

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HELD AT VICTORIA

Miscellaneous Application No 007 of 2010

(Arising from Civil Side No 306 of 2007)

In the Matter of Spero Court Holdings Limited

And

In the Matter of the Companies Act, 1972 and the Companies (Winding Up)
Regulations, 1972

Mr. Divino Sabino for the Liquidator

RULING

Egonda-Ntende C.J.

[1] The, applicant, the liquidator of Spero Court Holdings Ltd, herein after referred to as the company, is seeking in this application permission of this court to continue as liquidator of the company in question beyond the two years initially permitted by Section 91(2) of the International Business Companies Act, 1994, hereinafter referred to as the Act. The grounds of the application are contained in the supporting affidavit to the motion sworn by Mr. Bernard Pool.

[2] I will set out the relevant parts of the affidavit *in extensio*.

‘3. Since my appointment as liquidator in May 2008, I have managed to ascertain the following:

a) The company has one Bank account with Bankwest St. Georges Terrace, Perth, Western Australia.

The Bank account, under my direction, is being operated by the company’s stock broker in Australia.

- b) The company has 5 loan agreements with Mr. Bradley Maguire as “Borrower”; Mr. Bradley Maguire was also a creditor of the company for advances made thereto. Mr. Maguire was the Petitioner requesting that the company be put into liquidation.
 - c) At the date of my appointment as liquidator, a Mr. Justin Sykes was the company’s sole director, although I received some communication from Mr. Sykes, I am presently unable to communicate further with him due to his apparent unwillingness to reply to my correspondence.
 - d) The company has in issue 5000 shares of US\$1/- each to “Bearer”; I have been unable to contact or ascertain the whereabouts of the bearer of the share.
 - e) The company’s main activity was to act as Trustee for the Sykes family.
 - f) In order to secure the loans mentioned at (b) above Mr. Bradley Maguire has pledged shares he personally owns in various banks in Australia the said shares are held by the company’s stock broker in Australia, Messrs D.J. Carmichael & Co of Perth Western Australia.
4. a) Section 91(2) of the International Business Companies Act 1994 requires that as liquidator, I may not carry on business of the company for a period in excess of two years without permission of the Court.
- b) Under the terms of the loan agreement mentioned in 3(b) above, the “borrower may at its option, extend the term of the loan for a further period of up to five years.....” The “Borrower” has given notice of his intention to extend the loan repayment which now must be repaid by the year 2014 at the latest; the repayment date will therefore extend beyond the maximum two year period indicated in 4(a) above.
 - c) The “Borrower” has up to date complied with his covenants to pay interest on the various loans as agreed.
 - d) In order to discharge my duties as liquidator for the benefit of all stakeholders it is my considered opinion that the liquidation process should carry on until the loans are repaid fully in accordance with the terms thereof.
5. The facts and matters deposed to herein are true where the same are within my knowledge and are otherwise true to the best of my information and belief, being based upon information and documents supplied to me as indicated therein.
6. That I pray that this honourable court grant leave for me to carry on as the liquidator of the Company for a period in excess of 2 years.’

[3] Mr. Divino Sabino, learned counsel for the applicant, submitted that the applicant is trying to save the company and would require more time until 2014 to do so. I am not sure if it is duty of the liquidator to save the

company. The duties of the liquidator are to wind up an insolvent company, albeit in the most efficient manner possible.

[4] The duties of the liquidator are set out in Section 90(1) of the Act, which states,

‘A liquidator shall , upon his appointment in accordance with this Part and upon the commencement of a winding-up and dissolution, proceed—

- (a) to identify all assets of the company;
- (b) to identify all creditors of and claimants against the company;
- (c) to pay or provide for the payment of, or to discharge, all claims, debts, liabilities and obligations of the company;
- (d) to distribute any surplus assets of the company to the members in accordance with the Memorandum and Articles;
- (e) to prepare or cause to be prepared a statement of account in respect of the actions and transactions of the liquidator; and
- (f) to send a copy of the statement of account to members if so required by the plan of dissolution required by Section 92.’

[5] On this application it has now been disclosed that Mr. Bradley Maguire, the creditor that initiated proceedings for winding up of the company is actually a debtor to the company which he had claimed was insolvent, hence the application for winding up. In his affidavit in support for the petition for winding up of the company, Mr. Conrad Lablache, an agent of Mr. Maguire, did not disclose that the petitioner owes money to the company he was seeking to have wound up for failing to pay its debts.

[6] In the affidavit of the liquidator in support of this application the agreements in respect of which Mr. Maguire borrowed money from the company are not attached though mention is made of the existence of 5 such agreements. It is not disclosed how much money Mr. Maguire owes the company for which he has been paying interest. Neither is it disclosed the amount of interest he has been paying. And to what application that

money has been put, given the liquidator's duty to pay all existing debts and obligations of the company, is not revealed.

[7] The liquidator has not provided to this court a statement of account of the affairs of the company which he has taken over for the last 2 years. What has been accomplished is not disclosed. Neither has he disclosed what is outstanding in terms of his mandate.

[8] The liquidator states on oath that in his opinion the liquidation process should carry on until loans are repaid fully in accordance with the terms thereof. Neither the full terms of those agreements nor the sums advanced are disclosed on the affidavit. The stakeholders for whose benefit it is claimed, continuing liquidation is necessary, are not identified. Is it the debtors or the creditors? Is it for members?

[9] No information is provided as to what would be the consequences of not extending the period of liquidation.

[10] In the circumstances I can only come to one conclusion. The liquidator has failed to put at the disposal of this court credible information upon which this court could consider whether the continuation of the liquidation process in excess of a period of 2 years is in the interests of the creditors and / or members of the company.

[11] Section 91(2) of the Act does not set out the considerations that a court shall take into account to determine whether it is necessary to extend the period for liquidation beyond the two year period provided by statute. The reason that was advanced by Mr. Sabino that extension of the period was to save the company seems to be wholly at conflict with the statutory

duties of the liquidator which in this case is to wind up the company and not to save it.

[12] The original order for liquidation was made on the basis that it is just and equitable to wind up the company as it had failed to meet its obligations. No information has been made available to court as to what has happened to those obligations. What is new now is that the original petitioner and creditor to the company is now a debtor to the company. How this occurred has not been explained to this court.

[13] The liquidator had wide ranging powers under Section 222 of the Companies Act. However, he must explain to court what he has done as far as gathering of the assets of the company, identifying and settling the liabilities, and what he is done with the assets of the company that have come under his control. He must disclose what remains to be done for which time is required for the court to consider whether the period of liquidation should be extended or not. In the circumstance of this case the liquidator has not done so. Opinion that is not backed up with information giving rise to it cannot form a basis for action by a court of law.

[14] I am left with no alternative but to reject this application.

Signed, dated and delivered this 3rd day of May 2010

FMS Egonda-Ntende
Chief Justice