

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

CASE NO: 17519/2009

DATE: 18 AUGUST 2009

5 In the matter between:

SUSANNA JORDAAN N.O. FIRST APPLICANT

And

BIZ AFRICA 1332 (PTY) LTD RESPONDENT

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J U D G M E N T

DAVIS, J:

15 [1] This is an application for a final order of liquidation of
respondent which was placed into provisional liquidation
on the 21st July 2009 and which order was made
returnable on the 14th August 2009.

20 [2] On the 14th August 2009 applicants, under case number
17519/09 (Susanna Jordaan N.O.) and others v Biz Africa
1322 (Edms) Bpk brought an application for a
postponement of this matter. I shall refer to these
parties as "the applicants" in that it is necessary for me
25 to deal firstly with the postponement. In the event that

the postponement fails it is clear that there is no other reason to refuse to application for the final order.

5 [3] The background to this case is the sad financial loss of many of those who can ill afford the loss unfortunately is all too common. It flows from the collapse of a set of companies, in this case the King Group, as a result of which some 10 000 investors have lost their hard-earned investment and have been left financially destitute as a result of what, on these papers, is alleged to be significant financial mismanagement. About these 10 allegations I prefer to say no more in that the issue is not before me.

15 [4] The purpose of the application for a postponement was initially set out in an affidavit deposed to by Mr Bernard Bosman Joubert who stated the following:

20 “Hierdie aansoek is daarop gerig om die keurdag van die voorlopige likwidasie bevel vir ‘n tyd uit te stel om die moontlikheid van die verkryging van externe finansieering te ondersoek vir doeleindes van die doel van ‘n skema in terme van artikel 311 van die Maatskappywet 160 van 1973”.

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To this, the applicants in the principal matter (that is the matter for the final order) contended that the reasons for a postponement were invalid because:

5 (a) the papers in the application had been filed on the 25th June 2009. By the time the application for a postponement would be heard more than eight weeks would have past. In their view, Mr Joubert did not state why he
10 now seeks a further six weeks to do investigations when there was at least seven weeks in which to do that previously.

15 (b) In his initial affidavit for a postponement, the averment was made that Mr Pierre Groenewald would be involved in the investigations as to the possibility of acquiring the necessary funding which in turn would underpin a scheme to be conceived in terms
20 of section 311 of the Companies Act.

To this, the applicants contend that Mr Groenewald is not the most competent and able person to facilitate the procurement of
25 external financing. Attempts by Dr King and

5 various other high profile professions to raise external funding to salvage the King Group in the same fashion as Mr Groenewald claims to be doing at present have, over a long significant period and under far more favourable economic circumstances, floundered.

10 (c) Mr Adrian King had informed Mrs Zera that he had found a BEE partner who was seeking to inject finance into respondent ('Biz Africa').

15 (d) On 26 November 2008 Mr Adrian King, who was then the MD of the King Group, sent Mrs Zera an email stating, *inter alia* "we are expecting funds soon, we have got a new BEE partner that is buying 26% of the shares and 260 million in shares".

20 (e) In the papers before me there is attached a group newsletter of the 24th June 2009 in which the following is stated on behalf of the King Group:

5 “King Financial Holdings...is currently in the process of a major restructuring process...various profession firms and personnel have been appointed to facilitate the restructuring process. These professional firms are also involved in the capital-raising exercises we have embarked on”.

10 (f) The first intervening creditor averred that he was informed by a senior official of the King Group that the Group was waiting on a large capital injection as it had obtained a BEE partner and that the BEE partner is waiting for the net asset value certificate.

15 (g) On the 27th June 2009 Brenda Steyn, a senior executive financial coach in the employ of the King Group, circulated an email amongst the clients. In that email the following was stated:

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“Dit gaan hoofsaaklik in verband met die Switsertse Bank wat miljoene by ons ingekoop het en wat natuurlik 'n geweldige invloed op

die aandele gaan maak (net vir kliënte wat reeds aandele het)".

5 (h) Jacobus F van Schalkwyk, a former employee of the King Group, stated, *inter alia*, in his affidavit pertaining to a meeting that was held by the directors of King:

10 "Die vergadering het gehandel oor die nuwe website, 'n Switserse belegger wat groot somme geld in King gaan belê asook die bekendstelling van die King Financial Holdings struktuur en dat hulle (die King) nou aandele in die maatskappy gaan verkoop".

15 (i) Mr van Schalkwyk, referring to an earlier affidavit, stated:

20 "King het vir my gesê dat 'n deel met 'n buitelandse belegging (ek kan nie onthou of dit dieselfde een was nie) klaar geteken is en dat die geld up die laaste 14de November 2008 in hulle rekening sal wees. Paul het vir my gesê dat die belegger elke kwartaal van
25 2009, 50 miljoen euro in King sal belê was

hoofsaaklik aangewend sou word om hulle eie verbande aan mense toe te staan op eiendom”.

5 (j) In a letter generated by Mr Peter Kemp of Eversheds it was stated with reference to the King Group:

10 “The King Group’s efforts to raise funding have not yet been successful, however two international sources of funding has recently been identified and discussions are currently underway heading by ourselves and funded by Arcay”.

