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IN THE HIGH COURT OF SOUTH AFRIC
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 6/9/10 SIGNATURE

DATE: 2 SEPTEMBER 2010
CASE NO: 25035/10

In the matter between:

ABSA BANK LIMITED **APPLICANT**

Vs

MOGALE CITY MALL (PTY) LIMITED **FIRST RESPONDENT**

SMOKEY MOUNTAIN TRADING 512 (PTY) LTD

SECOND RESPONDENT

JUDGMENT

BOTHA, J

This is an application for the liquidation of the first respondent.

The applicant, Absa Bank Ltd, brings the application as a member and as a creditor of the first respondent.

The second respondent is the applicant's co-share holder in the first respondent. The applicant holds 30% of his shares in the first respondent.

The application is brought on four grounds: that the first respondent has suspended its business for more that a year, that 75% of the first respondent's share capital has become lost, that the first respondent is unable to pay its debts, being factually and commercially insolvent, and that it would be just and equitable to wind it up.

The applicant claims that the first respondent owes it an amount of R85 million, R38 938 445.62 being in respect of a loan (originally R32 million) and R47 million in respect of a loan made by Immobili Retail Investment (Pty) Ltd (Immobili) to the first respondent of which loan the applicant is the cessionary.

Immobili is a company that, like the first respondent, can be described as belonging to the UPP (Universal Property Professionals) or Immobili group, a number of companies controlled by the Theodosiou brothers. Other companies in that group are Bel Air Mall (Pty) Ltd (Bel Air), Mall on 14th Avenue (Pty)

Ltd (Mall on 14th). All these companies were involved in property development, mainly shopping centres and malls. At this stage most of these companies have been wound up, certainly Immobili, Mall on 14th and Bel Air.

The first respondent, as it name betrays, was destined as the vehicle for the development of a shopping mall near Krugersdorp, at the intersection of Hendrik Potgieter Avenue and the R28. The applicant acquired its 30% shareholding in the first respondent from the second respondent, another company in the UPP group. There is a written shareholders' agreement regulating the relationship between the applicant and the second respondent.

The loan of R32 000.00 was granted in terms of a written loan agreement dated 13 December 2007.

The applicant also supplied loan capital to the companies in the UPP group in terms of loan agreements.

The first respondent does not dispute its indebtness in respect of the loan agreement, but relies on a counterclaim that it contends offsets its indebtedness.

It alleges that it and the applicant had an overall partnership agreement in respect of the various developments by companies in the UPP group. Although it accepted that the relationship between the applicant and it came to an end in mid 2008, it contends that the applicant breached the fiduciary duty it had towards it, that it deviously undermined its relationship with it, that it colluded with a competitor, Retail Africa Wingspan Investments (Pty) (Wingspan) and that it was *mala fide* in foreclosing on the loan agreement. It alleges that it had a counterclaim some R360 million, being profits it would have made if the applicant had not withdrawn its support of the Mogale development.

The first respondent admits that its case is to a great extent based on inferences. Therefore it asked the court in *limine* to order the applicant in terms of Rule 35(13) to make discovery in respect of various categories of demands.

It is to be noted that a substantive application of the same nature was brought in respect of Immobili, Bell Air and Mall on 14th, amongst others. That application was dismissed by Prinsloo J. The court gave reasons in a judgment of 199 pages, the first half of which dealt with the issued of discovery.

Logically I must first deal with the issue of discovery.

As stated in **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979(2) SA 457 (W) at 470 D-F** the power of a court to order discovery in motion proceedings is one that will only be exercised in exceptional circumstances. One must remember that in application proceedings parties are obliged to produce their evidence. If a party refers to a document in his affidavit the opposite party may in terms of Rule 35(12) deliver a notice to be allowed to inspect the document.

What is also relevant in this case, which mainly concerns a defence that the first respondent has a counterclaim, is that this court is not directly concerned with the counterclaim.

The first respondent is in essence attempting to trawl through the applicant's documents to see whether it can find support for its inferences.

In all the circumstances I am of the view that the first respondent has not proved exceptional circumstances justifying an order that Rule 35(14) should apply to this application.

In respect of the application for the winding-up of the first respondent there is no dispute about the loan to the first respondent and the fact that the balance amounts to R38 million.

There is a dispute about the cession of the loan of Immobili to the applicant. There is also a dispute about whether 75% of the first respondent's share capital has been lost.

In respect of the contention that it would be just and equitable that the applicant be wound up, it would seem that justice may require the winding-up of the first respondent in a situation where so many of its associated companies have been wound up, especially Immobili to which it, on its version, owes R42 million.

