



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 15610/2023

In the matter between:

GOLDEN LOOP TRADING 21 CC
(Registration No: 2006/060265/23)

Intervening Party

IN RE:

MUTUAL HEIGHTS BODY CORPORATE

Applicant

and

RED SOCKS INVESTMENTS (PTY) LTD
(Registration No: 2015/049720/07)

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 17 JANUARY 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is the extended return date of a provisional liquidation order which was granted on 28 March 2024 for the winding up of the respondent (*'Red Socks'*), as

well as an application by a third party, Golden Loop, to intervene in the proceedings to oppose the granting of a final order.

[2] The applicant is a Body Corporate, in which Red Socks owns a property in terms of a sectional title. The sole director of Red Socks is Mr Mark Kleynhans. He is also one of the three trustees of the Kleynhans Family Trust, which in turn is the sole member of Golden Loop.

[3] The application for the provisional liquidation was opposed by Red Socks, and the provisional order was granted per judgment of Pangarker AJ, as she then was, and she found that the applicant had made out a *prima facie* case that Red Socks was commercially insolvent and unable to pay its debts as and when they fell due.

[4] In terms of the provisional order, the return date was 31 May 2024. It was initially extended to 15 August 2024, and later to 17 October 2024. The first postponement was to allow Red Socks to file a further answering affidavit, and the second one was on account of the intervention application which was delivered three days before the set down of 15 August 2024.

[5] The intervention application, which is vehemently opposed by the applicant, is brought on the basis of section 354 of the Companies Act 61 of 1973 (*the Companies Act*), and Golden Loop seeks, not only to oppose the granting of a final order, but also that the provisional order should be discharged. Since the grounds on which it is brought are virtually the same as those relied upon by Red Socks in the main application, it is convenient to deal with the intervention later.

B. THE FINAL ORDER OF LIQUIDATION

[6] In the first place, Red Socks repeats the grounds of opposition it relied upon at the provisional stage of the proceedings, and they may be summarised as follows: firstly, that the applicant failed to provide a reconciliation of the levies account to Red Socks when requested to do so; secondly, an alleged disparate treatment of interest charged on arrear levies; thirdly, the rejection of a previous settlement offer which was a conditional offer of security; and fourthly, an antagonistic relationship between

the parties, and *mala fide* intentions on the part of the applicant. These were all dealt with comprehensively in the provisional judgment, and were rejected. The respondent raises nothing substantially new in that regard, and I have found no reason to interfere with the reasoning of the court in that regard.

[7] The main ground relied upon for discharge of the provisional order is a payment of R3 190 000 made by Kleynhans on 20 May 2024 into the applicant's account, ostensibly to satisfy the applicant's full claim and interest. On the basis of this payment, Red Socks and Golden Loop make several claims: that the applicant's claim has been paid in full and the provisional order should be discharged; that the applicant has lost its *locus standi* to continue with liquidation proceedings; the fact of the payment shows that Red Socks is not commercially or factually insolvent; and that the applicant has ulterior motives by pursuing these proceedings and by not accepting the payment of 20 May 2024.

[8] It is not in dispute that the payment was made after the granting of the provisional order, and by the legal representatives of Red Socks on behalf of Kleynhans, directly to the applicant's bank account. It was also made after the provisional liquidator was appointed by the Master. Kleynhans states that he made the payment of R3 190 000 to settle Red Socks' indebtedness which at that point, was R 3 040 000. According to the papers, on the day that Kleynhans made the payment *via* his attorneys, they sent a letter to the applicant's attorneys setting out the basis for the payment, namely: (a) payment of arrears of R 3 040 000, which were reflected in the May 2024 statement of account; (b) levies to be raised by the applicant for June 2024 and July 2024; and (c) any interest that may have accumulated since receipt of the May statement. It is also common ground that after payment of the money into the applicant's bank account, a statement was generated for Red Socks, reflecting it as payment.

