THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1323/2018

In the matter between:

THOMAS CHRISTOPHER VAN ZYL NO **FIRST APPELLANT**

LAILA ENVER MOTALA NO **SECOND APPELLANT**

and

OFF THE SHELF INVESTMENTS SEVENTY EIGHT (PTY) LIMITED **RESPONDENT**

Neutral citation: *Van Zyl & another v Off the Shelf Investments Seventy Eight (Pty) Ltd* (1323/2018) [2019] ZASCA 175 (2 December 2019)

Coram: Navsa, Mbha and Van der Merwe JJA and Tsoka and Koen AJJA

Heard: 21 November 2019

Delivered: 2 December 2019

Summary: Companies – provisional liquidation – creditor relied on a debt owed to it by respondent as reflected in the latter's financial statements – respondent disputed accuracy of its financial statements – held that financial statements correctly reflected debt owed to creditor – provisional liquidation ordered.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Langa AJ sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The respondent is placed under a provisional order of winding-up in the hands of the Master of the Western Cape Division of the High Court, Cape Town (high court).

(b) A rule *nisi* is issued calling upon the respondent and all interested parties to show cause, if any, to the high court on 13 January 2020 at 10h00, as to why:

(i) the respondent should not be placed under a final order of winding-up; and

(ii) the costs of this application (including the costs of two counsel) should not be costs in the winding-up of the respondent.

(c) Service of this order shall be effected:

(i) by the sheriff of the high court or his lawful deputy on the registered office of the respondent;

(ii) on the South African Revenue Services;

(iii) by publication in one edition each of the *Cape Times* and *Die Burger* newspapers and in the *Government Gazette*;

(iv) by registered post on all known creditors of the respondent with claims in excess of R25 000;

(v) on the employees of the respondent in terms of s 346A(1)*(b)* of Act 61 of 1973; and

(vi) on any registered trade union that the employees of the respondent may belong to.'

JUDGMENT

Van der Merwe JA (Navsa and Mbha JJA and Tsoka and Koen AJJA concurring)

[1] The appellants are the liquidators of Cinmark Twelve (Pty) Ltd (Cinmark). In that capacity, the appellants applied in the Western Cape Division of the High Court, Cape

Town for the provisional liquidation of the respondent, Off The Shelf Investments Seventy Eight (Pty) Ltd. The respondent opposed the application and the court a quo (Langa AJ) dismissed it with costs. It refused leave to appeal. The appeal is before us with the leave of this court. As I shall show, the principal issue in the appeal is whether the respondent is indebted to Cinmark.

[2] Cinmark and the respondent are subsidiaries of Skipness Société Anonyme, a company registered in Luxembourg (Skipness). Mr Christian Renè Dauriac is a director of Skipness and the 'controlling mind' thereof. During 2003 Skipness invested in wine farming in South Africa through the respondent, Cinmark and another of its subsidiaries, Natanna (Pty) Ltd (Natanna).

[3] Since 2003 Skipness held 88 per cent of the shares in the respondent. The remaining 12 per cent was held by the trustees of the Hopefull Trust. The directors of the respondent were Mr Dauriac, his daughter and one of the trustees of the Hopefull Trust. The respondent acquired a wine farm, portion 27 of the farm Natte Valleij no 747 (the farm). The Marianne Wine Estate was established on the farm. After April 2017, Skipness acquired the shares of the Hopefull Trust and the respondent became a wholly owned subsidiary of Skipness.

[4] At all relevant times, Cinmark was wholly owned by Skipness and its directors were Mr Dauriac, his daughter and his son. Cinmark was created exclusively to make and sell red wine. The reason for this was that the Department of Trade and Industry (the DTI) offered incentives to attract investment in the production of red wine in South Africa. Natanna was involved in the farming activities, that is the production of the grapes for winemaking. It also produced white wine. The grapes were grown on the farm and the wine was made in the wine cellar on the farm. The development of the wine cellar on the farm is a central feature of the case and I shall shortly return thereto.