I will, however, focus on the ground of the first respondents inability to pay its debts, which was the ground that was argued before me.

In essence the first respondent did not dispute the indebtedness of R38 million, but relied on a counterclaim for damages suffered as a result of the applicant's breach of a fiduciary duty towards it.

Mr Cook, SC, who appeared for the first respondent accepted that the first respondent was bound on the basis of issue estoppel by a judgment of Hartzenberg J, delivered on 31 March 2010 when he granted a final winding up order against Immobili and a number of related companies. The learned judge dealt extensively with the issue of the alleged breach of a fiduciary duty. I quote:

> **"The Breach of its Fiduciary Duty by ABSA.**
>
> **The real defence of the respondents is a hybrid approach consisting of allegation of unconscionable behaviour by ABSA by failing to allow the respondents a proper opportunity to realize their full potential and by fraudulently conniving with Retail Africa Wingspan to the detriment of the respondents under circumstances where it had a duty to inform the respondents of its relationship with that concern. There is also a defence that the last Amended and Restated Loan Agreement did**

not reflect the common intention of the parties in that the respondent required of the applicant to insert a provision in the agreement stipulating that in the event of excussion the applicant first had to excuss against the assets of the shopping centres before turning to the other companies in the UPP group.

Before dealing with these defences it is necessary to give a general overview of the nature of all the agreements between the parties to be able to evaluate the defence that there existed a general partnership between ABSA and the respondents, which partnership agreement was breached by ABSA. There are umpteen loan agreements between the lender and the various borrowers. There is not the slightest indication in any one of those agreements of an overall partnership agreement. The agreements arrange security for the loans, interest, the repayment of the loans and the usual provisions to be found in loan agreements. There are specific agreements in two instances where ABSA took up shares in two of the companies that are not involved in these proceedings. The agreements provide for the

advance of loans to and of the investing of equity in the particular companies. The relationship between the shareholders is regulated by shareholder agreements. What I find particularly difficult to understand is what exactly the partnership agreement was. Was it a situation where the parties had agreed that ABSA would bring money into the partnership and the UPP group expertise? In such a case was ABSA entitled to repayment of the loans as was stipulated in the agreements and to receive interest on their investment? Was the idea that ABSA had to be repaid from the sale of the assets. What was to happen to the profit after the sale and repayment of the loans and interest? The respondent did not indicate a single document or discussion in which that most important issue was discussed. Were the parties to share fifty-fifty in the profit, or what were the partners' share in the partnership? Was a value to be put on the UPP expertise, and if so, what value. There are a few e-mails in which representatives of ABSA loosely made use of the word partnership but as I have indicated there is not the slightest indication of the rights and obligations of

the parties to such an agreement. If there really was a partnership I have no doubt that these aspects would have been discussed. If one looks at the length to which the parties went to reduce the loan agreements to writing it is highly unlikely that if there was a partnership agreement that the terms would not have been reduced to writing. I accept ABSA's version that although there may have been talks about a partnership in respect of particular projects that there definitely was no overall partnership agreement.

The respondents were aware of the difficulty to sell the idea of a partnership to the court. In the latest application (for the postponement and the referral to evidence) the reliance on a partnership was abandoned and substituted with an argument that the relationship was not a partnership but that ABSA and the UPP companies had a joint venture. ABSA, according to the argument, had an ideal to accumulate a massive fund consisting of investments in properties and more in particular in properties that can accommodate retail businesses. Mall on 14 is an example of such an

investment in the envisaged overall fund. ABSA obtained a 30% shareholding and the UPP group got 70%. As in the case of the argument for the existence a partnership there is absolutely no indication of what each party could expect from the other party. I may just indicate that an important point of departure for the joint venture argument is the latest affidavit of Clinton. His initial affidavit was to the effect that the relationship was a banker client relationship but that ABSA indicated a willingness to enter into a specific joint venture agreements with the UPP group in instances where it regarded the specific project as a sound investment. He emphatically denied that there was an overall relationship other than that between a banker and a client. In his latest affidavit he again denies the existence of a partnership. He does not retract his denial of an overall partnership but says that there was a joint venture. As I have indicated, he does not give any detail about the rights and obligations of the parties to the agreement in this very vague affidavit. I am satisfied that there is no reason to find, at this belated moment, that the relationship between ABSA and the UPP group

was anything else that a banker client relationship. In the light of that finding the result is that the respondent contention that ABSA owed if a fiduciary duty of good faith, and was not entitled to enter into a loan agreements with other developers, and in particular Retail Africa Wingspan, is without foundation.

