REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: 45670/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

13/8/12
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED Applicant

and

NEWCITY GROUP (PROPRIETARY) LIMITED
Respondent
(Registration Number 2002/021843/07)
For the final winding up of the Respondent

Case No: 28615/2012

In the matter between:

CHAIM COHEN Applicant

and

NEWCITY GROUP (PROPIETARY) LIMITED First Respondent

ABSA BANK LIMITED Second Respondent

For the beginning of business rescue proceedings

JUDGMENT

SUTHERLAND J:

[1] This judgment addresses two related applications. To avoid confusion the parties are referred to by their names.

[2] The first application is by Absa to wind New City Group (Pty) Ltd (Newcity) which application is now at the stage of the return day of a provisional winding up order, issued on 13 June 2012. Newcity opposes the confirmation of the provisional winding up order. The second application is by Chaim Cohen (Cohen), the sole shareholder and director of Newcity, for an order to begin business rescue proceedings of Newcity, pursuant to Section 131(1) of the Companies Act 71 of 2008 (Companies Act, 2008). Absa opposes the application for an order to begin business rescue proceedings.

[3] Two other parties, Quantum Property Group Ltd (QPG) and A Million Up 105 (Pty) Ltd (AMU) who claim to be affected parties, notwithstanding no notice having been given to them as contemplated by Section 131(1) of the Companies Act, 2008 also were represented in the hearing. Whether or not they were entitled to participate was addressed by me in their favour, at the hearing on 13 June 2012. *Mr Brett,* for Newcity and for Cohen, in this hearing, contended these 'affected parties' had a

legitimate interest only in the business rescue application. Whether this, in the present context, is a distinction without a difference need not be resolved. (*Cf: Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group & Another (Advantage Projects Managers (Pty) Ltd Intervening) 2011 (5) SA 600 (WCC) at [21]. Also see: Henochberg's commentary on Section 347 of the Companies Act 1973, Vol I at p729* on the common law position about intervention in liquidation proceedings). The affected parties filed no papers.

[4] The controversy is about whether or not either order is warranted. In essence, Absa contends that the business rescue application is not genuine and is an abuse of the process. Cohen contends that he has placed before the court a proposal that meets the threshold set for a business rescue order, and further, irrespective of the success or failure of that application, it is contended by Newcity that it has shown cause why the provisional winding up rule should not be confirmed, essentially because it has presented a plan which will result in Absa's claim against it being paid in full.

The background to the current skirmishes

[5] A brief history of Newcity's activities is required to provide a platform for an evaluation of the contending stances.

[6] Newcity is an investment holding company of which Cohen is the sole shareholder and director. Through it, Cohen has engaged in the development of and

trading in property. In turn, Newcity is the sole or significant shareholder in several special purpose vehicles. (SPVs) One such SPV is Crystal Lagoon Investments 53 (Pty) Ltd (Crystal Lagoon), 100% owned by Newcity. Its function was to house a project to own and run an hotel. For this money was needed. It was gotten from Absa.

[7] On 20 January 2010, Absa granted a credit facility capped at R30 million to Crystal Lagoon for 6 months. Security for the loan was provided by Newcity. A surety bond was passed over unit 96 in The Emperor, a mega-expensive apartment block and ostentatious blot on the Sandton skyline, which unit is owned by Newcity. The bond also bound Newcity as surety and co-principal debtor for a maximum sum of R30 million.

[8] On due date the debt was not repaid. On 1 July 2010, Absa demanded payment from Crystal Lagoon. It remained unpaid. On 27 January 2011 Crystal Lagoon was placed under the supervision of a business rescue practitioner by resolution of its board of directors, as contemplated by Section 129(1) of the Companies Act, 2008.

[9] Over the ensuing year talks were held. On 13 July 2011, Absa *qua* creditor of Newcity in respect of the suretyship, demanded satisfaction from Newcity as contemplated by Section 345(1)(a) of the Companies Act, 61 of 1973, (the Companies Act, 1973) and when it remained unpaid, Absa, relying on a deemed inability of Newcity to pay its debts, applied on 29 November 2011 for the winding up of Newcity as contemplated in Section 346(1) (b) of the Companies Act, 1973.

