THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 457/2011

In the matter between

CORPORATE MONEY MANAGERS (PTY) LIMITED (Under Curatorship)	**First Appellant**
CMM FINPRO (PTY) LIMITED (Under Curatorship)	**Second Appellant**
MIRO CAPITAL (PTY) LIMITED (Under Curatorship)	**Third Appellant**
FOUR RIVERS TRADING 307 (PTY) LIMITED (Under Curatorship)	**Fourth Appellant**
REGENT GROUP CAPITAL (PTY) LIMITED (Under Curatorship)	**Fifth Appellant**
ESCASCAPE INVESTMENTS (PTY) LTD (t/a SAKHA IBLOKHO) (Under Curatorship)	**Sixth Appellant**
CMM TREASURY SERVICES (PTY) LIMITED (Under Curatorship)	**Seventh Appellant**
CMM CASH MANAGEMENT FUND (Under Curatorship)	**Eighth Appellant**
PIETER HENDRICK STRYDOM N.O.	**Ninth Appellant**
JOHN RODERICK GRAEME POLSON N.O.	**Tenth Appellant**
LOUIS STRYDOM N.O.	**Eleventh Appellant**

and

KUFA TRADING ENTERPRISE CC **Respondent**

Neutral citation: ***Corporate Money Managers (Pty) Ltd & others v Kufa Trading Enterprise CC*** **(457/11) [2012] ZASCA 100 (1 June 2012)**

Coram: Farlam, Navsa, Ponnan and Tshiqi JJA and Kroon AJA

Heard: 4 May 2012

Delivered: 1 June 2012

Summary: **Close Corporation – winding up by court – whether grounds for winding up established by applicants.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam AJ, sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

FARLAM JA (Navsa, Ponnan and Tshiqi JJA and Kroon AJA concurring):

[1] In this matter the appellants, six companies in what was described as the CMM group of companies, a management fund regulated in terms of the Collective Investment Schemes Control Act 45 of 2002, and the three curators of the companies and the fund, who were appointed in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001, appeal against the dismissal by Bam AJ, sitting in the North Gauteng High Court, Pretoria, of the application brought by them for the winding up of the respondent, Kufa Trading Enterprise CC.

[2] In the founding affidavit, which was deposed to by the ninth appellant, the winding up of the respondent was sought on the grounds that the respondent was insolvent, was unable to pay its creditors and that it was just and equitable to liquidate it.

[3] The appellants relied on what was described as a ‘loan agreement’, dated 27 February 2009, between the respondent and the second appellant, CMM Finpro (Pty) Ltd, in terms of which the second appellant agreed to make available an amount of R15 million to the respondent, at an interest rate of 2 percent per month. Annexed to the founding affidavit was an acknowledgement of debt in favour of the first appellant, Corporate Money Management (Pty) Ltd, signed on behalf of the respondent in which the respondent acknowledged its indebtedness to the first appellant ‘on all withdrawals made in terms of the agreement with [the second appellant] limited to the sum of [R15 million] (“the Capital Amount”).’ The ‘loan agreement’ itself was not annexed.

[4] The respondent undertook to pay the ‘Capital Amount, together with interest thereon at a rate of 2.0 percent (two percent) per month from the date upon which the Capital Amount or part thereof was advanced to date of payment by the Principal in terms of the contract agreement between the [respondent] and [the first appellant].’

[5] It was stated that the loan had been agreed to in order to enable the respondent, as it was put in the founding affidavit, ‘to fund’ a contract for which the respondent had successfully tendered for the upgrade of a residence at the University of Limpopo.

[6] The reference to ‘date of payment by the Principal’ was a reference to the date the university paid the respondent what was due to it under the contract for the upgrade of the residence.

[7] The ‘contract agreement’ between the respondent and the first appellant was not annexed to the founding affidavit. Instead the deponent annexed three documents described as ‘deal sheets’, reflecting ‘deals’ between the respondent and the first appellant involving advances of R450 000, R1 881 000 and R6 500 000.

[8] It later became apparent that there were two agreements between the respondent and the first appellant involving advances to the respondent and that the first advance of R450 000, which according to the ‘deal sheet’ was made on 25 July 2008, related to the first agreement. The respondent’s contention that it was repaid was not seriously challenged by the appellants and clearly could not be relied on as a basis for a winding up order against the respondent.