It is necessary to look at the alleged breach of the fiduciary duty. ABSA entered into a joint venture with the UPP group for the development of a shopping centre in Krugersdorp, the Mogale project. It also entered into a joint venture with Retail Africa Wingspan for the development of a shopping centre in the very close vicinity of the Mogale project, literally across the street. The respondents contended that ABSA entered into the joint venture with Retail Africa Wingspan with the intention to harm them and the UPP group. The problem with the argument is that ABSA has shares in both developments and if the intention was to harm the Mogale project Absa would also harm itself in that its own shares would be negatively affected. The same holds true for the argument that although ABSA would

impair the value of its own shares in Mogale, it knew that it was about to bring an application for the liquidation of the respondent, and that it planned to take over the properties of the respondent. The flaw of the argument still remains that it had shares in both developments and that if ABSA did foresee a negative impact it had to lose money by investing in both projects. I fail to see the devious plot alleged by the respondents."

In my view that finding leaves no room for a finding by me that there was a fiduciary duty and that it was breached. As I said Mr Cook accepted that the first respondent was bound by the judgment through the operation of issue estoppel. It may be that *res iudicata* is the appropriate legal concept. Then one may ask whether the judgment related to the same parties, in particular the same respondents. It seems to me that one can say that the first respondent was in privy with the respondents liquidated by Hartzenberg J in the sense that they were directed by the same governing minds. In any event, if estoppel or *res iudicata* are not applicable, the judgment of Hartzenberg J is precedent as much in point as a precedent can ever be. Its reasoning is compelling and I accept it.

Mr Cook attempted to circumvent the judgment of Hartzenberg J by referring to two factors that, he argued, distinguished this case from the case before Hartzenberg J.

Firstly he referred to the fact that in the case before Hartzenberg J the land in which the Mogale Centre was to be built was not an issue. In this case the complaint is that the applicants involvement with Wingspan was inimical to its involvement in the Mogale project. That very issue was addressed by Hartzenberg J and he made the point that it was unlikely that Absa would jeopardise a development in which he had an interest.

The second distinguishing feature on which he relied was a statement made by the applicant's deponent, Mr Loubser, in an affidavit resisting a petition for leave to appeal against the judgment of Hartzenberg J. It reads as follows:

> **"It has always been common cause that by August/September 2007 and once the indebtedness of the UPP Group was under the control of Business Support Services the intention was to exit the relationship and that Absa insisted that the shopping centres belonging to Bel Air and Immobili be sold to**

make payment of the indebtedness. There was no pretence in this regard".

He argued that it showed that the applicant had already decided in August/September 2007 to withdraw from the Mogale project. I agree with Mr Leathern SC, who, with Ms Naudé, appeared for the applicant, that the statement must be seen in the context of a plan at the time to rationalize the affairs of the UPP group by selling two shopping centres, pay its debt and continue with the remaining projects, one of which would be Mogale.

In paragraph 33.3 of his affidavit Mr Loubser said the following:

"By September 2007 the accounts were in "intensive care" and under the control of Absa's Business Support Division whose expressed intention, as the Theodosious were well aware, was exiting the Debt relationship and in particular by moving the UPP Group so far as to comply with their undertakings to sell the Immobili and Bel Air shopping centres".

This makes it clear that Mr Loubser referred to the debt relationships.

The general scheme of the plan to sell two shopping centres and pay off debt was also confirmed in paragraphs 93.5 of the answering affidavit (p404) and the minutes of a meeting held on 13 August 2008 (p1102).

Mr Cook also contended that it was falsely held out that the Heritage Village project did not form part of the portfolio of Wingspan. The applicant explained that Wingspan was a fund that only held completed projects and that Heritage Village was taken out of it because it was undeveloped. Only once it had been developed could it have been submitted to Wingspan for consideration. See paragraphs 113.3 – 5 on p721. That is a satisfactory explanation that should allay all the suspicions voiced by the first respondent.

Mr Cook referred me to **Bellairs v Hodnett and Another 1978(1) SA 1109 (AD) at 1130 E-G** for the proposition that the analogy of a partnership is apt where a company is used as the vehicle of a joint understanding. The fact is that in this case

Hartzenberg J found that there was no fiduciary duty and no breach of a fiduciary duty. The shareholders agreement also excludes any obligations other than those recorded in the agreement. See Clause 29 (p150).

For all these reasons I am of the view that the respondents have failed to show that there was a breach by the applicant that could give rise to a claim for damages. It follows that a winding-up order should be granted. In the circumstances of this case it should be a final winding-up order.

An order is granted in terms of prayer 1 of the notice of motion.

C. BOTHA
JUDGE OF THE HIGH COURT