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[5] According, to the various applicants and, in particular to the arguments which were put up by the liquidating creditor, notwithstanding all these promises and undertakings by Dr King, the directors, Evershed, Mr Peter Kemp and the Arcay Group to raise financing to salvage the King Group, no funding has been forthcoming. Therefore, the liquidating creditor submitted that it was inconceivable that Mr Groenewald would be more successful in his attempts now undertaken under far more parlous economic circumstances as

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presently exist in the South African economy to raise the necessary funding.

5 [6] Furthermore, the respondent was placed in liquidation and various of its subsidiaries have similarly been placed under provisional liquidation. The group has ceased to trade and, according to the liquidating creditor, business confidence in the group and its projects have manifestly been lost.

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[7] In an affidavit deposed to by the attorney for first applicant (in the principle application), Mr Duvenhage, it was alleged that Mr Groenewald may have been very seriously implicated and thus be held to be responsible for the irregularities committed by the management of the King Group and which have given rise to the financial demise of the group and hence the present application. I emphasise that these are allegations made by Mr Duvenhage and in which this Court is not in a position to say more.

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[8] According to Mr Duvenhage, Mr Groenewald acted as the chief financial officer of the King Group, signed off on the consolidated group management statements for the period ending 31 December 2008 in which it was

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reflected that the group had achieved a profit of more than R53 million during that period. He should have, according to Mr Duvenhage been, acutely aware of cash flow problems and financial difficulties of the group and should not, as a responsible chief financial officer, have approved statements containing such manifestly gross misrepresentations.

[9] These averments by Mr Duvenhage are also supported by Mr Andersen who deposed to an affidavit on behalf of the Financial Services Board and which this Court notes is of great significance in that it was given by an independent institution.

[10] In an analysis of the systems and functions of the King Group, Professor Kenneth McGregor prepared a report in which the following comments appeared concerning Mr Groenewald:

“Pierre Groenewald be replaced as head of finance by someone who can introduce the necessary disciplines and procedures in a corporate financial division. Based on the information I have obtained, it is dubious whether Pierre possesses the ability to

hold a management position in a corporate environment”.

[11] On the day of the hearing, applicant for the
5 postponement deposed to a new affidavit. In this
affidavit, deposed again to by Mr Joubert, he avers that
his application for a postponement is now supported by a
significant percentage of the creditors, that is the initial
application is now bolstered by a further constituency. In
10 this affidavit the following appears:

“Ons die tussen betredende skuldeisers handel nie
in isolasie nie. Ek heg hierby aan ‘n lys van
beleggers...van hulle name en hulle eis bedrae wat
15 die verlenging van die keurdag ondersteun in
woorde wat wissel dat hulle wens dat die likwidasie
bevel nie finaal gemaak word nie en of dat hulle die
likwidasie opponeer en/of teen staan. Hierdie lys
bawat 107 name en entiteite en is ‘n gesamelike eis
20 van R98 275 689,00 en by gevolglik ongeveer drie
keer meer in waarde en twee keer meer in getal as
die groep wat die prokureurs Duvenhage en Burger
voorteenwoordig word”.

He then sets out the purpose of the application as being to hold a meeting of creditors and investors. Mr Joubert then informs the Court :

5 “By hierdie vergadering sal die
 stokeisers/beleggers/aandeehouers behoorlik
 ingelig kan word teen aansien van die staat van
 sake van die King Group en sal die Agbare Hof
 versoek word om te gelas dat die voorlopige
10 likwidadeurs by hierdie vergadering verslag doen
 waar dit verwys word in artikel 402 van die
 Maatskappywet”.

[12] The affidavit seeks to illustrate the benefits of the
15 scheme conceived in terms of section 311 of the
 Companies Act. In addition, a series of emails from
 investors are then attached, mainly in the same format,
 all of which seek to oppose the final order because,
 understandably, these investors are concerned that they
20 will lose their investment were a final order be granted. A
 significant sum of these emails appear to have been
 generated by one Ms Alide Nel who is described in the
 report of the Financial Services Board, to which I have
 made reference, in a critical fashion because of her role
25 in the provision of incorrect information to the investors.

In addition, the following, with great respect, breathtaking email is annexed in further support of this application by Mr Joubert. It is generated from one Marie Groenewald (presumably related to Mr Groenewald) and
5 seeks to provide evidence as to why there is some possibility of a 311 scheme being successful:

“Ek het die inligting na drie van die entities waarmee ons werk gestuur as 'n teaser, natuurlik
10 alle name en verwysings na entities uitgelaat. Twee van die drie is die bedrag van 680 miljoen absoluut geen probleem insover dat hulle ability is om te bevonds. Die derde een word definitief gedruk met daardie syfer maar kom ons kyk wat die
15 reaksie is”.

[13] I say this claim is breathtaking because blandly to suggest in the present economic climate that an investment of R680 million in a company which, on any
20 basis is insolvent, will cause no problem to genuine prospective investors without any further justification, is the kind of Alice in Wonderland type claim which if made before a Court is one which should be rejected.