[9] In terms of the two other ‘deal sheets’ the advances of R1 881 000 (which was made on 13 February 2009) and R6 500 000 (which was made on 3 March 2009) were repayable on 30 November 2009 and 31 August 2009 respectively.

[10] In the founding affidavit it was stated that a notice in terms of s 69 of the Close Corporations Act 69 of 1984 had been sent to the respondent, calling for payment of the advances made to it. The respondent’s attorneys replied to this notice on 26 November 2009. Their reply contained the following:

‘We had the opportunity to briefly take instructions from our client and we are instructed to record that our client denies your client’s claim as set out in the letter dated the 12th October 2009.

Your reliance on the document styled “Acknowledgement of Debt” is misplaced as the Acknowledgement of Debt is clearly not a stand-alone agreement but must be read

together with the provisions of the document headed "Agreement, CMM Finpro (Pty) Ltd and Kufa Trading Enterprise CC" in respect of the upgrade of residence 5B at the University of Limpopo.

We are instructed that our client has adhered at all material times to the terms of the last agreement and that it is in fact CMM Finpro that has materially breached the terms of the agreement.

Our client has a substantial claim against CMM Finpro and our client is obviously entitled to raise any defence against Corporate Money Managers (Pty) Ltd (under curatorship) that it has available in law to CMM Finpro. Our client will therefore not make any payment as requested and further denies that any grounds for a liquidation exist. There is a *bona fide* dispute between the parties and you are well aware of this fact. In such circumstances an Application for Liquidation would be an abuse of the provisions of the Close Corporations Act, the Companies Act and the applicable rules of Court and should you institute such proceedings our client will ask for a punitive cost order.'

[11] The ninth appellant contended in the founding affidavit that the respondent had not complied with the statutory demand made to it in terms of s 69(1)(*a*) of Act 69 of 1984 and was accordingly deemed to be unable to pay its debts. He also averred that the respondent's alleged liability to the first appellant had not been 'genuinely disputed on substantial grounds.'

[12] He also said that the respondent had, as it was put, 'misappropriated' the loans granted to it because it had used R1 650 000 of the moneys advanced to it to buy three Caterpillar Backhoe loaders and had not used the money advanced to fund the building contract for the upgrading of the residence on the campus of the university.

[13] The ninth appellant contended that apart from being unable to pay its debts the respondent was insolvent and he dared it to present proof that it was solvent and in a position to repay its creditors, including the appellants.

[14] In support of the allegation that it was just and equitable that the respondent be wound up he relied on the allegation that the respondent 'misappropriated, or at least applied the money advanced to it in terms of the loan for non-disclosed purposes, by purchasing equipment.'

[15] In the opposing affidavit filed on behalf of the respondent, which was deposed to by its member, Mr David Benjamin Sithole, it was denied that the respondent was insolvent or unable to pay its creditors and that 'the [appellants'] claim against it, if any, [was] due and payable.' It was also denied that it was just and equitable for the respondent to be wound up.

[16] Mr Sithole annexed to his affidavit, as 'Annexure B', the 'loan agreement' between the second appellant and the respondent. This contract referred to the building contract which had been awarded to the respondent by the University of Limpopo to upgrade and rehabilitate 5B residence on the Medunsa campus of the University of Limpopo and provided for the appointment by the respondent of the second appellant to provide it with administration and support services set out in the second schedule of the contract 'and/or' the loan as set out in the fifth schedule to the contract. It was recorded in the contract that the respondent and the second appellant 'are not a joint venture and/or partnership.' A copy of the second schedule was annexed but not the fifth schedule.

[17] Mr Sithole stated that it was agreed between the parties that the second appellant was to provide administration and support services in connection with the building contracts *and* the loan in question. The contract provided that the second appellant was to manage the project (its duties in that regard being spelt out in the second schedule) and also, amongst other things, to give a performance construction guarantee on behalf of the respondent in favour of the university.

[18] He said that the 'deal sheets' annexed to the founding affidavit were internal documents of the appellants and said that he had never seen them and that they bore no relation to the agreed terms as set out in the 'loan agreement' between the second appellant and the respondent.

