

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

CASE NO: 2022/13230

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED: NO

DATE: 3 April 2023

SIGNATURE:

In the matter between:-

MOHALA MOIFO ATTORNEYS INCORPORATED

APPLICANT

and

MAKWE FUND MANAGERS PROPRIETARY LIMITED

RESPONDENT

JUDGMENT

Mazibuko AJ

Introduction

1. This is an opposed application for the final winding up of the respondent in terms of section 345(1)(c) read with section 344(f) of the Companies Act 61 of 1973 ("the Act").
2. The applicant is a company with a registered and trading address in Brooklyn, Pretoria.
3. The respondent is a financial services provider company with a trading address in Sunninghill, Johannesburg.

Factual matrix

4. On 24 June 2020 and 9 July 2020, the applicant deposited an amount of R1 275 000.00, and R151 666.87, respectively, into the respondent's bank account.

5. On 29 July 2020, the applicant and the respondent concluded a mandate agreement (agreement). In terms of which (a) the respondent would invest and manage the applicant's funds, (b) the funds would be paid to the applicant upon notice given to the respondent.
6. On 18 January 2021, the applicant sent notice to withdraw the R1 275 000.00. On 2 February 2021, the applicant requested to withdraw R59 858.87 with interest, leaving a balance of R92 808.00, which would continue generating interest.
7. The respondent paid R59 858.87 to the applicant on 3 March 2021.
8. The applicant sent the respondent an Acknowledgment of debt (AOD) for them to sign and return to the applicant. The respondent did not sign the said AOD.
9. On 22 April 2021, the applicant gave notice of the withdrawal of the entire amount. The respondent did not make the payment after the expiry of the given notice period. On 26 May 2021, he undertook to make a payment of R300 000.00 on 28 May 2021.
10. In July 2021, the applicant sent an email to the respondent attaching a Section 345 of the Companies Act letter of demand.
11. On 6 August 2021, the parties had a meeting, and the respondent undertook to make immediate payment.
12. On 17 August 2021, the respondent requested a three months indulgence to make payment in full and final settlement. The applicant did not accept the settlement proposal.
13. On 28 September 2021, the parties agreed that the respondent would immediately pay R250 000.00 and another R250 000.00 in November 2021. The remaining amount was to be paid in January 2022. On 30 November

2021, the second instalment became due and payable. However, no payment was made by the respondent.

14. On 8 December 2021, the respondent paid R100 000.00, which was R150 000.00 short of the November instalment. The applicant gave the respondent until 17 January 2022 to pay the outstanding amount. The respondent did not make the payment.
15. In May 2022, the applicant commenced the liquidation proceedings against the respondent pursuant to the respondent's alleged failure to pay the applicant a sum of R1 426 666.87, payments made in respect of the JSE investment.

Applicant's case

16. On behalf of the applicant, it was argued that the respondent be finally wound up as it is unable to pay its debts.

Respondent's case

17. The respondent raised two *points in limine*; (a) the settlement agreement represented a loan agreement. (b) The applicant should have instituted proceedings to prove its claim against the respondent before launching the liquidation proceedings.
18. The application is resisted on the following, as stated by the respondent in its answering affidavit; (a) the monies demanded by the applicant are not due, owing and payable as they were invested and lost in the Johannesburg Stock Exchange (JSE). (b) The settlement agreement is void ab initio. (c) The applicant has no locus standi to institute the proceedings as the debt is not due, owing and payable.

Issues

19. The issue for determination is whether merits exist on the raised points in *limine*. Further, whether the applicant has made out a case that the

respondent is commercially insolvent in the sense that it is unable to meet its day-to-day liabilities in the ordinary course of business.

Legal principles

20. Section 345(1) of the Companies Act 61 of 1973 (the Act) provides:

“(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts.”

21. *“Section 344(f) provides, “A company may be wound up by the Court if- the company is unable to pay its debts as described in section 345.”*

22. The Courts have held that in deciding whether or not a company carrying on business should be wound-up as commercially insolvent, the crisp question that a court is called upon to answer is whether or not the company has liquid assets or readily releasable 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. Once the Court finds that the Company cannot meet demands on it from creditors, the Court may, and should, grant the order that the company is wound up. The implications of liquidation are that the Company or business will cease to operate.

Points *in limine*:

(a) The settlement agreement

23. It was argued on behalf of the respondent that the settlement agreement represented a loan agreement between the parties. The settlement agreement was concluded on 28 September 2021.

24. The relevant paragraphs of the settlement agreement are as follows:

“3.1. MMA made payment of the first and second Investments to Makwe pursuant to the Mandate agreement.”

“4.1. Makwe hereby acknowledges that it is currently indebted to MMA in the amount of the indebtedness.”