[5] The audited financial statements of the respondent for the year ended 31 December 2015, which also reflected the corresponding figures for the year ended 31 December 2014, were signed by its auditor and by or on behalf of all three directors of the respondent on 16 March 2016. According to the financial statements the assets of the respondent included 'investment properties'. Under 'investment properties', the

farm and improvements thereto were listed. It contained an entry 'Improvements: Wine cellar – Cinmark', which indicated that during the period from 2004 to 2006 a wine cellar had been developed on the farm at a total cost of R11 907 092. The financial statements also reflected, as a long term liability, a loan of R11 907 092 owed by the respondent to Cinmark. The following note accompanied the entry in respect of the loan:

'The loan bears no interest as agreed upon by the parties and has no fixed terms of repayment.'

This meant that the loan was repayable within a reasonable time or on demand. The corresponding figures as at 31 December 2014 were exactly the same. The *fons et origo* of the appellants' application for the provisional liquidation of the respondent was the failure of the respondent to repay this loan.

[6] Item 9(1) of Schedule 5 to the Companies Act 71 of 2008 provides that until a date to be determined, Chapter 14 of the Companies Act 61 of 1973 (the 1973 Act) continues to apply 'with regard to the winding-up and liquidation of companies under this Act'. Chapter 14 of the 1973 Act comprises s 337 to s 426 thereof. In terms of item 9(2) of Schedule 5, the provisions of s 344 of the 1973 Act, amongst other provisions of Chapter 14, do not, however, apply to a solvent company. In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2013] ZASCA 173 (SCA); 2014 (2) SA 518 (SCA), this court held that the word 'solvent' in item 9(2) means commercially solvent. In the result, commercially insolvent companies may only be wound up under Chapter 14 of the 1973 Act. See also *Murray & others NNO v African Global Holdings (Pty) Ltd & others* [2019] ZASCA 152 (22 November 2019) para 23.

[7] On 22 March 2017 the sheriff of the court a quo delivered a letter of demand in terms of s 345(1)*(a)*(i) of the 1973 Act to the respondent, requiring it to pay the amount of R11 907 092 to the appellants. Despite the effluxion of a period of three weeks thereafter, the respondent did not make payment nor attempted to secure payment to the satisfaction of the appellants. It follows that should it be held that the appellants established the aforesaid liability of the respondent to Cinmark, the respondent would be deemed to be unable to pay its debts and the appellants would therefore be entitled to a provisional liquidation order.

[8] The main theme of the answering affidavit on behalf of the respondent, deposed to by Mr Dauriac, was that the entry in the respondent's financial statements that

reflected the liability to Cinmark was simply an accounting fiction that had been made in error. He said that it was merely a book entry that did not reflect an actual loan or actual flow of funds.

[9] The first question is whether the appellants furnished the required proof of the debt that they relied upon. As they moved for a provisional order of liquidation, they only had to provide prima facie proof thereof. However, as this court explained in *Kalil v Decotex (Pty) Ltd & another* [1988] 2 All SA 159 (A); 1988 (1) SA 943 (A) at 978-979, where real and fundamental disputes arise in an opposed application for provisional liquidation, the necessary prima facie proof is established on a balance of probabilities on all the affidavits. The well-known ordinary rules in respect of disputes of fact in motion proceedings apply when a final liquidation order is sought on the return date of the provisional order.

[10] The evidence established beyond doubt that Cinmark had expended the precise amount of R11 907 092 to develop the wine cellar on the farm. Cinmark entered into a written contract with the DTI in terms of which the DTI would provide incentives to it in respect of investment in the production of red wine. In terms of the contract, the incentives would be calculated on investments made in 'qualifying assets' during the period from 1 March 2005 to 29 February 2008. The development of the wine cellar was completed by 29 February 2008. Cinmark, inter alia, claimed and received incentives from the DTI based on the investment of the amount of R11 907 092 in the development of the wine cellar on the farm. It received at least R3 261 120 in incentives.

[11] One of the various suppliers used by Cinmark to develop the wine cellar was Rullier Agro Equipement SARL (Rullier), a company registered in France. Rullier supplied winemaking equipment to Cinmark. Cinmark, however, did not make payment of what was due to Rullier. A balance of € 203 308,43 remained outstanding. Rullier sued Cinmark in the Commercial Court of Bordeaux for payment of that amount, interest thereon and costs. On 20 November 2009 that court gave judgment in favour of Rullier. Rullier successfully applied for the recognition and enforcement of the judgment in South Africa. Because it was unable to obtain satisfaction of the judgment, Cinmark was finally liquidated by the Western Cape Division of the High Court at the instance of Rullier on 24 May 2016. The appellants therefore seek payment from the respondent of

the amount of R11 907 092, in order to distribute it amongst the creditors of Cinmark, including Rullier.

