CCA/63/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

ANJU CIVILS (PTY) LIMITED	**PETITIONER**
AND	
TRENCON BUILDING WOLD BELELA JOINT VENTURE	**1ST RESPONDENT**
TRENCON CONSTRUCTION (PTY) LIMITED	**2ND RESPONDENT**
BUILDING WORLD (PTY) LIMITED	**3RD RESPONDENT**
BELELA CONSTRUCTION (PTY) LIMITED	**4TH RESPONDENT**
MCT HOLDINGS (PTY) LIMITED	**INTERVENING PARTIES**
AND 16 OTHERS	

JUDGMENT

Coram : L.A. Molete J
Date of hearing : 9th December 2014
Date of Judgment: 8th April 2015

SUMMARY

Insolvency – Petitioner alleging debtor's liabilities exceed assets – Joint Venture may be declared Insolvent – Two partners in agreement that JV is insolvent – One partner opposing matter – Identity of Joint Venture as registered partnership – Factors to be considered in

granting final order – Costs ordered against Joint Venture and Respondent opposing matter.

ANNOTATIONS

CITED CASES

Lebusa Motlomelo v Lethabela C of A (CIV) NO:21 of 2004

Absa Bank Ltd v Rheboskloof (Pty) Ltd & Others 1993(4) SA 436

Cohen v Jacobs (Stand 675 Dowerglen Pty Ltd Intervening) 1998(2) All SA 436

Commissioner for the South Africa Revenue Service v Hawker Air Services (PTY) Ltd (2006) SCA 555

Amod v Khan 1947(2) S.A. 435

Meskin and Co. v Friedman 1948 (2) SA 555

Lotzgru v Ruaben heimer 1959(1)

STATUTES

Partnership Proclamation 78 of 1957

Insolvency Proclamation No 51 of 1957

BOOKS

Hockly's Insolvency Law, 8th edition - Robert Sharrock, Kathleen van der Linde & Alastair Smith

[1] The Petitioner applies to this Court for the sequestration of the estates of the Respondents. The 1st Respondent is a Joint Venture and registered Partnership consisting of the 2nd, 3rd and 4th Respondents.

[2] The 2nd, 3rd and 4th Respondents are registered limited liability companies. The 2nd and 4th Respondents in South Africa, and the 3rd Respondent in Lesotho.

[3] The Petitioner claims against 1st Respondent a sum of **M959 464-50** being the balance in respect of construction work done; and materials supplied and equipment rentals at the special instance and request of the 1st Respondent.

[4] A document attached to the petition shows that 1st Respondent has unpaid creditors who are owed a total amount of **M48,136,513-25** (Forty eight million, one hundred and thirty six thousand, five hundred and thirteen maloti and twenty five lisente)

[5] It is stated that the 1st Respondent is insolvent and unable to pay debts and meet its obligations as they fall due, and the value of its assets is significantly less than the amount of the debts. Thus, the Petitioner concludes that 1st Respondent is insolvent.

[6] A provisional liquidation order was granted by my sister **Madam Justice Chaka-Makhooane** on the 31st May 2013. The petitioner set out in detail the reasons for approaching the court urgently and attached the December 2012 financial statements and creditors list at end March 2013.

[7] The affidavit in support of the allegations of insolvency was deposed to by one **Mr Louis Fourie**, the Project Manager of Aurecon Lesotho. The company was responsible to provide Program Management and Construction Supervision Services for the work, which was a Health Infrastructure Project by Millennium Challenge Account – Lesotho;

with contract with a price of **M568,483 031-00** (Five hundred and sixty eight million, four hundred and eighty three thousand and thirty one maloti).

[8] The Deponent stated that it was urgent to grant the provisional order against 1st Respondent as that would interdict the removal of certain goods and documents. That it would be to the advantage of creditors to sequestrate the estate of 1st Respondent, while it was not so urgent to sequestrate the estates of 2nd to 4th Respondents.