25. In terms of the Mandate agreement, (a) the respondent would earn 2% for the brokerage, exchange and administration fees, taxes, levies, custodian and bank charges or any other costs. (b) Any of the parties would be entitled to terminate the mandate agreement by giving 30 days' written notice. Upon termination, all costs and fees relating to the mandate agreement would immediately become payable. (c) The applicant undertook not to hold the respondent liable in the event of any loss or damage that may be incurred or suffered as a result thereof unless such loss and damage are as a result of gross negligence or wilful misconduct of the respondent.
26. At the time payments were made to the respondent by the applicant on 24 June 2020, the mandate agreement was not in place as it was concluded on 29 July 2020. However, the applicant paid the said monies more than a month prior. It is unclear what mandate or for what purpose the monies were paid to the respondent before the mandate agreement. It will be accepted that when the mandate agreement was concluded, only then was the respondent given the mandate to invest and manage.
27. The applicant contends that the debt owed by the respondent emanates from the settlement agreement, not the mandate agreement. However, the settlement agreement makes reference to the mandate agreement, and the settlement agreement is not an addendum to the mandate agreement. The mandate agreement was concluded after the payments were made.
28. The respondent agreed with the applicant that the monies paid were later invested at a fee for the benefit of the respondent.

29. The respondent, through its counsel, argued that the said settlement agreement is void *ab initio* as the claimed amounts do not form part of the mandate agreement. The respondent further raised that it was coerced into concluding the settlement agreement. It is not clear on what basis the respondent was coerced into concluding the settlement agreement. I could not find any evidence from the papers filed of record suggesting that the respondent was coerced.
30. On the evidence, it cannot be true that the payments were made pursuant to the mandate agreement for the reasons already discussed in that payments were made before the mandate agreement. Therefore, the argument that the respondent was to invest the monies in terms of the mandate agreement cannot assist the applicant. The mandate agreement does not make a provision for retrospective effectiveness.
31. It is not clear on what basis the respondent is of the view that the settlement agreement represented a loan agreement. On the other hand, the applicant places its reliance on the settlement agreement, which settlement agreement refers to the mandate agreement concluded after payments were already made to the respondent. No cogent facts were placed before the court that the settlement agreement was a loan agreement.

b. Institution of legal proceedings before the winding up application

32. The respondent raised its second point in *limine*, arguing that the applicant needed to institute legal proceedings proving its claim prior to bringing an application to wind it up.
33. The Court may wind up a company if it is unable to pay its debts as described in section 345 of the Act.
34. It was argued that the monies in issue do not form part of the mandate agreement, though it is referred to in the settlement agreement. However, it is

stated that the funds were paid pursuant to the mandate agreement, which was not in place and, therefore, not enforceable.

35. It is not clear at what stage the funds were invested, and that raises the following questions; (a) was it immediately upon receipt by the respondent or after the conclusion of the mandate agreement? If it was after the conclusion, it might be that the instruction was explicit that the funds needed to be invested into the less volatile portfolio. However, where it was before, the question would be (b) In which portfolio would the investment be made? (c) Was there an indemnity clause applicable? There exist material issues of dispute that require to be well-ventilated during oral evidence, as they are not clear from the papers filed of record. For these reasons, it is justified that the application cannot succeed.

The final winding up

36. In terms of section 345, the court would grant an order winding up a company where it is satisfied that the applicant has proven that the company is unable to pay its debts. In *casu*, the respondent denies that it owes the applicant. It stated that it invested the applicant's monies, and they were lost in the JSE market because of the volatile and risky nature of the stock market.
37. Conversely, the applicant argues that the mandate was to invest in a conservative investment which would allow growth at a low level of equity exposure and volatility. It then makes reference to paragraph 5.6 of the mandate agreement, which states that the respondent would maintain records of all transactions and advice taken on behalf of the applicant. In this instance, the applicant must prove the respondent was negligent or dishonest.
38. Section 344 of the Act provides that the court is vested with the power to liquidate a company. It may grant or dismiss any application under section 346, adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just.

39. The respondent has not paid its debts despite demand. It is so that liquidation implies that the business will cease to operate. In my view, a notification not only to the trade unions, employees, SARS and the Master of the High Court but also to other interested parties like creditors and investors is essential.
40. Notwithstanding the application for a final winding up of the respondent, there was no notice to other interested parties, which I found to be important in *casu* when one has regard to the respondent's type of business. It is also not clear how the final winding up of the respondent would benefit other interested parties, which could be other creditors and/or investors of the respondent. What is clear is that the respondent did not pay the applicant according to its demand. The respondent denied its indebtedness towards the applicant, notwithstanding paragraph 4 of the settlement agreement providing that the respondent acknowledges its indebtedness to the applicant.
41. It is trite that once the Court finds that the company cannot pay its creditors, it follows that it is entitled to, and should, hold that it cannot pay its debts and wind up the company. However, in *casu* I find that there are material disputes of facts. The respondent denies its indebtedness to the applicant. It contests that the fact that it has not paid the applicant does not necessarily mean it cannot pay its debts. These issues may be well-ventilated in a trial court. For the reasons already mentioned, I find that no cogent facts were placed before the court that the final winding up of the respondent will be just and equitable.
42. With regard to costs, on filing this application, the applicant became aware of the disputes of facts according to the *Plascon Evans* principle. The disputes were clear from the respondent's answering affidavit. The applicant's replying affidavit did not assist much as more issues became apparent.
43. Consequently, the application cannot succeed. The following order is granted;

Order:

1. The application for winding up is dismissed with costs.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

For the applicant:

ADV K Mashishi

Instructed by:

Edward Nathan Sonnenberg Inc

For the first respondent:

ADV T Mhlanga

Instructed by:

Ngcobo D Attorneys

Hearing date:

31 January 2023

Delivery date:

3 April 2023