulterior motive? And if not;
- (c) is it just and equitable to wind-up the respondent.

[15] It is trite law that the onus rests on the applicant to establish its locus standi as a creditor and/or contingent creditor. In this regard, it seems to be clear in this case that the indebtedness of the respondent to the applicant or at least the substantial part of the debt is admitted. Therefore, the onus rests with the respondent to demonstrate a bona fide defence thereto.³

[16] It seems to me that the issues raised in paragraphs (a) and (b) above are capable of being determined under the rubric of the bona fide defence to indebtedness. Firstly, the respondent submits that the application is instituted for an ulterior motive to appropriate CAMS software for a price lower than its value and thus it is an abuse of process. Secondly, the Tyrus loan is not due because (a) the true intention of the parties was to settle the Tyrus loan on sale of CAMS; and the written agreement has to be amended; and (b) there has been no demand for payment.

[17] In regard to (a) above, it is contended by the respondent that the rectification of a loan agreement is capable of being raised as a defence in a plea by setting out the facts necessary to entitle that party to rectification.⁴ I have been referred to paragraphs 45-49, 51, 55, 71, 73, 91 and 95 to 96 of the respondent's answering affidavit as parts which set out the necessary facts entitling it to rectification.

[18] As mentioned above, it is submitted, on behalf of the respondent, that there was an agreement between the parties that there would be no repayment of the Tyrus loan until CAMS is sold. And it is alleged, that explains why there has been no demand for payment.

³ See *Machanick Steel and Fencing (Pty) Ltd v Wesrhordan (Pty) Ltd* 1979 (1) SA 265 (W) at 269A-G; *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA).

⁴ *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) paras 31-33; *Gralio (Pty) Ltd v D E Claasen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A-C.

[19] This claim is resisted by the applicant as a contrivance for the following reasons:

- (a) The agreement as it stands is admitted; and its provisions has always been known.
- (b) The debt is reflected as a current liability in the respondent's balance sheet.
- (c) Nowhere in the papers is it shown that CAMS would be a catalyst for repayment or that it was the common intention of the parties that the applicant should wait for its money from an entirely different entity. The claim is quintessentially uncommercial, with no details as to whom and when CAMS would be sold; how much would be recoverable from it; and whether it would be sufficient to pay the R18 million or R31 million debt.

[20] In my view, the submissions made by the respondent lack merit. The heart of the application has been misconceived and/or misplaced as a dispute in the ownership of the CAMS software, which it is not. The application simply relates to the liquidation of a separate entity viz Affinity Capital which seems to be clearly indebted to the applicant. Whether it is in the sum of R18 million or R31 million is, for current purposes, immaterial, if due and payable.

[21] It is evident that the CAMS software is not owned by Affinity Capital sought to be liquidated but by a separate entity, Affinity Software, which is not a subject of liquidation. The ultimate sale of CAMS by Affinity Software would have to be at the instance of the liquidator of Affinity Capital; and only in so far as Affinity Software could not repay, that it may lead to being liquidated and its assets sold in order to satisfy the debt of Affinity Capital.

[22] Therefore, the pending disputes in the other applications which may relate to the CAMS software bear no relevance to these proceedings, and the possible commercial consequences hypothesised above can hardly be characterised as an abuse equivalent to an application which is *mala fide*, with *ulterior or improper motive*.

[23] The evidence shows that the Tyrus loan as well as the additional loans was extended and paid to Affinity Capital which was, at the time, presented as a holding company of the Affinity Group of companies. There is no documentary evidence to the

contrary. If anything, on the respondent's version, Affinity Capital is the lending company while Affinity Solutions is the operating company.

[24] The respondent's contention that there was some agreement between the parties that the Tyrus loan would be repayable only on the sale of CAMS runs counter to the express terms of the loan agreement for which no plausible basis exists for its rectification. In the event, the loan is due and payable in accordance with its terms. It, therefore, should not avail Affinity Capital to say that it could repay its debt on the occurrence of some future and uncertain event relating to a different entity, Affinity Software.