[10] Newcity did not immediately file an answering affidavit thereto. Instead, Cohen, on 6 February 2012 launched the first application for a business rescue of Newcity. This was taken by the parties as having the effect of suspending the liquidation proceedings, as envisaged by Section 133(1) of the Companies Act, 2008, from the moment it was instituted. Whether or not their stance is correct as to the effective date upon which the moratorium commences as provided for in section 133(1) of the Companies Act, 2008, remains a question open for a definitive decision by a court. In this judgment it is assumed, but not decided, that this is the correct legal position. As a result, the Liquidation application was delayed until 12 June 2012. On the day before that hearing, Cohen withdrew the business rescue application and Newcity filed an answering affidavit in the winding up application.

[11] All the material facts about the failure of Newcity to pay *all* its debts were conceded, as was the fact of a present inability to do so. However, the various assets of Newcity were paraded to demonstrate that, as a fact, the value of the assets did indeed exceed the liabilities, albeit that sufficient liquidity to pay R30 million was, at present, a problem. No other day-to-day expenses were unmet.

[12] It was candidly stated by Cohen that this first business rescue application was an intentional time-buying ruse to facilitate deal making to procure funding for the distressed Crystal Lagoon project.

[13] At the hearing of 12 June 2012, a postponement of the liquidation proceedings, until 23 July 2012, was asked, to allow an allegedly splendid potential investment in Crystal Lagoon to be consummated, which, by implication, would inject cash into that project and materially contribute to enabling Crystal Lagoon to pay Absa, thereby solving Newcity's difficulties. Furthermore, Cohen himself would contribute R25 million. By such means, so it was alleged, full payment to Absa would be achieved by approximately that date.

[14] The demonstrable demerits of that proposal were addressed by me in a judgment delivered on 13 June 2012 refusing the postponement and granting a provisional winding up order returnable on 31 July 2012, the substance of which, I do not repeat. The demerits of that proposal are now conceded on behalf of Newcity. In addition, counsel who appeared for Newcity, at that earlier hearing, gave an undertaking, confirmed under oath, in the supplementary answering affidavit now filed and deposed to by Cohen, that if the postponement was granted, and the payment was not made, Newcity would not oppose a final winding up order on 23 July. That undertaking, so Cohen now deposes, was intended to be conditional upon the postponement and hence he claims that he and Newcity were released from that promise by the failure to grant the postponement. The functionality of such conditionality was not explained, nor may I say, is understood by me. Self evidently, the deal that was supposedly done and dusted, bar a signature, has not materialized and not a word is said about why. In addition, the representation about Cohen coughing up R25 million has also not materialized, and as will appear elsewhere in this judgment, the present offer to contribute by Cohen has shrunk to R6 million.

[15] Thus was the stage set for the return date on 31 July 2012: would the deal and the payment be forthcoming or would Newcity be wound up? Perhaps, predictably, neither occurred. Instead, round two replicated round one. On the eve of the hearing, Cohen launched business rescue application number two and Newcity filed a supplementary answer; the affidavits in this second business rescue application and the supplementary answer contain virtually mirror image contents.

[16] The resistance to a winding up is again met by a so called business rescue application which Cohen candidly says he will withdraw if the provisional winding up order is discharged. This represents a slight shift in strategy, but, in substance, having the same objective of paralyzing the liquidation application. Unsurprisingly, Absa perceives this behavior as an abuse of the process, a contention which will be addressed later.

[17] Owing to the last minute service of the supplementary answer and new business rescue application, Absa chose not to serve any replying affidavits, and to argue the matters on the papers as they stood.

The New business rescue application (30 July 2012)

[18] The Second Newcity/Cohen proposal is significantly different from that put up in round one. It may be summed as set out hereunder.

18.1 The business rescue application is conditional; ie, if the rule is discharged it will be withdrawn. Ergo, it can properly be inferred that its sole aim is to block the liquidation proceedings and has no objective beyond that outcome.

18.2 The 'rescue plan' on offer is premised on the fact that Newcity's assets exceed its liabilities and that the admitted failure to pay Absa is the result of illiquidity.

18.3 Only the Absa debt, a single debt, is outstanding; otherwise, all other day to day debts are being met.

18.4 The rescue plan is a programme to effect payment to Absa, in full, albeit not at once.

18.5 The plan is premised on realizing assets of Newcity which have been selected by Cohen and by disgorging cash on hand at this time; as set out below.