[19] He contended that on a proper construction and interpretation of the contract the amount due to the appellants in terms of the advances made could only be due and payable once the project had been finalised and completed and a final account had been submitted for payment to the university. Interim payments had been received but there was no surplus available as the proceeds had to be reinvested by the respondent in the project because the appellants breached their obligation to provide funds as agreed.

[20] The project was delayed as a result of problems with relocating students from the residences and that construction only commenced two months after the first eight appellants were placed under curatorship. The curators, he stated, 'did absolutely nothing to step into the shoes' of any of the first eight appellants and disregarded the provisions of the contract between the second appellant and the respondent.

[21] Accordingly he denied that the respondent was obliged at this stage to pay anything to the appellants and also denied that by purchasing the earth moving equipment (which he admitted) the respondent had misappropriated any of the moneys advanced and stated that the equipment purchased was used on the contract as well as on others.

[22] He responded to the appellants' challenge to put up proof of the solvency of the respondent by annexing the annual financial statements of the respondent for the financial year ending 28 February 2010, which indicate that the respondent is indeed solvent. He accordingly prayed for the dismissal of the application.

[23] In the replying affidavit filed on behalf of the appellants and deposed to by the ninth appellant the deponent, after pointing out that 'Annexure B' was not signed on behalf of the second appellant, denied that it 'represents any agreement or terms of any agreement between the [second appellant] and the respondent.' He then, in the alternative, contended that if Annexure B does constitute an agreement between the second appellant and the respondent it does not assist the respondent because, as there is no schedule 5, it is not, so he contended, a loan agreement. In the further alternative, it was contended, that as the document does not provide for a repayment date the common law applied and the loans are repayable on demand. In a third alternative argument he contended that there is 'not a single shred of evidence' to support the respondent's allegation that the loans will only become repayable when the contract is completely finalised.

[24] Annexed to his affidavit was an affidavit made in November 2009, seven months before the winding up application was instituted, by the managing director of the second appellant at the time when the advances were made, Mr Ernst Philippus Sevenster. In this affidavit Mr Sevenster stated that the second appellant had granted a loan facility to the respondent in 2008 in respect of a contract for the refurbishment of the dental faculty at the Medunsa campus of the University of Limpopo. In terms of this facility R450 000 had been advanced to the respondent and it was his understanding that this loan plus interest had been repaid in full. (This is the amount dealt with in the first 'deal sheet' annexed to the founding affidavit.)

[25] Thereafter, he said, the second appellant granted a further facility to the respondent, this time for the contract to refurbish the student accommodation at the Medunsa campus. He said that he and Mr Johan Neethling, the legal and compliance officer of the CMM group and the company secretary of the second appellant, discussed the request for this second facility and agreed to ask Mr Sithole to pay them R500 000 'as compensation for the approval of the facility and the payout of the money.' He said that this proposal was put to Mr Sithole, who agreed to it. The facility was approved and the first advance, of R1 881 000, was made. The money was used, he said to buy the ground-moving equipment. He said that he and Mr Sithole knew that this payment had no relation to the approved project but it was nonetheless approved. Subsequently he authorised the second payment under the facility, namely the payment of R6 500 000 on 3 March 2009. Thereafter Mr Sithole paid R570 000 into his account, Naledi Business Trust, at FNB, Bethlehem, and he paid R250 000 to Mr Neethling's account.

[26] The ninth appellant submitted in the replying affidavit that 'the fraud and corruption discovered alone…are more than sufficient grounds to liquidate the respondent on the basis of it being just and equitable to do so.'

[27] Turning to the financial statements annexed to the opposing affidavit, he said that they 'do not include the loans, which are not in dispute. If the loans are included in the respondent's statements', he continued, 'the respondent, on its own version, is not solvent.' He repeated his contentions that the respondent should be wound up on 'all of the following grounds:

(1) [it] is unable to repay the loans;

(2) [it] is insolvent; and

(3) it is just and equitable that [it] be liquidated.'