[9] The response from the applicant's attorneys, dated 22 May 2024, was an acknowledgement of receipt of the communication, including the attachment, which was the proof of payment. The applicant's attorneys stated that they were awaiting the response of the provisional liquidator regarding how the payment was to be approached. They opined that it was not competent for the company in liquidation to

enter into any agreements at that stage, and that, absent any explanation, the reasonable assumption was that the payment was a donation which accrued to the company in liquidation for distribution by the liquidator to the body of creditors. On 14 June 2024, the applicant's attorneys advised that the money had been paid over to the provisional liquidator to be held in account until finalisation of the liquidation proceedings.

[10] The first argument raised by Golden Loop and Red Socks is that, once the payment was made, the applicant lost its *locus standi* to continue with these proceedings. But, as the applicant points out, that argument is directly against the authority of *Express Model Trading 289 CC v Dolphin Ridge Body Corporate*¹, a case emanating from the Supreme Court of Appeal (SCA). Similar to this case, the case concerned liquidation proceedings arising from arrear levies owed to a body corporate. And similar to this case, a third party made payment ostensibly to extinguish the debt after the granting of the provisional order, and it was claimed, amongst other things, that this meant the body corporate lost its *locus standi* to continue with the liquidation proceedings.

[11] The SCA put paid to this argument as follows at paragraph 14:

‘...even if the payment by the third party had wiped the slate clean, as one is dealing with a relationship between the body corporate as creditor and Express Model as debtor in relation to a recurrent debt in the form of monthly levies and charges, for as long as the latter continued to own properties in Dolphin Ridge, the body corporate (as Mr Bester correctly observed) remained a prospective creditor of Express Model. That legal relationship is established by the provisions of the Sectional Titles Act. In *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 528 Trengove J defined a prospective creditor as ‘one who by reason of some existing *vinculum juris* has a claim against a company which may ripen into an enforceable

¹ *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* (656/2013) [2014] ZASCA 17; [2014] 2 All SA 513 (SCA); 2015 (6) SA 224 (SCA) (26 March 2014).

debt on the happening of some future event or on some future date'. And as to what is meant by the term *vinculum juris*, Nestadt J observed in *Holzman NO v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 787E-F that 'there must I consider be a legal obligation which creates a right enforceable in a court of law. It can arise either from contract or delict' Nestadt J added (at 787G): 'It is clear therefore that the claim of the "creditor" need not be due or payable at the date of the presentation of the application for winding-up . . . But it is essential that there actually exists a *vinculum juris* with the company. It does not suffice that it will probably arise in the future'.

Counsel for Express Model was thus constrained to concede that he had some difficulty in persisting with the submission that the body corporate had lost its *locus standi* after payment of the sum upon which the application was originally founded.'

[12] There is accordingly no merit in the *locus standi* argument.

[13] Next is the argument that the fact of the payment should result in an inference that Red Socks is able to pay its debts as and when they are due. This too was an argument raised in *Express Model* which was similarly dismissed, as follows²:

'To the extent that the full court held that the mere fact that a debt is paid by a third party did not *per se* justify the inference that a debtor is unable to pay the debt - that may as a general proposition be unobjectionable. But, the last sentence of the quoted passage appears to me to state the position rather too widely. An enquiry of this kind, I do believe, is fact-based. Thus as important as the fact of payment, may well be the source of payment. A debtor's ability to raise a loan from a third party may indeed be a demonstration of its creditworthiness. On the other hand, it could conceivably demonstrate the exact opposite, where (as here) it amounts to no more than borrowing from Peter to pay Paul. Unlike

² At para 16.

in *Helderberg*, where the funds appear to have been borrowed pursuant to an arm's length transaction from an unrelated entity, here, Express Model's benefactor initially remained undisclosed. It subsequently emerged that assistance was obtained from corporate entities, namely Billmont and Class A Trading, who as part of Mr Hassan's stable of corporate entities, enjoyed a fraternal relationship with Express Model. Mr Bester explains:

'The Corporation is surety for the debts of Billmont No. 104 CC to Rand Merchant Bank ("RMB"). Billmont is a "subsidiary" of the corporation. RMB registered surety bonds over the remaining units of the corporation in liquidation, which surety bonds were registered in the capital amount of R18 000 000.00 (excluding the additional amounts). The current outstanding amount owing by Billmont to RMB amounts to R25 300 000.00 (see "A3"). The full suretyship obligation forms a contingent liability in the books of the corporation and must be taken into consideration in its liability statement. RMB has submitted two requisitions in the provisional liquidation of the corporation (see "K1" and "K2"), and I have established that Billmont is currently in arrears with its payments to RMB.'