18.6 First, a sum of some 8 million could be paid to Absa, consisting of R2 million in Newcity's bank account and R6 million of Newcity's or Cohen's money at present in their attorney's Trust Account. In argument, counsel indicated that Newcity and Cohen would submit to an order for immediate payment.

18.7 Secondly, a sum of some 9 million is expected to be received by Newcity by about the end of August 2012, some one month or so away. This income is from completed property sales at present on the verge of being transferred to their purchasers. The details of the agreements are not revealed

in the papers but they were tendered for inspection, and the present pending transfer status is confirmed by an attorney, Mr Loftus of Ramsay Webber.

18.8 Third, a sum of about R12.5 to R16 million could be obtained from the sale by public auction of unit 96 in The Emperor. This is the very property subject to Absa's bond. At present it is leased to the occupant, who is a potential buyer, having, on 29 June 2012, signed an agreement to purchase to purchase the unit for 16 million. However, he is currently in default to pay the deposit of R13 million. The lease to the occupant, on the interpretation of Newcity, shall not endure beyond transfer and, if the sale is cancelled, will terminate at once. This interpretation of the relevant clause in the sale agreement is not without doubt. This issue is revisited hereafter.

[19] How might a court approach these circumstances to evaluate the contending positions?

[20] First, a decision must be made whether to grant or refuse a business rescue order. The appropriate test has been extensively considered in several decisions, and it is unnecessary to traverse the jurisprudence yet again. (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC at [20] –[24]; Koen & Another v Wedgewood Village Golf and Country Estate 2012 (2) 378 (WCC) at [13] – [19]; and Oakdene Square Projects (Pry) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (GSJ) at [12] –[18])* The upshot of these decisions, as I understand them, renders the law to be as follows:

20.1 The purpose of a business rescue is that set out in Section 128(1)(b) of the Companies Act, 2008 and it is these statutory objectives which is the aim of an order. These objectives are defined as follows:

> "'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-
>
> (i) the temporary supervision of the company, and of the management of its affairs, business and property;
>
> (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
>
> (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company"

20.2 The threshold standard for deciding that an order is appropriate is whether there is a reasonable prospect or reasonable possibility of achieving a rescue through those statutory objectives; and in this regard, the point of departure is that it is preferable to rescue a company than to let it drift, or sometimes plummet, into extinction. *(eg; Oakdene at [12]; Southern Palace (Supra))*

20.3 A close scrutiny of the factual platform presented and the rationale mounted on that platform is required in order to decide if the threshold standard has been met. This assessment must be made on solid information presented to the court, not upon conjecture.

20.4 Moreover, in this regard, the risk of abuse or manipulation of the rescue application process, through "un-genuine" applications to procure an illegitimate immunity must be guarded against.

[21] The question therefore is whether or not the threshold standard been met by Cohen?

Is it genuine application aimed at a rescue?

[22] There is considerable evidence, from which to draw, to argue that it is not a genuine application. The frank admissions by Cohen himself that the first application was a ruse and that the second application is conditional, and upon a discharge of the provisional order, it would be withdrawn, probably suffice to establish the feigned character of the invocation of the device of business rescue. Moreover, the institution, on the eve of the return day, of the second application, as with the timing of the withdrawal of the first business rescue application, on the eve of round one, affords corroboration for such an inference. There is more. The singular absence of an explanation about the fate of the so called deal that was the basis for the postponement sought at the earlier hearing, and the failure to explain why Cohen offered to put R25 Million initially but only R6 million now points to a material and suspicious non-disclosure.

[23] Further, Cohen's other conduct ratchets up even deeper distrust. For example, he concluded a sale of unit 96 The Emperor, the subject of the bond, on 29 June 2012, *after* the provisional winding up order was granted, a distinctly illegitimate act. The chief criticism is non-disclosure of critical information. The affected parties alluded to

ongoing litigation between them and Newcity in which allegations of fraud have been flung at Cohen. There is inadequate information before me in these proceedings to weigh the import of such litigation, save that the non-disclosure of the relevant details by Newcity is damaging to its efforts to be seen to be *bona fide*. Newcity's revenue stream is not candidly revealed; the source of income is understood to be sales of property but this cannot be verified on the data presented. Moreover, the anomaly in Cohen's allegations about Newcity's solvency did not go unnoticed. Although protesting that Newcity has ample assets to satisfy the claim, it is also said that other than the security over unit 96, for say R12 - 16 million, the balance of the R30 Million is unsecured and for this amount Absa will be a concurrent creditor on liquidation and "is unlikely to obtain a significant concurrent dividend" It is argued that adverse inferences are warranted.

