

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO

Case No: 2021/46586

(2) OF INTEREST TO OTHER JUDGES: YES/NO

Case No: 2021/46585

(3) REVISED.

.....

9 JUNE 2023

SIGNATURE

DATE

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

SIPHO TSHABALALA

RESPONDENT

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

PHUMELELE EVENTS MANAGEMENT (PTY) LTD

RESPONDENT

Neutral citation: *FirstRand Bank Limited v Siphon Tshabalala* (Case No 2021/46585);
FirstRand Bank Limited v Phumelele Events Management (Pty) Ltd (2021/46586) [2022]
674 (9 June 2023)

Summary:

ORDER

- 1 **Case number 2021/46585:** The application is granted.
- 2 Judgment is granted in favour of the applicant against the respondent, for payment of the sum of R834 950.33 together with interest thereon at rate of prime per annum (currently 7%) plus 9% calculated daily and compounded monthly in arrears from 21 September 2021 to date of payment, both days included.
- 3 The respondent to pay the costs of this application on an attorney and client scale.
- 4 **Case number 2021/46586:** The application is granted.
- 5 Phumelele Events Management (Pty) Ltd is hereby placed under provisional liquidation.
- 6 All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the second respondent on 11 July 2023 at 10:00 am or so soon thereafter as the matter may be heard.
- 7 That service of the provisional order of liquidation be effected:
 - a. on the respondent at its registered office address;
 - b. on the office of the South African Revenue Services;

- c. on any registered trade union, as far as the Sheriff can reasonably ascertain, representing any of the employees of the respondent;
 - d. on the employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's premises, or if there is no such access to the premises by the employees, by affixing a copy to the front gate of the premises from which the respondent conducted any business at the time of the presentation of the application papers;
- 8 That the provisional order of liquidation be published in the Government Gazette and The Star newspaper, alternatively, the Citizen newspaper;
- 9 The costs of the application be costs in the liquidation of the respondent.

JUDGMENT

Windell J:

INTRODUCTION

[1] There are two applications before this court. In the first application, the applicant (FirstRand Bank) seeks payment against the respondent, Mr Sipho Tshabalala, in the amount of R994,514.78 together with interest and costs (*the money judgment*). The claim is founded upon a suretyship agreement concluded by Mr Tshabalala in favour of the applicant and for the debts of Phumelele Events Management (Pty) Ltd ("PEM"). In the second application, the applicant seeks an order for the final winding-up of PEM. It is alleged that PEM is indebted to the applicant in the amounts of R994,514.78 (in respect of a loan agreement entered into between PEM and the applicant during May 2012 ("the loan agreement")) and R435,256.59 (in respect of overdraft facilities). The application is brought in terms of section 344(f), as read with section 345 of the Companies Act 61 of 1973 ("the

Act”), and as read with Item 9 of Schedule 5 of the Companies Act 71 of 2008 (“the 2008 Companies Act”), based thereon that PEM is deemed to be, and is in fact, unable to pay its debts (*the winding up application*). In the judgment Mr Tshabalala and PEM will collectively be referred to as “the respondents”.

[2] The respondents do not dispute the conclusion of any of the agreements with the applicant, but contend that PEM had been unable to comply with the terms and conditions of the loan agreement, due to a situation beyond its control. It is alleged that as a result of the Covid-19 epidemic, a National State of Disaster was declared by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27(1) of the Disaster Management Act 57 of 2002 during March 2020, and a national lockdown was implemented that impacted on the hospitality sector. PEM, which conducts business as a restaurant and bar, was therefore unable to conduct business and generate an income for extended periods, and was unable to service the loan agreement.

THE FACTS

[3] PEM is a property owning entity. Its only director is Mr Tshabalala. PEM conducts its business (the restaurant and bar) from a property in Vilakazi Street in Soweto (“the property”). The business is near the Nelson Mandela House, which is regarded as one of Gauteng’s popular tourist destinations. The business draws its income mainly from overseas tourists and only about 10% of its income comes from the local tourism. The business is privately owned and does not have a state subsidy nor does it receive any financial assistance from the government.

[4] During 2012, business was booming and PEM wanted to expand and renovate the property. Mr Tshabalala, in his capacity as the managing director of PEM, approached the applicant for a loan. On 18 May 2012, the parties concluded the loan agreement. In terms

of the loan agreement, the applicant loaned PEM the sum of R1 million. As security for the loan, PEM registered a first covering mortgage bond in favour of the applicant and over the property and Mr Tshabalala concluded the suretyship in favour of the applicant. In terms of the suretyship, Mr Tshabalala bound himself as surety and co-principal debtor for the debts owed by PEM to the applicant. The amount recoverable from Mr Tshabalala was limited to R1 million together with interest and legal costs. It was agreed that a certificate of balance shall be *prima facie* evidence of the debt owed to the applicant.