[25] Clause 4.1 of the agreement provides that the loan shall be repaid by the borrower no later than 12 months after drawdown. Whether the loan was repayable within 12 months of the drawdown of each tranche or after the drawdown of the final tranche is immaterial. It is in my view inconsequential that a period of 12 months' indulgence was afforded/provided by the applicant to the respondent for the repayment of the Tyrus loan and the additional loans. Granting of such an indulgence did not mean that the terms of the loan repayment have changed.

[26] It would appear to me that the written correspondence sent by the applicant to the respondent, on 2 June 2022 would constitute a demand (or a recording that the loan from Tyrus to Affinity Capital was due for repayment) even though such demand would not be necessary for the purposes of the liquidation proceedings in terms of s 345(1)(c) of the old Companies Act, in contrast to a winding-up in terms of s 345(1)(a) thereof.⁵ The debt is due by virtue of the terms of the written agreement, which is admitted, irrespective of whether or not a demand has been made.

[27] It is common cause that Affinity Capital has no income stream and no ability to repay the Tyrus loan and the additional loans. Instead, it proposes that the applicant must wait until the CAMS system is finally developed and sold by Affinity Software who, in turn would then repay its debt to Affinity Capital, who would then repay the Tyrus loan. The ineluctable inference to be drawn therefrom is that Affinity Capital is

⁵ *Ridley v Marais* 1939 AD 5.

insolvent, unable to pay its debts within the meaning of s 345(1)(c) of the old Companies Act and stands to be wound up. Should the court exercise its discretion not to grant liquidation or refuse it in terms of s 344(h) of the Act?

[28] The court's discretion concerning the granting of the liquidation order is very narrow since "for an unpaid creditor who cannot obtain payment and who brings his claim within the Act is, as against the company, entitled *ex debito justiae* to a winding-up order".⁶

[29] Affinity Capital contends that its winding-up is not just and equitable within the meaning of s 344(h) of the old Companies Act because Affinity Solutions is its creditor, and the applicant has no other creditors. Therefore, it is submitted that it would not be in the interests of any other creditor to liquidate Affinity Capital until the undertaking made in the pending applications is waived or the trial is heard.

[30] Firstly, it is confounding how and for what business sense the money received from the applicant, as claimed through Affinity Solutions, was lent to the company which in turn should have been the lender, and which admittedly did not trade and had no income stream. Affinity Solutions has not sought to intervene in the proceedings.

[31] In any event, it is clear that Affinity Capital has also lost its substratum. It is evidently run, if it runs at all, for a different purpose alien to the applicant's interests.

[32] Even if CAMS were to be sold tomorrow, it cannot be determined whether the amount receivable would be enough or adequate to pay the Tyrus loan. What would then happen if insufficient or inadequate amount is received to discharge the loan? Clearly the applicant's unpaid loan would remain unsecured. Even on this aspect the Affinity Capital must be wound up.

⁶ *Henochsberg on the Companies Act 71 of 2008* Vol 2 (Issue 32) at APP1-57; *Bowes v Hope Life Insurance Co* (1865) 11 HLC 389 at 402; *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597; *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (CC) at 618; and *Afgri Operations* above fn3 para 13.

[33] I am also advised that summons issued under Case No. 9823/2023 was only intended to arrest prescription of the debt. The other claims – for damages (under Case No. 4095/2024); and a declarator for the cancellation of the Inception and Clyne shares (under Case No. D3761/2024) are all clearly irrelevant to the liquidation of Affinity Capital.

[34] All issues considered; I conclude that Affinity Capital has not raised any cognizable defence to the liquidation application. The formalities contemplated in s 346 of the old Companies Act have been complied with. The applicant is thus entitled to the provisional liquidation.

Order

[35] In the result:

1. The rule nisi shall issue in terms of paragraphs 1 to 4 of the Notice of Motion.
2. The rule is returnable on 7 October 2024.



Z P NKOSI ADJP

CASE INFORMATION

DATE OF HEARING : 22 July 2024

DATE OF JUDGMENT : 23 August 2024

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