[9] After the proceedings were instituted, a number of additional parties sought to intervene in the proceedings. They claimed to be creditors who also had substantial claims against 1st Respondent, but who did not support the sequestration. The matter of intervention also came before the learned Judge, **Chaka-Makhooane J**, but was resolved by the parties consenting to the intervention.

[10] It is not necessary to set out in any detail how the matter ended up being argued before me. Suffice it to say that a very unwelcome and repugnant approach by an individual associated with one of the Respondents in the matter, led to the Judge's pre-mature withdrawal by her recusal from the case.

[11] The case was accordingly argued before me; and at that point the parties had already agreed to a convenient and practical manner of dealing with the various aspects of the matter. The relief sought by the intervening parties introduced new elements into the case.

[12] The relief sought was divided into three categories; namely;-

(a) The sequestration relief which they opposed and argued should not be made final and that the provisional order should be set aside.

(b) The Lombard Interdict Relief. This was concerned with restraint of Applicants from calling up the bond and receiving money from the insurer; **Lombard Insurance Company Ltd**.

(c) The other relief, or alternative remedies sought by the parties and which it was anticipated might require some of the issues to be referred to oral evidence.

[13] After some postponements and several extensions, the matter came before court; and the parties all agreed that the Court should limit itself to decide on the sequestration relief only; presumably because it would be decisive on the other matters or could determine their validity either directly or indirectly.

[14] This approach simplified the task of this Court and was appreciated. It greatly facilitated my understanding of the issues and what I should not bother with in the complex and bulky record of these proceedings.

Identity of First Respondent

[15] At first, the question of whether the joint venture was a registered partnership, that could be sued seemed to present itself as an issue before me.

[16] It became so because the petitioner had cited 1st Respondent as an unregistered partnership; and a further development that was so called "Dissolution and Reconstitution of Joint Venture" that was agreed by the 2nd to 4th Respondents. The intended purpose of this document was to

remove **Belela Construction (Pty) Ltd** from the Joint Venture and reconstitute it with only the two remaining partners.

[17] In answering the citation, the deponent on behalf of third Respondent; one **Shameem Osman Moosa** clarified that the second to fourth Respondents had entered into a written Joint Venture agreement; and registered their partnership which was done under number 29685 in the Deeds Registry.

[18] To my mind, that resolved the issue of the identity of the 1st Respondent. It was in fact and in law a Registered Partnership; and such statues it maintained whether or not the Petitioner was aware of it. It could not be changed merely by the incorrect citation.

[19] According to our law; the terms of every partnership shall be recorded in a Deed of Partnership which shall be signed by all the partners before a notary public or an administrative officer, who shall attest the same accordingly[1]. Our Court of Appeal in the **Motlomelo case**[2] held that without proper registration in terms of the Act; a partnership will not be recognised as valid in law.

[20] In the same way a deed of dissolution of partnership must be registered. The Act says that;

"Every dissolution of a registered partnership, arising out of any cause other than death of a partner, lapse of time, completion of purpose…… insolvency, or order of court, shall be recorded in the form of a deed

[1] Section 2(1) of Partnerships Proclamation 78 of 1957
[2] Lebusa Motlomelo vs Lethabela Mathe C of A(CIV) NO 21 of 2004

signed by all the partners before a notary public or an administrative officer who shall attest the same accordingly."[3]

The same requirements are mandatory for the registration and the dissolution of a partnership.

[21] The inevitable result of the above provisions is that according to our law only the partnership between the 2nd to 4th Respondents exists. It is the one that was provisionally liquidated and in respect of which the final order is sought.

[22] It follows also that the so called "dissolution and reconstruction of Joint Venture" did not have the desired effect, nor did it change the position of the registered Joint Venture of 2nd, 3rd and 4th Respondents. Indeed, not only did the parties fail to register the dissolution as required by law; they proceeded to also make their "reconstructed" Joint Venture subject to South African Law.

[23] This means that there existed two partnerships where the intention was to substitute one for the other. There was never a dissolution of the old partnership; and the formation of the new entity had no effect on the existing partnership. No new partnership was ever registered, and the old Joint Venture Partnership was never dissolved. Despite the intention of the parties to alter the arrangement, they did not do so. They formed another entity, which may or may not be legal in South African Law, but which certainly constituted nothing in Lesotho.