The raw proposal- does it have merit?

[24] Nevertheless, despite any justification for the distrust of Cohen, the proposal, in the business rescue application itself, must itself be scrutinized to determine whether or not it has any merit in striving for an objective provided for in Section 128(1) (b) of the Companies Act, 2008.

[25] The plan purports to do so; ie, Subsection (ii) - a temporary moratorium of the right of a claimant, and subsection (iii)- a plan "to rescue... by restructuring its...debt... that maximizes the likelihood of the company continuing in existence on a solvent basis.."

25.1 The application also expressly refers to a restructuring and alludes to achieving a better return for creditors and share-holders than a liquidation might yield, although this latter aim is really more pertinent to an orderly extinction of a company than to what is envisaged here, ie, a payout, leaving the company intact, although slimmer. In any event, as considered in the *Oakdene case at [49],* there is no substance to the notion that a business rescue practitioner might realize assets more effectively than an independent liquidator.

25.2 That the assets of Newcity indeed do exceed the liabilities and the illiquidity is in respect of a single huge debt ought to be a substantial factor in favour of a rescue. Mere illiquidity, capable of being overcome within a reasonable time, should be a trump card to resist liquidation. (It is unnecessary to examine whether or not such a factor should qualify as a 'special circumstance' as contemplated in *Firstrand v Evans 2011 (4) SA 597 (KZN) at [27]* decided before the companies Act, 2008, came into operation.)

[26] Notwithstanding these favourable considerations several criticisms were advanced:

26.1 The Newcity payment plan proposal, as initially set out in a draft order, did not envisage any immediate cash payments. However, that position was softened in argument. There is now a tender to immediately disgorge R2 million from Newcity's account and R6 million from the attorney's trust account. This amounts to immediate payment of R8 million. These sums approximate 30% of the claim.

26.2 The sum of about 9.2 million, which is said to be expected to be received by the end of August 2012 as a result of various allegedly

consummated sales which are at the point of transfer, is said by Absa to be a vague and unpersuasive representation. The failure of Newcity to attach copies of the sales agreements to the answering affidavit is said to be suspicious. *Prima facie* this is a sound complaint; however, Newcity tendered inspection of the agreements which takes the sting out of that point. It is to be inferred that Absa did not follow up on that tender.

26.3 Moreover, the 'imminence' of transfer is corroborated under oath by an attorney. The expectation of payment in August is not elaborated; it is left to the reader to suppose the usual regime applies in which guarantees are being held by the conveyancer. It is a pity this detail was not fleshed out, not least, detail about why this formed no part of the 12 June 2012 proposal, but in the absence of a rebuttal and upon the application of the rule in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD),* I must take the statement, by Newcity and by cohen that assets have already been disposed of and that money is due, as a proven fact. Even if the end of August 2012, as due date for receipt, is unduly optimistic by, say, a month, the proposal is not *per se* to be sneezed at; its value is about 30% of Absa's claim.

26.4 The most controversial component of the payment plan was the realization of unit 96, The Emperor. The idea is to sell it at a public auction with a reserve price in excess of the value Absa needs to achieve; ie about R12 million, assuming that Absa receives the other

sums totalling R18 million. Several blemishes are said to exist in this proposal.

26.3.1 The present putative sale has already been alluded to. Furthermore, it was shown that in a 2009 valuation of this unit that it was let until December 2011 at a total rental of R78840 per month. In the present sale agreement the rental income is R60000 per month. This bare fact suggests a dip in the rental market if not the sale market. As to the property value itself a 2009 value of 23 million has diminished to about R17 million.