[14] None of the investors have deposed whose emails are annexed to the founding affidavit to their own affidavit, taking the Court into their confidence as to the contents of what they were informed before opposing the final relief sought. It is manifestly obvious that any investor who has already shamelessly been deluded into investing hard-earned funds into a group that squanders their funds, would be desperately concerned, understandably so, about the loss of their financial investments. That is the tragedy of this case and the Court takes this sentiment with the utmost seriousness.

[15] The reality is that these people have already been deluded. To simply provide emails saying they oppose a final liquidation without informing the Court precisely what they were told in order to so oppose the liquidation, on its own cannot be regarded as sufficient evidence to be taken as a justification for a postponement.

[16] Mr de Vries who appeared on behalf of the applicant for postponement, tenaciously argued that:

- (1) there was no real prejudice to the granting of this postponement;

(2) investors were entitled to hope that some of their funds could be saved; and

(3) their views were entitled to be heard and considered.

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These are significant submissions to which weight must be attached and which is the reason why this Court postponed giving judgment yesterday at the hearing in order to carefully reconsider each of these submissions in the light of a further careful analysis of the papers.

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[17] The submissions, however, need to be assessed in terms of the architecture of the Companies Act and, in particular, section 354 and 413 thereof, which need to be read together. Section 354(1) of the Act provides:

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“(1) A 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

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voluntary winding up on such terms and conditions as the court may deem fit.

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

Section 413 of the Act provides, *inter alia*:

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“Whereby this Act the court is authorised in relation to a winding up to have regard to the wishes of creditors, members or contributories:

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(a) The value with respect to the creditors’ claims and the voting rights of the various members of contributories of the company in terms of its memorandum or articles shall also be taken into consideration;

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(b) the court may, if it deems fit, for the purpose of ascertaining the wishes of such creditors, members or contributories, direct meetings of the creditors, members or contributories to be

called, held and conducted in such manner as
it directs...”

[18] These two sections need to be read together. Section
5 354 provides the Court with the power to stay “all
proceedings in relation to the winding up”. Therefore,
the section empowers the staying of proceedings at any
date, even after the final order of liquidation has been
granted. As Mr Woodland, who appeared on behalf of
10 the liquidators, correctly submitted, it has always been
the practice in these courts where a viable section 311
scheme is proposed, for a court to invoke its powers
under section 354 of the Act even after the final order
has been granted, so as to allow the section 311 scheme
15 to be properly and fairly considered.

[19] In exercising its discretion under section 354, a court will
consider the interest and views of all interested persons.
In normal circumstances, a court would not stay or set
20 aside proceedings unless there were no creditors or the
creditors had been paid in full or provision for them to be
paid in full has been or will be made, or they have
consented to the stay or to the setting aside of the order
or they are otherwise bound not to object, as for example

[22] In this case the main justification for the postponement was a possible scheme in terms of section 311 of the Act. Unfortunately, the application(s) for a postponement resembled a jurisprudential moving feast in that the initial affidavit was based entirely on a possible section 311 scheme. Somehow this idea was given a different nuance in the second affidavit to which I have already made reference; that is a section 311 scheme is now only one of the justifications for a postponement. Nonetheless, when the case made out for the postponement is examined carefully, there is no viable option other than the notion that a section 311 scheme may be possible.

[23] For what other purpose could a meeting be held? There would be no purpose in convening a meeting of ten thousand investors simply to inform them that there is, on the one hand, the option of liquidation and, on the other hand, an option of some vague, convoluted promise for further investment to be forthcoming along the lines of the various attempts that have been made and to which reference has already been made in this judgment. It could only be to put to the investors that there is some possibility, realistically grounded, that a 'saviour' could be found. No 'other saviour' has been mooted in the

papers; other than one conceived in terms of section 311 of the Act.

[24] But, as I have already mentioned, the powers in terms of section 354 can, and have been employed, to stay a liquidation if there is a realistic scheme on offer. By contrast, the costs of convening a meeting of ten thousand interested people for no other purpose would be an extravagance which cannot be sanctioned by the Court.

[25] Thirdly, there has been a paucity of justification for the meeting other than that to which I have already alluded. Fourthly, this Court must take cognisance of the various attempts which have already been made to secure funding and the potential conflict of interest of some of the *dramatis personae* who appear to be behind the present postponement, including Mrs Nel and Mr Groenewald, (whose role has been conveniently relegated from centre stage to a bit part that is from the first to the second affidavit). Finally no viable section 311 scheme is set out in the papers.

[26] All of these reasons militate against the exercise of a discretion in terms of section 413. In a case such as the

present the best possible option is for an independent party, being the liquidators, to take control of the entire set of operations of the group were there to be a realistic section 311 scheme on offer they could manage the process by virtue of conceding to a postponement in terms of section 354 of the Act and for a then realistic scheme to be considered. It is here where there is no prejudice to be found.

10 [26] Accordingly, the application for postponement is dismissed. I am not going to make any costs order in this particular regard because do not think there is much purpose served therein. Having dismissed the application for postponement, I must grant the application for a final order of liquidation to which there is no realistic opposition. Accordingly the final order as sought is so granted.

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DAVIS, J