It follows that no inferences favourable to Express Model's creditworthiness or its ability to raise arm's length funding can accordingly be drawn.

[14] Similar to the circumstances in *Express Model*, the payment here was made by Mr Kleynhans who explains that he obtained a loan in his personal capacity from Jean Avenue Property Investments (Pty) Ltd to settle the arrears on behalf of Red Socks. It can hardly be argued that this was an arm's length transaction. Kleynhans was the sole director of Red Socks. No explanation has been forthcoming about the terms of this loan, and whether and to what extent Red Socks is exposed thereby.

[15] Perplexingly, it is Golden Loop that claims, in the intervention application, that it is a creditor of Red Socks. This assertion raises more questions than answers, given that Kleynhans claims to have obtained the loan in his personal capacity, not in the name of Golden Loop. And if the assertion is true, it means that Golden Loop advanced the said loan to Red Socks, the details of which are yet to be disclosed. Such an arrangement would furthermore have been made without the intervention of the provisional liquidator, thus acting against the very purpose of a liquidation, which is to establish a *concursum creditorum*. Further, a loan by Golden Loop to Red Socks would not be an arm's length transaction given that the former is the sole shareholder in Red Socks, a situation akin to the circumstances in *Express Model* where the payment was made by corporate entities which enjoyed a fraternal relationship with the company in liquidation.

[16] There is moreover no basis to conclude, on the facts of this case, that the payment of 20 May 2024 proves creditworthiness or solvency on the part of Red Socks. The payment was, after all, not made by Red Socks, but by Kleynhans. And if it is correct that the payment was a loan to Red Socks, whether by Kleynhans or Golden Loop, the details of that arrangement have not been disclosed, and the Court is not able to assess whether it is an arrangement that is favourable to Red Socks. Such a decision should, in any event, have been made by the provisional liquidator were she properly involved and informed thereof. It has also not been shown that Red Socks has any realisable assets to satisfy the debt. In any event, the mere advancing of a loan to Red Socks does not necessarily justify an inference that it is able to pay its debts as and when they fall due, but may mean that it can only survive on loans, which amounts to the proverbial 'borrowing from Peter to pay Paul'.³

[17] Still on the ability of Red Socks to pay debts as and when they arose, the facts of this case date back some years, and the record shows that Red Socks repeatedly failed to pay levies, resulting in summons being issued. And even in these proceedings, Red Socks does not dispute that it owes arrears, although it disputes the amounts, based on the various repeated defences already adverted to above and which have no merit. The arrears that are the subject of these proceedings are

³ *Body Corporate Fish Eagle v Group 12 Investments* 2003 (5) SA 414 (W) at 426-427.

substantial, amounting to R 2 270 024.25, and are calculated from as far back as May 2018 to 22 March 2023, with regular notification and demands for payments, to no avail. There has never been an explanation for these extended delays in paying the arrears which were due, and it is no wonder that the applicant approached the Court to draw a legal conclusion, based on the provisions of section 345 of the Companies Act, that Red Socks is unable to pay its debts as and when they are due.⁴ To make matters worse, despite multiple affidavits filed on its behalf, Red Socks has never disclosed any financial information in these proceedings, whether in the form of bank statements, bank statements, balance sheets or income statements in support of its contention that it is commercially and factually solvent. The conclusion is irresistible that Red Socks is unable to pay its debts as and when they fall due.⁵

[18] In addition to all this, the applicant disputes that the amount paid on 20 May 2024 extinguished all the arrear levies, stating that it is R300 000 less than the outstanding debt. It explains that, whereas two interest amounts of R178 950 and R271 455 are reflected as 'written off' in the statements, that is only for purposes of the applicant's income tax, not for the benefit of Red Socks. This explanation appeared in the applicant's further replying affidavit which was in reply to the further answering affidavit of Red Socks which relies substantially on the payment of 20 May 2024. It has not been seriously contradicted. It is not disputed that there has never been an agreement to write off the said interest, and accordingly that it is owed.

