

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENGLOCAL DIVISION, JOHANNESBURG

Delete whichever is not applicable

- (1) Reportable Yes / No
- (2) Of interest to other Judges Yes / No
- (3) Revised.

Date: _____

Case No: 0017/2015.

In the matter between:

SCANIA FINANCE SOUTHERN

AFRICA (PTY) LTD

Applicant

And

THE SHERIFF JOHANNESBURG

First Respondent

ZINANDI TRADING 1009 (PTY) LTD

Second Respondent

J U D G M E N T

Ismail J:

[1] An application was launched in this court in two parts. Part A which was brought by way of urgency. In that application the applicant sought an order that the Sheriff, first respondent, be interdicted from executing an order of a magistrate. Part B entails an application for the winding up of the second respondent. This matter relates to part B

[2] The application relating to Part A was struck of the roll for lack of urgency. I will not deal with that portion of the application which was sought in the urgent court and will only confine this judgment to the order sought in terms of Part B.

[3] This application relates to an order which the applicant seeks against the second respondent in the following terms:

- (i) that the second respondent be finally wound- up;
- (ii) the costs of part B of this application be costs in the liquidation;
- (iii) the applicant be granted further and or alternative relief.

[4] The applicant avers that the second respondent has not paid its contributions in terms of a lease agreement and is indebted to it in the amount of R7 919 625.10, for six buses which were leased.

[5] The applicant avers that the second respondent filed its answering affidavit out of time, almost a year late, and had not made out a case for condonation for the late filing of its answering affidavit. To this the second respondent submitted that there was a reasonable explanation for the delay and that the prospects of success in its favour were strong. In addition thereto that the matter was in both parties interest to be decided and determined by a Court.

[6] Second respondent raised several points *in limine* amongst others, that the first respondent has been joined as a party to the application when the first respondent had no interest in the matter whatsoever. It also contended that the applicant failed to prove that the second respondent was unable to pay its debts in terms of section 344 read with section 345 (1) (c) and (2) of the Companies Act. Thirdly that the applicant failed to furnish the Court with a certificate from the Master for security.

[7] As far as the formalities of service on the Master, South African Revenue Service, employees of the second respondent and security for

costs are concerned, the applicant had complied with those requirements. A candidate attorney, Charl Francois Sieberhagen, deposed to an affidavit¹ wherein he stated that he attended to service on the persons and institutions mentioned, above.

[8] The second respondent contended that the applicant failed to satisfy the court that it is trading under such conditions that would warrant that it be wound up. It was submitted that the second respondent is in a position to pay its debts and that the applicant had not shown anything to the contrary. It maintained that no factual or legal basis existed for submitting that the second respondent is in liquidation.

[9] The second respondent does not dispute that it owes the applicant money, however it alleges that the amount claimed is incorrect, without stating what it alleges the outstanding amount is. At page 182, of the paginated papers, at para 102 it sated:

“ Apart from bringing to the court’s attention that this information was never presented to court at the hearing of the *ex parte* application, it is further submitted that the information has been incorrectly calculated and I dispute the level of indebtedness as alleged.”

¹ pages 275-277

[10] The applicant submitted that the second respondent failed to give any plausible explanation for its failure to settle its indebtedness to the applicant. Mr Freedman, acting on behalf of the applicant, submitted that apart from disclosing the amount which the second respondent alleges it owed, it failed to provide a reason why that amount was not paid. The second respondent also failed to demonstrate by means of financial statements or management accounts that it was able to pay its debts. It was contended by the applicants that this omission on the part of the second respondent led to the inescapable inference that it was both factually and commercially insolvent.

In *ABSA Bank Ltd v Rhhebokskoof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440 F-I where the court stated:

“ 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 realizable 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 exceeds 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..”

see also: *Service and Trade Suppliers (Pty) Ltd v Dasco & Sons (Pty) Ltd*

1962 (3) SA 424 (T) at 429.

[11] In this regard the applicant avers that the logical inference to be drawn is that the second respondent is commercially insolvent. It relied on the judgments of *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*.² and *Rosenbach & Co (Pty) Ltd v Singh Bazaars (Pty) Ltd*³ for holding this view.

[12] During argument before me I posed a question to second respondent's counsel, to the effect why did the second respondent not pay the amount it alleges it owed, alternatively pay the amount of R137 778. 86 which the applicant claims is due to it into a trust account pending the determination of the amount due, or even provide security for the alleged amount owing. To this end there was no reasonable explanation tendered.

[13] Mr Ford submitted that the issue is *lis pendens* as the same reasons were provided in the magistrates court when magistrate Banks ordered the return of the buses to the second respondent. He expanded on the submission that the applicant appealed magistrates Banks order, however they failed to proceed with the appeal and therefore the appeal

² 2014 (1) SA 528 (SCA); [2014] 1 All SA 507 (SCA) at para [17], [18] and [28].

³ 1962 (4) SA 593 (D)

has lapsed. The issue before the Magistrate related to the buses being returned whereas this application deals with the question of whether the second respondent is able to pay its debts in terms of the Companies Act

[14] Mr Freedman submitted that the second respondent is clearly commercially insolvent as it had not paid two months instalments in respect of the six lease agreements and in addition thereto it owed Standard Bank monies for another bus in terms of an agreement with that bank. He pointed out that any creditor who is owed monies may launch an application against the second respondent if it did not pay its indebtedness to the creditor. Furthermore, the second respondent could have provided a simple income and expenditure account of its business which would have indicated that it was not commercially insolvent, however Mr Mansingh gave some obscure explanation that it owns a filling station which sells 300 000 liters of petrol per month. The filling station in any event is not owned by the second respondent.

[15] During his address Mr Freedman addressed the court on the points that were raised *in limine* relating to the NCA, the formalities relating to service for winding up, such as service on the Master, employees of the second respondent and security for costs. Mr Ford advised that he was not persisting with those points, as there was due compliance with the formalities.

[16] In its heads of argument, the second respondent, avered that the main creditors confirmed that it settled its debts on time. This with the utmost respect is not a suitable defence which would sustain an application to fail and be dismissed. The court is after all called upon to examine the facts of the case before it and would not be swayed by the opinion of a creditor which is 'favoured' by a debtor above others.

[17] The argument that the first respondent ought not to have been joined in this application, once again has no merit, as part B, of the papers merely seeks a winding up of the second respondent. The first respondent was merely cited as an original party to the papers. No order was sought against the first respondent.

[18] Having heard the arguments presented by both parties I am of the considered view that it would be just and equitable to make the following order:

1. That the second respondent be finally wound up;
2. The costs of this application be costs in the liquidation.

Ismail J

Dated: 31 / v / 2016

APPEARANCES:

For the Applicant :

Adv Freedman instructed by

Senekal Simmonds Inc, Attorneys Bedfordview

For the second Respondent:

Adv Ford instructed by Amiraj Bachoo Attorneys

91 Harry Road, Robertsham, Johannesburg

Date of hearing:

10 May 2016

Date of judgment:

31May 2016