26.3.2 It was argued by Absa and the affected parties that a proper interpretation of the sale agreement indicated that the occupier was not obliged to vacate if the sale fell through. As a result, the prospect of a buyer putting up R12 million, not to say R16 million, was slim indeed. To counter this view, Newcity refers to the letter of Loftus, the conveyencer, of 12 July 2012, to the purchaser averring that failure to pay the deposit will mean *inter alia* that the purchaser must immediately vacate the unit. In my view this does lend support to the contention that the occupant is in occupation solely as a prospective buyer. The risk of litigation to dispute this stance can never be wholly discounted, but as the affidavit implies that there is no other lease agreement, and there is no rebuttal by Absa, I must take this to be the proven position.

26.3.3 Lastly, the question of when such auction might take place was raised as a concern. Newcity tendered to submit to a time dictated by the court. In any event, Absa as bondholder has the right to agree or refuse to let the property be auctioned.

[27] An evaluation of these matters results, in my view, that notwithstanding the distrust that Cohen has engendered, the proposal *prima facie,* is not without merit. The outcome, at best, is full payment to Absa within months. At worst, Absa is paid about half its claim and retains its iron-clad security over unit 96, The Emperor. If the norm to be applied is to avoid liquidation if a rescue plan has a 'reasonable prospect' of preserving the company, then that threshold standard seems to have been met.

[28] However nothing should be weighed in isolation. The question that Absa poses is why Cohen is bent on avoiding the prying eyes of a liquidator. The pattern of non-disclosure is, in particular, a source of legitimate scepticism. Were his proposals aimed at an alternative orderly extinction, this suspicion might have carried weight. But it is plain that he seeks to preserve Newcity. Nevertheless, it is also plain that the application is indeed not genuine for the reasons alluded to earlier about Cohen's motives and his conduct. The remarks in *Southern Palace (Supra)* are apposite ;

".It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune

to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends. The courts in Australia have been careful not to allow their equivalent procedure to be used where there appears to be an ulterior purpose behind the appointment of an administrator by the directors. It is necessary that an application for business rescue be carefully scrutinised so as to ensure that it *entails a genuine attempt* to achieve the aims of the statutory remedy."

In my view notwithstanding the prima facie merits, the business rescue application must be branded an abuse and refused. That leaves the way open to consider the fate of the provisional order.

Should the provisional winding up order be confirmed or discharged?

[29] It was controversial what ought to be the test for a decision about whether or not to order a winding up.

29.1 In these cradle days of the Companies Act, 2008, the procedure for winding up is still regulated by the provisions of the Companies Act,1973. Section 344 is the sole source of authority that vests a court with power to liquidate a company. *((Ex Parte Muller NO: In Re: P. L. Myburgh (Edms) Bpk 1979 (2) SA (N) 339 at 340D.)* This authority is discretionary. (*SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk 1973 (3) SA 371 (C) at 373C.)* Section 347 of the Companies Act, 1973 stipulates the powers of a court upon considering an application. The relevant portion provides:

> "The court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just....."

29.2 The plethora of judicial authority spawned by disputes about the powers provide for in Section 347 has included the notion that even where the rationale for a liquidation was 'commercial insolvency' (ie the assets did *de facto* exceed liabilities and illiquidity was the explanation for non-payment) the court's discretion to refuse an order was limited because a creditor with an unpaid debt is "entitled *ex debito justitiae* to an order of winding up. *(Rosenbach & Co v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F).*

29.3 Perhaps the pinnacle of this perspective is to be found in *ABSA Bank v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at 440F- 441A:*

"Turning to the merits of the matter, Mr Gauntlett contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercially insolvent'. The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F:

> 'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available

> out of which, or the proceeds of which, the company is in fact able to pay its debts.'
>
> Notwithstanding this, the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae,* to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)."

[30] The question arose whether this doctrine remains good law since the coming into force during 2011, of the Companies Act, 2008. It was argued that the new legislation is at pains to assert a fresh approach to corporate governance as a whole. This cannot be doubted. The issue has been addressed in *Koen, Oakdene, and Southern Palace (Supra)*.