[19] Besides, it is not disputed that Red Socks had other creditors, namely the City of Cape Town in the amount of R320 216, and the SARS in an undisclosed amount. There is every reason for the provisional liquidator to have been consulted in the process of making of this payment since she is lawfully vested with the insolvent estate, so that other interests in the estate could be considered. In this regard, there was nothing untoward in the applicant reporting the fact of the payment to the liquidator, or for forwarding the payment to her as requested.

⁴ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) 347-348. *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC). *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 446J.

⁵ *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA).

[20] Red Socks continues to claim that the applicant's failure to retain the payment and to use it to extinguish the debt amounted to an ulterior motive with the single aim of ejecting Red Socks from the premises. No evidence is presented to support the latter claim. As for the former, the applicant has explained, firstly, that the account statement which was generated in favour of Red Socks, reflecting the payment, was automatically generated and had since – by the date of deposing to the applicant's further replying affidavit on 15 July 2024 - been corrected. This appears to have been on account of the applicant's legal position that it was not entitled to accept the payment and enter into an agreement post-provisional liquidation. This evidence is not seriously disputed on the papers.

[21] The parties disagree about the status of the payment, and relying on the case of *Corruseal*⁶, the applicant claims that it was amounted to a donation to the estate. On the other hand, the intervening party relies on the SCA case of *Mostert and Others v Firstrand Bank t/a RMB Private Bank* ⁷ in which it was held, based on the principles of the law of contract, that a creditor is not entitled to refuse payment from a third party who makes a payment on behalf of a debtor in circumstances where it makes no difference to the latter by whom the contract is performed, as long as the performance is effective and in terms of the contract. The obvious problem facing this argument is that, since Red Socks was in liquidation at the time that the payment was made, the present case concerns, not only the principles of contract, but also the laws of insolvency.

[22] Ultimately, whatever the status of the payment may be, the fact of the payment does not cure the fundamental problem that is at the core of this application, namely that it has not been established that Red Socks is able to pay its debts as and when they become due, for all the reasons already discussed. Accordingly, even if the payment were construed as payment of the debt as contended by Red Socks and Golden Loop, that does not discharge the inference

⁶ *Corruseal Corrugated KZN (Pty) Ltd and Another v Zakharov and Another* (2108/2021) [2023] ZAWCHC 48 (6 March 2023).

⁷ *Mostert and Others v Firstrand Bank t/a RMB Private Bank* (198/2017) [2018] ZASCA 54; 2018 (4) SA 443 (SCA) (11 April 2018) see para 27. See also *Absa Bank Ltd v Moore & Another* [2016] ZACC 34; 2017 (1) SA 255 (CC).

that Red Socks is commercially, if not factually, insolvent. The applicant has otherwise complied with the requirements of the provisional order of 28 March 2024, and there is no reason not to grant the final order.

[23] Turning to the intervention application, it raises the same issues and defences raised by Red Socks in the main application. This, despite the fact that the affidavits in the application are deposed by Kleynhans in his capacity as a representative of the three trustees in the Kleynhans Trust.

[24] The founding affidavit in the intervention application sets out the circumstances of the payment of 20 May 2024 and, on the basis thereof the application avers that all its debts against the applicant are extinguished; the applicant has lost its *locus standi* to proceed with the liquidation proceedings; and that the applicant displays *mala fide* intentions by continuing with these proceedings and not accepting its payment. The affidavit also sets out some events subsequent to the granting of the provisional order which involve an arrangement or agreement to enter into a collaborative effort with another entity, namely Onomo Hotels to generate income. Not only is this a regurgitation of what was mentioned in the further answering affidavit of Kleynhans in the main application, but it alarmingly shows that the deponent continues to enter into final arrangements on behalf of Red Socks, apparently without the involvement of the provisional liquidator.