[12] It is clear that Skipness provided the amount of R11 907 092 to Cinmark to fund the development of the cellar as part of a total loan of approximately R21 million. The mainstay of the respondent's case (that the loan relied upon by Cinmark was merely an erroneous book entry), was Mr Dauriac's evidence that Skipness had advanced the amount of R11 907 092 on loan to the respondent and not to Cinmark. In this regard he stated that the advance had been made to the respondent, 'perhaps via Cinmark' and 'utilising Cinmark as a conduit'. The court a quo, however, rejected this contention and held that Skipness had loaned that amount to Cinmark. This finding was rightly not challenged before us.

[13] It is common cause that the wine cellar was permanently attached to the farm and thus acceded to the immovable property owned by the respondent. However, because Cinmark was designated to claim incentives from the DTI based on the investment in the development of the wine cellar, its financial statements had to reflect this wine cellar as an asset of Cinmark. By the same token, the wine cellar could not be shown as an asset of the respondent in its financial statements. This was quite wrong, of course, and is perhaps best illustrated by the manner in which the 'investment' was reflected in Cinmark's financial statements during the relevant period. They reflected the amount of R11 907 092 simply as 'Buildings' that formed part of Cinmark's non-current assets. But Cinmark owned no land or buildings and in this manner it misrepresented its financial affairs to the DTI and others.

[14] When the contract in respect of incentives between the DTI and Cinmark had run its course, there was no further need for Cinmark and Natanna to operate separately. Therefore it was decided, so Mr Dauriac said, to 'restructure' or 'consolidate' the businesses of Cinmark and Natanna by combining them within Natanna. On the probabilities this also led to the adjustment of the financial statements of the respondent, in order to reflect the wine cellar as part of its assets as well as the liability of the respondent to Cinmark for the amount it had expended to develop the wine cellar.

[15] The respondent placed a lot of emphasis on the fact that it did not advance the amount of R11 907 092 to Cinmark and that no such funds passed from the respondent to Cinmark. Regrettably, the court a quo was persuaded by this oversimplification. As I have demonstrated, the directors of the respondent, no doubt on the advice of its auditors, deliberately approved the financial statements of the respondent that reflected these changes. These entries were perfectly in accordance with what actually happened, namely that the respondent obtained a wine cellar that was paid for by Cinmark with funds that it had borrowed from Skipness. Clearly the directors of the respondent, which included two of the directors of Cinmark, resolved that the position stated in these financial statements was true and correct. Thus, there is no reason to doubt the accuracy of the respondent's financial statements for the year ended 31 December 2015 (nor for the year ended 31 December 2014).

[16] The respondent owed the amount of R11 907 092 to Cinmark on loan account. That, in fact, is what the directors of the respondent certified on 27 November 2014 under the signature of one of them, as follows:

'CERTIFICATE OF LOAN ACCOUNT

THE DIRECTORS of OFF THE SHELF INVESTMENTS 78 (PTY) LTD certifies hereby that the amount of R11 907 092 was due to CINMARK TWELVE (PTY) LTD on loan account by OFF THE SHELF INVESTMENTS 78 (PTY) LTD.'

[17] I find that the appellants established on a preponderance of probabilities that the respondent is liable to Cinmark in the amount of R11 907 092. It has not in any way been suggested that the amount is not due and payable.

[18] The respondent, however, had a further string to its bow. Mr Dauriac said that ancillary to the aforesaid 'restructuring' or 'consolidation', the respondent accepted liability for the repayment of the loan owed by Cinmark to Skipness. This, he said, resulted in the 'netting off' of the entries in the books of account, including the entry that reflected the liability of the respondent to Cinmark.

