



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

SIGNATURE

DATE: 8 April 2024

Case No. 2023-092274

In the matter between:

**ELITE GROUP AND 20 FURTHER CREDITORS OF
THE HABIB OVERSEAS BANK LIMITED LISTED IN
ANNEXURE "A" TO THE NOTICE OF MOTION**

Applicants

and

ZEENATH KAJEE NO

First Respondent

HABIB OVERSEAS BANK LIMITED

Second Respondent

JUDGMENT

WILSON J:

- 1 The applicants, to whom I shall refer as "the depositors", all have accounts in credit with the second respondent, Habib Overseas Bank ("Habib Bank"). The first respondent, Ms. Kajee, is cited in her official capacity as Habib Bank's liquidator.

- 2 Habib Bank was placed in final liquidation under an order of this court, made by Kholong AJ on 26 February 2024. The depositors are creditors of the bank. They claim standing under section 360 (1) of the Companies Act 61 of 1973. That provision entitles a creditor of “any company unable to pay its debts and being wound up by the Court” to “apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator”. If a court decides to grant a creditor or member such authority, the court “may impose any condition it thinks fit” on the exercise of that authority.
- 3 The depositors are interested in preserving Habib Bank as a going concern. They have been seeking out potential purchasers of the bank who would maintain the bank’s operations. Their interest in doing so is obvious. They are more likely to recover the value of their deposits if the bank is maintained as a going concern than if the bank ceases trading and its assets are sold-off.
- 4 The depositors say that there are at least three potential purchasers who are likely to maintain the bank as a going concern. However, before those purchasers will so much as express an interest to Ms. Kajee in buying the bank, they want to see the bank’s books of account. The depositors now seek an order from me directing that information from those books be provided to them for inspection. Their intent is to send the information on to the three prospective purchasers identified in their founding papers, and to anyone else who the depositors think might be keen on opening negotiations to purchase the bank.

5 Section 360 (1) sets three jurisdictional requirements to be met before a court can grant authority to inspect a company's books of account. First, the application for such authority must be brought by a member or a creditor of the company. Second, the company concerned must be unable to pay its debts and be in the process of being wound-up, either by the court or by its creditors.

6 In my view, these two jurisdictional requirements have plainly been met. Mr. Smit, who appeared for the respondents, argued that the depositors have not established that Habib Bank is "unable to pay its debts" in the required sense that its assets exceed its liabilities. However, even though there is no engagement with the bank's financial situation in the depositors' founding papers, it is clear from the unchallenged findings of Kholong AJ in his 26 February judgment that the bank is in fact insolvent in that sense. Paragraph 63 of the judgment makes clear that the bank is unable to pay its debts because it has a negative net asset value. In other words, the bank's liabilities exceed its assets. It would be naïve to ignore these unchallenged findings merely because they were not set out in the depositors' founding papers. I need only be satisfied by way of admissible evidence that the bank is unable to pay its debts. Kholong AJ's unchallenged conclusions are such evidence. They clearly demonstrate that Habib Bank is unable to pay its debts in the required sense.

7 I cannot accept, however, that the third jurisdictional requirement of section 360 (1) has been met. That requirement is that the purpose of the application must be for the member or creditor themselves to inspect the information

they apply to see. I do not think that section 360 (1) was meant to facilitate a company's creditors acting as conduits for the flow of financial information about a liquidated company to third party prospective purchasers in the manner the depositors envisage. This is clear from the use of the words "for an order authorising him to inspect" in section 360 (1) (my emphasis). The scope of the court's power is to authorise the member or the creditor themselves to inspect "any or all of the books and papers of that company". It is beyond the scope of that power to give the member or creditor access to the information for the sole purpose of passing it on to someone else.

8 I think that this limit on a court's power was recognised in *Anchor Holdings Ltd v Cox* 1964 (2) SA 405 (W) ("Cox"). In that case, Boschhoff J, albeit dealing with a similar provision of an earlier iteration of the Companies Act, refused an application to inspect a company's books on the basis that the creditor making the application "itself ha[d] no interest in the inspection of the books and papers" of the company being wound-up in that case (see *Cox*, page 412).

9 A great deal of argument was addressed to me on whether the decision in *Cox* applies to the facts before me. Ultimately, though, I do not think that matters. It is clear from the text of section 360 (1) itself that a court has no power to make an order where the creditors or members making the application are not themselves interested in inspecting the books of account.

10 Mr. Nel, who appeared together with Mr. Spiller for the depositors, urged me to find that the depositors do not wish merely to pass the information they seek on to prospective purchasers. Mr. Nel submitted that they wish also to

compile a body of information about Habib Bank which will allow them to assist Ms. Kajee in finding a purchaser for the bank. As carefully and as amiably as Mr. Nel advanced this submission, I think the argument relies on far too optimistic an interpretation of the depositors' affidavits. It is clear from those papers that the depositors do not seek to compile a prospectus or some other brochure of information that might interest a prospective purchaser. They seek possession of the information for the sole purpose of passing it on – in its raw form – to anyone who they think might be interested in buying the bank. That, as I have said, is beyond the scope of section 360 (1).

11 Even if that sort of scheme were not beyond the scope of the section, I would still have exercised my discretion against allowing the inspection the depositors seek in this case. The authorities make clear that an order for the inspection of an insolvent company's books and papers under section 360 (1) must foreseeably benefit the winding-up process in some way (see *RAM Transport (Pty) Ltd v Replication Technology Group (Pty) Ltd (In Liquidation)* 2011 (1) SA 223 (GSJ), paragraph 10 and the cases cited there). I fail to see how it would benefit the winding-up process to give the depositors access to "any or all" of the bank's "books and papers" for the sole purpose of passing them on to third parties they think might be interested in purchasing the bank.

12 Mr. Nel invited me to narrow the scope of the information to which the depositors will be given access, but I think that misses the point. The purpose for which the depositors seek the inspection of any of the

information they seek is fundamentally disruptive of Ms. Kajee's powers and functions. It is, after all, she who has the primary duty to deal with the bank's assets, whether by sale of the bank as a going concern or otherwise. I do not see how it could benefit the winding-up process to compel Ms. Kajee to tolerate the supply of any of the bank's books and papers via the depositors to whichever third-party prospective purchasers the depositors might think are worth encouraging. That would fundamentally undermine the control Ms. Kajee is entitled to exercise over the bank in the performance of her functions.

13 Finally, the depositors have given no good reason why a prospective purchaser they might identify ought not simply to approach Ms. Kajee with any requests for further information they may have. Mr. Nel emphasised how skittish a prospective purchaser might be, but there is nothing to suggest that Ms. Kajee would not treat any approach in confidence, or that she would not supply a potential purchaser with the information that they may reasonably need to consider before making a bid for the bank.

14 For all these reasons, the application must be refused. Costs will follow that result. The application was originally enrolled on an urgent basis before Mkhabela AJ on 19 September 2023, when the bank was still under provisional liquidation. It was then removed from the urgent roll by agreement, with costs reserved, before being specially allocated to me. The respondents sought, and are entitled to, the costs reserved by Mkhabela AJ.

15 The application is dismissed with costs, including the costs reserved in the order of Mkhabela AJ dated 19 September 2023.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 8 April 2024.

HEARD ON: 22 March 2024

DECIDED ON: 8 April 2024

For the Applicants: G Nel SC
L Spiller
Instructed by Larson Falconer Hassan Parsee Inc

For the Respondents: JE Smit
Instructed by Edward Nathan Sonnenbergs Inc