[31] In plain terms, it is seems now to be incorrect to speak of an 'entitlement' to a winding up order simply because the applicant is an unpaid creditor. The rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees, and with the public interest too. I endorse the perceptive observation by Eloff AJ in *Southern Palace at [20] (Supra)* about the shift in terminology between a 'reasonable probability' in the judicial management provisions of the Companies Act, 1973, and the phrase "reasonable prospect" in Section 131 of the Companies Act, 2008. To the ear and eye of a South African Lawyer, a "reasonable probability" is the hallmark of a happening that, on balance, is more likely than not, whilst the phrase "reasonable prospect' suggests merely a chance, albeit a good one. The norm that infuses the law about the governance of companies

after the advent of the Companies Act, 2008, means that the age of creditor supremacy is over. This outcome must be distinguished from that illustrated in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd 2003 (2) SA 253 (SCA) at [10]* where it was held that a rule nisi should not be discharged for any other reason than one that goes to the root of the applicant-creditors *causa,* which on the facts of that case, was a real right possessed by the creditor in respect of the debtors' asset under a perfected notarial security bond in favour of the creditor.

[32] It is true that Newcity does not expressly invoke any of the factors that are properly the subject matter of the wider set of considerations now relevant under the Companies Act, 2008, but that is not of moment because the principled preference of a rescue over the demise of a company is sufficient to defeat the older viewpoint examined here.

[33] Upon an application of this approach, it must therefore be asked if liquidation in this particular case can reasonably be avoided, a question that is independent of the prospect of a business rescue option, as addressed earlier. In my view, despite some wrinkles in the substance of what Newcity advances, there is a sufficient body of fact and rationality in what is on offer to result in a reasonable pragmatic programme of payments that could avoid the extinction of Newcity.

[34] In my view, the provisional order should under these circumstances be discharged, and an order made, along the lines invited by Newcity, regarding disposal of assets and payment to Absa, with appropriate safeguards for the interests of Absa, including, leave to Absa to approach the court on these papers if certain conditions remain unmet. Such an order would be consistent with the court's power provided for

in Section 347 of the Companies Act,1973, to "make any interim order or any other order it may deem just" an injunction, self-evidently, to be interpreted in the context of the post 2011 regime under the Companies Act, 2008.

[35] Accordingly, the following order is made:

The provisional order is discharged: furthermore: -

35.1 Absa is granted leave to approach the court again, for a winding up of Newcity, on these papers, in the event that any of the orders set out below are not complied with.

35.2 Newcity, shall effect payment, in cash, to Absa of R2 million from its bank account within 3 days of the date of this order.

35.3 Absa, or Cohen, shall cause payment of R 6 million to be paid to Absa within 7 days of the date of this order.

35.4 Newcity, shall pay to Absa, the proceeds of the sales of the following properties, and shall account fully in respect of such sales and moneys received and expended in connection therewith, by not later than 15 September 2012:

35.4.1 Units 3,7,88, 176 and 177 in the Esprit Estate

35.4.2 Unit 15 in the Dunhurst Estate

35.4.3 Units 103,104 and 105 in The Emperor

35.5 Newcity, shall pay to Absa, the proceeds of a sale of unit 96 The Emperor, Sandton, which sale shall be effected with the consent of Absa *qua* bondholder, or make over to Absa the full ownership and title thereof to Absa, before 30 September 2012, or such later date as Absa may consent to in writing.

35.6 In the event that after the payments referred to above, there remains any balance owing in respect of the obligations of Newcity to Absa under the terms of the Bond, such balance shall be paid in full within three days upon written demand by Absa to Newcity.

35.7 The costs of Absa in these proceedings, including the proceedings of 13 June 2012 shall be borne by Newcity in respect of case number 2011/45670 and by Cohen in respect of case no 2012/2815.

35.8 The costs of the affected parties in the business rescue application case No 2012/2815 shall be borne by Cohen.

ROLAND SUTHERLAND
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Hearing: 6 August 2012
Delivered: 13 August 2012.

For Absa Bank Ltd:
L.N. Harris SC, with him F. Ismail
Instructed by Webber Wentzel Bowens
Ref: T Versfeld

For New City Group (Pty) Ltd and C. Cohen:
J Brett SC, with him D.Mahon
Instructed by Terry Mahon Attorneys:
Ref: T Mahon

For Quantum Property Group Ltd and A Million Up 105 (Pty) Ltd (in provisional Liquidation):
B.K. Pincus SC
Instructed by Cliffe Dekker Hofmeyr
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