[19] On Mr Dauriac's own evidence, however, this proposition was nothing other than an ex post facto reconstruction that was not based on any facts. He said:

‘99.5 As between Respondent and Cinmark, the “restructuring” or “consolidation” referred to above has achieved nothing more than effecting a correction of these entries and to the extent necessary, a setting-off of the book entries made.

99.6 As I have indicated, the book entries did not reflect the true position between the parties and thus do not require any legal explanation.

99.7 To the extent that I may be wrong in that regard and some legal construction is required, then what has clearly happened is that the Respondent has undertaken to repay the loan directly to Skipness in return for which Skipness has waived any claim against Respondent [Cinmark].

99.8 It is clear that no written agreement to this effect is required and this has been achieved by the directors of the holding company who are also directors of and/or control the subsidiaries agreeing to no doubt instructing the preparation of the financial statements on this basis. As the controlling mind of the holding company, I confirm this.

. . .

109.7 It appears that the restatement of the financial affairs of the companies was agreed between their directors as evidenced by the basis upon which the financial statements themselves in particular insofar as they have been signed by the directors.

. . .

109.9 To extent that any underlying agreement is required in terms whereof the liability to repay the funds advanced by Skipness for the improvement of the wine cellar is to be undertaken directly by the Respondent to Skipness, such agreement may be oral or even tacit, but is clearly evidenced by the financial statements of Skipness and those of the Respondent, which evidence such agreement.

. . .

110.2 Again, the agreement is evidenced by the financial statements prepared at the behest of the directors, both of the holding company being the creditor and of the Respondent subsidiary, being the debtor.’

[20] Despite the fact that Mr Dauriac was said to be the controlling mind of Skipness and was a director of its subsidiaries, he was clearly unable to provide any factual evidence as to how, when and by whom such agreement had been reached. And he only produced draft financial statements of the respondent for the subsequent years

ended 31 December 2016 and 31 December 2017, without offering an explanation for the absence of approved financial statements.

[21] Moreover, even if it is accepted that para 99.7 quoted above was intended to convey that in return for the respondent's undertaking to repay the loan owed by Cinmark to Skipness, Skipness waived any claim against Cinmark, this in any event did not involve any agreement or decision by Cinmark to relinquish its claim against the respondent. According to the aforesaid evidence, only Skipness and the respondent would have been parties to the alleged arrangement.

[22] For the sake of completeness it should be mentioned that even if Cinmark relinquished its right to claim the amount of R11 907 092 from the respondent in accordance with what Mr Dauriac said, that could not avail the respondent. Such abandonment of rights would clearly constitute a disposition within the meaning of s 341(2) of the 1973 Act, which provides:

'Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

In terms of s 348 of the 1973 Act the date of commencement of the winding-up of Cinmark was the date of presentation of that application to the court. That took place during November 2015. It follows that such abandonment of rights by Cinmark would have been void.

[23] In the result the court a quo should have issued an order of provisional liquidation of the respondent. The appellants' costs of appeal, including the costs of two counsel, shall form part of the costs of the administration of the respondent.

[24] The following order is issued:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The respondent is placed under a provisional order of winding-up in the hands of the Master of the Western Cape Division of the High Court, Cape Town (high court).

(b) A rule *nisi* is issued calling upon the respondent and all interested parties to show cause, if any, to the high court on 13 January 2020 at 10h00, as to why:

(i) the respondent should not be placed under a final order of winding-up; and

(ii) the costs of this application (including the costs of two counsel) should not be costs in the winding-up of the respondent.

(c) Service of this order shall be effected:

(i) by the sheriff of the high court or his lawful deputy on the registered office of the respondent;

(ii) on the South African Revenue Services;

(iii) by publication in one edition each of the *Cape Times* and *Die Burger* newspapers and in the *Government Gazette*;

(iv) by registered post on all known creditors of the respondent with claims in excess of R25 000;

(v) on the employees of the respondent in terms of s 346A(1)*(b)* of Act 61 of 1973; and

(vi) on any registered trade union that the employees of the respondent may belong to.'

_____

C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellants:	A Kantor SC, with him B Wharton Instructed by: Rubensteins Attorneys, Cape Town Lovius Block Attorneys, Bloemfontein
For Respondent:	I C Bremridge SC Instructed by: Strauss Attorneys, Somerset West Symington De Kok Inc, Bloemfontein