[3] Section 7 (Partnerships Proclamation)

[24] This necessarily means that a lot of the arguments based on the unregistered partnership, and the reliance on the "Dissolution and Reconstruction Agreement" and subsequent actions or submissions before me that do not reflect this particular position are of no substance and are accordingly rejected.

[25] My concern therefore can only be with the legal Joint Venture which was put in provisional liquidation and which has for all intents and purposes been the only entity recognised by law in Lesotho. It is the one I consider myself obliged to grant or not to grant the final sequestration order thereof. This application or petition must necessarily establish that debtor is in fact insolvent.

Absa Bank Ltd v Rheboskloof (Pty) Ltd and others[4]

Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd Intervening)[5]

Opposition To Petition

[26] The petition was opposed only by the 1st and 3rd Respondents. The position of the 2nd and 4th Respondents is set out in the affidavit of **Donald Peter Sanders** which was filed on the 30th July 2013; (and confirmed by Anton Van des Mast). It is that;

> "10.1 The second and fourth Respondents do not oppose the granting of the final sequestration order in respect of the first Respondent and support the granting of a final order.

[4] (1993 (4)SA 436
[5] 1998(2) All SA 436

10.2 It is in the circumstances necessary that a final order be granted forthwith as it is prejudicial to the entire body of creditors of the first Respondent….." [6]

[27] It is clearly expressed also in paragraph 16.5, where the deponent at says;

"For purposes of this Application, it is not disputed that first Respondent is insolvent and it is necessary that a final sequestration order be granted forthwith".

The 2nd and 4th Respondents were only concerned about the powers that the interim trustees were given and considered them to be too extensive.

[28] Be that as it may; the Petitioner and the two Respondents reached an agreement. They chose not to continue engaging in the litigation in return for a promise that no adverse costs order will be made against them; and provided that the estates of the second and fourth Respondents will not be affected by the order of final sequestration.

[29] An order of court in that regard was made, and accordingly only 1st and 3rd Respondents remained; together with the intervening parties.

[30] The Affidavits of the 1st and 3rd Respondents to oppose the matter were filed. In particular, the 1st Respondent's Affidavit by one **Shabar Osman Moosa** shows that the picture is not good at all. It is one that portrays a sinking ship.

[31] In paragraph 2.6.1.73 the following can be found;

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[6] (Para 10.1 and 10.2)

"26.1.3 I can also confirm that I have contacted creditors to the Joint Venture to the amount of approximately M20 Million who have all confirmed that they view the continuation of the Joint Venture rather than the sequestration thereof as the best way forward…… In addition I have also contracted the following creditors;

26.7.1.3.1 Kayelem Group owed M3, 543,230-00

26.7.1.3.2 Universal Roofing's at Ceiling at M5, 243,345-55

26.7.1.3.3 All Roofing M468, 823-51

26.7.1.3.4 Boloka Harware M1, 088 786-00

26.1.7.3.5 Molliney Construction M238, 367-00

26.1.7.4 The allegations made by Mohapi in her affidavit that 1 rallied the creditors and persuaded them to intervenes is absurd. There are many reasons why the creditors would be opposed to the sequestration of the first Respondent.

26.1.7.4.1 Their completed works could not be assessed

26.1.7.4.2 They were not used to complete the contract

26.1.7.4.3 They have not been paid for services rendered".

[32] Apart from the fact that this discloses in specific terms the debts of the 1st Respondent, it also shows the misconception that the intervening

creditors were labouring under, i.e. that only if the Joint Venture continues to operate, will they have their completed works assessed and paid. There is nothing that should lead them to such a misconception. In fact the opposite is probably true that they are not likely to be paid unless 1st Respondent is sequestrated.

[33] It is common cause and granted that the employer has already terminated the contract as it was within its rights to do so and went ahead to use other contractors to finish the job.