[28] A further affidavit in answer to the appellants' replying affidavit was filed on behalf of the respondent. It was deposed to by Mr Sithole. He admitted that 'Annexure B' was not signed on behalf of the second appellant but disputed that this fact affects its validity as an agreement between second appellant and the respondent, for one or more of the following reasons:

(a) it was drafted and furnished to the respondent by the representatives of the second appellant;

(b) he signed it and handed the signed copy to Mr Sevenster, who undertook to furnish him with a copy bearing the signature of the second appellant's representative but never did so;

(c) it was furnished to the respondent's attorney by the appellants in response to a written request by the respondent's attorney;

(d) a contract in almost identical terms had previously been concluded between the respondent and the second appellant in respect of the Medunsa dental faculty project and was duly performed by both parties;
(e) he annexed invoices in respect of this contract referring to the performance by the second appellant of 'project management services', which were rendered by the second appellant to the respondent, together with a cheque in the sum of R265 553.97, which was paid by the respondent to the second appellant for these services.

[29] He said that 'Annexure B' did not stipulate a fixed date for payment because the parties agreed that the second appellant would directly receive and administer moneys on the project and only at the end of the project would the final accounting be done: the full contract sum would by that stage have been received by the second appellant on the respondent's behalf and there would be no impediment to the second appellant's receiving payment of the full loan. The fact that this had not yet happened was, he said, solely the result of the fact that the second appellant had not fulfilled its contractual obligations towards the respondent.

[30] He also said that the ninth appellant's interpretation of the respondent's financial statements was not correct. The loan received from the second appellant was reflected as 'costs of project income' and as such was deducted from the income to reflect a nett income of R9 940 547, instead of the gross project income of R26 567 026.

[31] Dealing with the payment made into Mr Sevenster's Naledi Business Trust account, he said that Mr Sevenster requested him to pay

R500 000 into the account as a raising fee. In view of the large amount involved (+- R15 000 000) he had, he said, no reason to question the fee as it is commonplace in the industry for raising fees to be charged. 'In fact', he added 'financial institutions often charge raising fees on loans advanced by themselves.' He denied that he had made any proposal in that regard. It was put to him as a non-negotiable term should the respondent require the loan. The money was paid into the Naledi Business Trust account because Mr Sevenster indicated to him that the second appellant was experiencing financial problems and it would be safer to pay the raising fee into that account. He had no reason, he said, to question this.

[32] He denied that the payment for the earth-moving equipment had no relation to the approved project.

[33] The learned acting judge in the court *a quo* found that he could not reject Mr Sithole's statements about the agreement between the second appellant and the respondent and that the fact that the agreement was not signed on behalf of the second appellant did not provide a reason for rejecting Mr Sithole's version about its contents.

[34] He also said that Mr Sithole seemed to have been justified in referring to the relationship between the second appellant and the respondent as a joint venture and that it appeared 'that the court should find that the second [appellant] in fact failed to comply with the provisions of the agreement as alleged by the respondent.'

[35] Dealing with a contention advanced on behalf of the appellants to the effect that the agreement between the parties should be regarded as null and void and that the respondent should not be allowed to rely on it, he stated that he had perused Mr Sevenster's affidavit and that although '[his] conduct may be argued to have amounted to bribery with the intention to have the agreement… entered into between the parties, I am not persuaded that I should find that the agreement between the second [appellant] and the respondent is void *per se* as a result of any corruption between Mr Sevenster and the owner of the respondent.'

[36] He also said that the appellants had 'failed to prove that the money, as alleged by the [appellants], is due and payable by the respondent.'

[37] Counsel for the appellants contended that the issues on appeal were:

(a) whether the two advances made to the respondent were void, alternatively, voidable on account of corruption and bribery;

(b) whether 'Annexure B' in fact governed the relationship between the second appellant and the respondent, ie (i) whether it in itself had not been tainted by the alleged corruption so as to render it void, alternatively voidable; and

(ii) if not, whether it established a joint venture between second appellant and the respondent, postponing the second appellant's claim for repayment to completion of the project 'to which', as he put it, 'the joint venture allegedly pertains.'

[38] Counsel for the respondent did not agree that those were the issues on appeal. He contended that they were these:

(a) what the correct terms were of the loan agreement which gave rise to the advances to the respondent;
(b) whether a conclusion of bribery was warranted in the circumstances of the case, therefore rendering the loan agreement voidable of the instance of the second appellant; and
(c) whether the respondent was factually or commercially insolvent.