[25] Section 354 of the Companies Act provides as follows:

(1) The Court may, at any time after the commencement of a winding-up, on the application of any liquidator, creditor, or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

[26] In *Essack v Resfam Investments CC and Others*⁸, the court set out the legal position regarding the application of section 354 as follows:

‘5.2 As set out in the commentary on this section in Meskin, Henochsberg on the Companies Act, this section accords a court a discretion whether to set aside a winding-up order or not. This is irrespective of whether the basis for such setting aside is the contention that the winding -up order should never have been granted or whether the basis is that subsequent events to the granting of the order justifies such setting aside.

5.3 A distinction should however, be made between circumstances where it is contended, as the Applicant does, that the order should never have been granted (in the words of Meskin (above): "should not have occurred") and circumstances where setting aside is sought by reason of subsequent events. In the former case, the application should only be granted in exceptional circumstances..

5.4 In deciding whether or not to set aside winding-up proceedings, a court should have regard to the wishes of the creditors and members. In this regard (similar as when considering a stay of proceedings), a court has to consider whether the rights of creditors have been protected, such as where "*satisfactory provision (has been made) for them to be paid in full*", and where the liquidators' "*special position has been fully safeguarded, either by paying (them) the proper amount for (their) expenses or by sufficiently securing payment*".

⁸ *Essack v Resfam Investments CC and Others* (81703/2019) [2020] ZAGPPHC 145 (14 April 2020).

5.5 The solvency or not of the Corporation is also a factor to be considered.

[27] To the extent that the intervention application is based on an assertion that the provisional order should not have been granted, Golden Loop has failed to establish any exceptional circumstances for such relief. As I have indicated, the basis for the intervention is what is already contended by Red Socks in the main application, which has no merit.

[28] To the extent that the basis for seeking intervention is subsequent events to the granting of the provisional order, it is clear that those subsequent events amount to the payment made on 20 May 2024. As I have already indicated, the payment and the arguments raised in support thereof do not justify the setting aside of the provisional order.

[29] There is also to consider the fact that Red Socks has other creditors, namely the City of Cape Town and possibly SARS. No mention is made of what is to become of their interests, and their wishes have not been solicited or placed on record. No effort has been made to show that satisfactory provision has been made for them to be paid in full. I am accordingly not satisfied that the rights of all creditors will be protected. Neither has it been shown that the special position of the liquidator has been fully safeguarded, either by paying her the proper amount for her expenses or by sufficiently securing payment.⁹ Finally, as I have already indicated, the solvency of Red Socks has not been established on a balance of probabilities.

[30] For all these reasons, the intervention application has no merit.

[31] Lastly, there is no reason why costs should not follow the result. This matter has unnecessarily become voluminous, with Mr Kleynhans delivering multiple affidavits, which were repetitious, raising the same or similar arguments at every turn. Then, in another effort to stave off the final liquidation of Red Socks, the intervention application was launched, with an affidavit deposed by Kleynhans, and

⁹ See *Essack v Resfam Investments* at para 5.4 relying on *Re Calgary & Edmonton Land Co Ltd* [1975] All ER 1046 (Ch) at 1052.

the same issues as those raised in the main case by Red Socks were raised. I am in agreement with the applicant that the delivery of multiple affidavits and the intervention application, coupled with the resulting postponements, amounts to abuse of court processes.

[32] In the circumstances, the following order is made:

- a. The intervention application of Golden Loop is dismissed with costs, including the costs of postponement of 15 August 2024.
- b. The rule *nisi* granted on 28 March 2024 is confirmed and the respondent's estate is placed under final liquidation, and the costs of the application shall be in the winding-up.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	:	Adv M Verster
Instructed by	:	Martin E Coetzee & Associates M Coetzee
For the respondent	:	Adv P S Bothma
Instructed by	:	Abrahams & Gross Inc. H Bothma
For the intervening party	:	Adv C L H Harms Lionel Murray Schwormstedt & Louw M Nzimande