However, having done so, does not preclude the trustees from obtaining the information required to assess the works, and pay the creditors a divided. The intervening creditors opposition in support of the 1st Respondent is accordingly misplaced and lacks merit.

Grounds Of Opposition To Final Order

[34] The first Respondent raised a number of defences or grounds of opposition to the final order. It raised the following:-

(a) That the Court had no jurisdiction and applicant no locus stand;

(b) That petitioner failed to prove act of insolvency or factual insolvency

(c) That the petitioning creditors claim is not due and payable

(d) That payments were withheld by the MCA – L

(e) Payment of retention money

(f) Prejudice to subcontractors (creditors)

(g) Collusion between petitioning creditor and employer

(h) *Ex parte* and urgency i.e. that matter should not have been brought in that manner.

[35] I will only concern myself with what is relevant and important to decide. The question of urgency was already decided when the provisional order was granted. I agree that the possibility of the removal of vehicles, machinery and other items including documents rendered the matter urgent.

Commissioner for the South African Revenue Service Vs Hawker Air Services (Pty) Ltd[7]

[36] It is also correct that the both the employer (MCA-L) and the creditor (Anju) had a claims against 1st Respondent. The employer could easily terminate on the grounds of inability to complete the works and breach of contract. While the creditor on the other hard would be entitled to petition for the sequestration of the estate on good cause shown. It does not matter what the sequence of the actions was; and they could even happen simultaneously. There is no merit in the argument that the two are related or one was in any way the cause or result of the other. I find argument on collusion to be misplaced and irrelevant.

[37] As for the prejudice to creditors, I have already decided that any argument to that effect is misconceived. It is for the court to decide if in the circumstances there is reason to believe that it will be in the interest of creditors to sequestrate the estate of 1st Respondent and this may overrule what they subjectively may think or were led to believe.

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[7] (2006) SCA 55

Withheld Payments Allegation

[38] The withheld payments, as well as the allegation of payment of retention monies are arguments against the 1st Respondent, even though intended to show that the MCA – L was obstructionist. This is because the 1st Respondent should be able to complete the work without having to wait for hand-outs and advance payments from the employer. Once it is unable to complete the works because payments were either disputed or not forthcoming for any other reason, that is an indication that it is insolvent rather than anything else.

[39] The only question to answer therefore is whether the court has jurisdiction to order the sequestration of 1st Respondent; and whether or not it is insolvent and would be to the benefit of the creditors to sequestrate.

[40] The definition of debtor in the insolvency proclamation is;

> " "debtor" in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word,……."[8]

I have already determined that 1st Respondent is a Registered Partnership, so it can be sequestrated.

Jurisdiction And Locus Standi

[41] The arguments that the court has no jurisdiction and the Petitioner no *locus standi* and that the debt is not a liquidated claim is a mysterious one and

[8] Insolvency Proclamation – Section 2

indeed baffling to the ordinary mind when one looks at the clear provisions of the Insolvency Proclamation.

[42] In section 9 the Proclamation provides:

> "9 Petition for sequestration of Estate
>
> (1) A creditor (or his agent) who has a liquidated claim for not less than one hundred rands, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than two hundred rands against a debtor who has committed an act of insolvency or is insolvent, may petition the court for the sequestration of the estate of the debtor.
>
> (2) A liquidated claim which has accrued but which is not yet due on the hearing of the petition, shall be reckoned as a liquidated claim for the purposes of sub-section (1)"

Within this section the answers to the 1st Respondent's allegations are answered in full. It is common cause that 1st Respondent owes Petitioner far in excess of M100-00 on the papers, and it cannot be denied honestly and truthfully that there is reason to believe that 1st Respondent is insolvent and it will be to the advantage of creditors to sequestrate.

[43] The already quoted case of the Commissioner for the **South African Revenue Service v Hawker air Services (Pty) ltd** in the South African Supreme Court of Appeal has been considered and it is relevant to answer a number of points raised by the Respondents in opposing the matter.

Insolvency of First Respondent

[44] What remains is whether in fact the 1st Respondent is insolvent.