[39] The issues as formulated by counsel for the appellants relating to the alleged bribery and corruption are not in accord with the appellants' case as stated in the ninth appellant's replying affidavit. There, it will be recalled, he relied on the respondent's inability to repay the loans, its insolvency and the contention that it should be wound up on the just and equitable ground.

[40] If the loans were tainted by the alleged bribery and corruption then the loan contract would have been voidable (see *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 728E-729D). The ninth appellant did not state in the replying affidavit that the second appellant had decided to cancel the loan contract because of the alleged bribery and corruption. If he had done so, the contract would have fallen away and the advances would have been unauthorised payments, which could have been reclaimed without more. Instead it was contended that the respondent could not repay the *loans* and the alleged bribery and corruption was only relied on in support of the contention that the respondent should be wound up on the just and equitable ground.

[41] The other 'issue' contended for by the appellants' counsel, *viz* whether there was a joint venture between parties does not, strictly

speaking, have to be decided because the respondent did not need a finding that this was a joint venture in order to succeed. Be that as it may, I agree with counsel for the appellants' submission that the judge *a quo* wrongly found that there was a joint venture, but I do not think that that has any bearing on the result of the appeal.

[42] The appellants sought a final winding up order. That meant, as was pointed out in *Cuninghame v First Ready Development 249* (*Association Incorporated under s 21*) 2010 (5) SA 325 (SCA) paras 1 and 2, that they had to establish their case on a balance of probabilities and that the matter had to be decided, essentially, on the respondent's version of the facts, except where that version contains denials that do not raise real, genuine or bona fide disputes of fact, or allegations or denials which are so far-fetched or clearly untenable than they can be rejected merely on the papers.

[43] In my opinion the first issue to be decided is whether 'Annexure B' in fact governed the relationship between the parties. I am satisfied that the court below correctly found in favour of the respondent on this point. I base this conclusion on the factors set out by Mr Sithole in his second affidavit, which I have summarised in para 28 above.

[44] The next issue to be decided is whether the appellants succeeded in showing that the amounts advanced to the respondent were repayable on demand, with the result that when the respondent failed to pay them after receiving the s 69 notice it is to be deemed to be unable to pay its debts. Here also I agree with the court below that the appellants failed to prove that the advances are due and payable by the respondent. On the

respondent's version they are not due and payable at this stage. Its averments in this regard do raise a real dispute of fact and cannot be rejected on the papers as far-fetched or clearly untenable. Support for the respondent's version is, in any event, to be found in clause 5.1 of the acknowledgment of debt on which the appellants rely, which is quoted in para 4 above.

[45] There are two reasons for finding that the agreement between the respondent and the second appellant did not fall away as a result of the alleged bribery and corruption. I have already given the first: the contract was not avoided by the second appellant. The second is that the alleged bribery and corruption were denied by Mr Sithole and this denial can also not be rejected on the papers. Mr Sevenster (who on Mr Sithole's version said that the amount to be paid into his account was a raising fee and that he wanted it paid there because of financial problems the second respondent was experiencing) was, after all, the managing director of the second appellant.

[46] It follows from this that it has not been shown that the respondent is commercially insolvent. Nor has it been shown that it was factually insolvent as the financial statements annexed to Mr Sithole's opposing affidavit, as explained in his second affidavit, do not reveal that the respondent is insolvent.

[47] The allegation that the respondent should be wound up on the just and equitable ground need not detain us for long. It was originally based on the allegation that part of the first advance was 'misappropriated' to buy earth-moving equipment. Mr Sithole's denial of this allegation

cannot be rejected on the papers. In the replying affidavit the ninth appellant contended that the alleged bribery and corruption afforded a basis for invoking the just and equitable ground for winding up. As appears from what has been said above, the appellants did not establish the alleged bribery and corruption.

[48] In all the circumstances I am satisfied that the court *a quo* correctly dismissed the appellants' application for the winding up of the respondent.

[49] The following order is made:
The appeal is dismissed with costs.

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I G FARLAM
JUDGE OF APPEAL

APPEARANCES

For Appellant:	R J Raath SC
	Instructed by: Roestoff & Kruse Attorneys, Pretoria Symington & De Kok, Bloemfontein
For Respondents:	F J Erasmus
	Instructed by: Van der Merwe du Toit Attorneys, Pretoria Honey Attorneys, Bloemfontein