[45] The Petitioner submits that an excess of liabilities over assets is about M17,857 300-47. The current liabilities of M21 298 678-88 which exceeds the current assets of M8 685 040-95 by the substantial amount of M12 623 637-93 means insolvency.

[46] Furthermore it is clear that the 1st Respondent could not fund the project on its own and was constantly seeking to raise funds to be able to pay its creditors. Initially from employer and later from one of the partners.

[47] The Petitioner by way of notice in terms of Rule 34(11) required the First and Third Respondents to produce certain documents, mainly the Audited Financial Statements and other documents to prove the viability of the Joint Venture. The Respondents failed to do so and accordingly could not gainsay the allegation of insolvency; and could not use the documents it failed to produce.

[48] In the end all we were left with were the allegations in the opposing Affidavits that the First Respondent is not insolvent if one considers that:

> "The First Respondent was awaiting an overdue payment from MCA-Lesotho of M48 Million and the Second Respondent agreed to inject M20 Million (vide annexure some 3) then the First Respondent had a surplus cash flow of some M68 Million against creditors of M48 Million."

[49] This is again an argument that is strange. To say that Respondent should not be liquidated because it is expecting money which is not forthcoming from its creditors is untenable. In fact the very reason why the First Respondent is insolvent is that its financial position is so distorted that it cannot hope to survive. This is usually because someone failed to pay in time or at all. The creditors are then entitled to seek an order to declare the debtor insolvent.

[50] In this case not only is it clear that the 1st Respondent is insolvent, I also think it was unwise far the 3rd Respondent to oppose the matter and incur unnecessary costs, especially where the other partners were agreeable to the final order.

It can be assumed that all the Partners rely on the same set of accounts and financial statements to come to the conclusion to support or oppose the final order. The impression I get is that the scales are tipped in favour of the final order being granted.

[51] I am not inclined to interfere in what is strictly the discretion of the office of the Master of the High Court which is vested with the powers to appoint and confirm the trustees, and also to give them the powers they may exercise and the extent thereof having regard to the particular circumstances of this case.

[52] It is unnecessary to deal with that aspect of the matter because the parties who sought a limitation of the powers of the trustees did not pursue their opposition to the matter. No argument was advanced in this regard, to persuade me to make the order one way or the other.

[53] When it comes to the final sequestration order the court must be satisfied on *a balance of probabilities* that the facts exist to conclude that the debtor is insolvent.

Amod V Khan[9]

Meskin & Co. V Friedman[10]

[54] The court will also have to be satisfied that it will be to the advantage of creditors to make the order;

Lotzofv v Rauben heimer [11]

No real case was made for the sequestration or liquidation of the individual partners; so I will not bother with that.

[55] In this case, in a Joint Venture of three parties, two of them support the sequestration of the Joint venture. The Joint Venture or Partnership has already lost the contract which was cancelled by the employer. The employer has already completed the works using other contractors and all that remains is really to wind up the affairs of the Joint Venture being 1st Respondent.

[56] It would not make sense for the court to refuse to grant a final order of sequestration in these circumstances.

[57] I therefore make the following order;

(a) The final order of sequestration of 1st Respondent is granted.

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[9] Amod v Khan 1947(2) S.A. 435
[10] 1948(2) SA 555
[11] Lotzofv vs Rauben heimer 1959(1) SA 90

(b) That the Estate of the First Respondent is placed in the hands of the Master of the High Court to be wound up.

(c) No order is made regarding the Estates of the Second, Third and Fourth Respondents.

(d) The First and Third Respondents are ordered to pay the costs of these proceedings in equal shares. The costs to include costs of two counsel.

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L.A. MOLETE

JUDGE

For Petitioner - Adv C.S. Edeling and Adv M. Mathe

For Respondents - Adv Howie for 1st Respondents

- **Adv Malebanye K.C for 2nd and 4th Respondents**
- **Adv Seltzer for 3rd Respondent**
- **Adv Ndebele for intervening creditors**
- **Adv Mpaka for the Provisional Trustees**