[5] PEM breached the terms of the loan agreement by failing to make payment of the monthly instalments, as well as failing to make payment of the municipal service fees for the property. As at 10 August 2021, PEM was indebted to the City of Johannesburg in an amount of R22,598.78. It also failed to make timeous payment of the amounts due in terms of its FNB Business Overdraft Facility, which triggered a cross default in terms of clause 10.1.16 of the standard terms and conditions of the loan agreement which provides that an event of default shall occur if:

‘10.1. The Borrower and/or any of the Security providers default on the due payment or due performance of any amount payable or obligation to be performed under any agreement (and irrespective at whether or not such agreement is with the Bank or a third party) which amount or which obligation the Bank considers to be material.’

[6] As a result of the aforesaid breaches, the applicant addressed a letter of demand to PEM on 2 August 2021. PEM was informed that its loan account was in arrears in the amount of R16,807.43 which amounts to an event of default in terms of clause 10.1.2 of the standard terms and conditions of the loan agreement; and that it was also in default of its FNB Business overdraft facility, which event the applicant considers to be material and has triggered an event of default in terms of clause 10.1.16 of the standard terms and conditions of the loan agreement, referred to above. PEM was advised that as a result of its default of

the FNB Business Overdraft Facility, the full outstanding balance of R435,256.59 would become due, owing and payable on 10 August 2021. The applicant requested PEM to provide it with written confirmation that the property was insured and that all insurance premiums have been paid up to date, and was advised that should it fail to make payment of the arrears within 7 days of the date of the letter, or in the event of any further defaults of its loan repayments, the applicant would have the right to: (a) claim immediate payment of the outstanding loan balance; (b) charge interest on the outstanding loan balance and the default penalty rate of 5% from the date of default until the date on which the default is rectified; and (c) levy execution against the property.

[7] PEM did not respond to the letter and failed to make payment of the arrears. Consequently, on 12 August 2021, PEM's account was handed over to the applicant's commercial recoveries department. Shortly after, on 19 August 2021, the matter was handed over to Werksmans Attorneys ("Werksmans"), the applicant's attorneys of record, to proceed with legal action against the respondents.

[8] On 19 August 2021, Werksmans dispatched a letter of demand in terms of section 345(1)(a)(i) of the Act, read with item 9 of Schedule 5 of the 2008 Companies Act to PEM ("the section 345 notice"). In terms of the section 345 notice, PEM was, *inter alia*, advised of the abovementioned breaches; called upon to make payment to the applicant of the full amount outstanding in terms of the loan agreement (R831,388.70 at the time, plus interest); and advised that should it fail to pay, secure or compound for the indebtedness to the reasonable satisfaction of the applicant within three weeks, PEM would be deemed to be unable to pay its debts.

[9] The section 345 notice was sent to PEM by email and was served on PEM's registered address on 31 August 2021. The respondent failed to adhere to the statutory demand in

that it failed to make payment of the indebtedness or to secure or compound for it to the reasonable satisfaction of the applicant.

[10] It is alleged in the founding affidavit that as at 29 September 2021, PEM was in arrears in respect of the loan agreement in an amount of R48,106.35.

[11] On 31 August 2021, Mr Tshabalala contacted Neo Kgame ("Kgame") of Werksmans telephonically to request a meeting with the applicant's 'Commercial Recoveries Manager' ("Ndimande") to discuss settlement of the matter. On 1 September 2021, and in response to Mr Tshabalala's request, Kgame addressed the following email to Mr Tshabalala:

'Dear Mr Tshabalala. I refer to our telephone discussion of 31 August 2021. Please take note that our client has agreed to have a meeting with you and our offices for purposes of discussing your settlement proposal. In this regard, our client is available during the following dates and times: 2 September 2021, between 9h00 and 13h30; and 3 September 2021, between 10h30 and 13h30. Once you have confirmed your availability during any one of the above time slots, I will send out a teams meeting invite.'

[12] On 2 September 2021, Mr Tshabalala sent an email to Kgame advising that he was at a school camp that week. He also requested for the meeting to be held the following week. On 8 September 2021, Kgame addressed a further email to Mr Tshabalala to make arrangements for a meeting. On 14 September 2021, Mr Tshabalala contacted Kgame telephonically to advise that he had fallen ill and as a result was not able to respond to the earlier email, but once again requested Kgame to make arrangements for a meeting to discuss settlement of the matter.

[13] On 15 September 2021, Kgame again addressed an email to Mr Tshabalala proposing various dates and times for the meeting and requested that Mr Tshabalala revert regarding

his availability. Mr Tshabalala did not respond. On 22 September 2021, Kgame addressed the following email to Tshabalala:

'Dear Mr Tshabalala We have tried to on multiple occasions to contact you to arrange a meeting, however, our emails and telephone calls remain unanswered. Take note that in the absence of receiving a settlement proposal from you to settle the debt owed to our client, we hold instructions to proceed with further legal action. We therefore trust that the above will not be necessary and urge you to contact our offices as soon as possible to discuss settlement of this matter. Kind regards"

[14] On 27 September 2021, Mr Tshabalala contacted Kgame telephonically. He confirmed receipt of the email dated 22 September 2021, and advised that the reason he did not respond was because he was travelling and did not have access to emails. He told Kgame that he would contact Kgame the next day (28 September 2021) as to his availability for a meeting to discuss settlement of the matter. Mr Tshabalala failed to contact Kgame on 28 September 2021 and it is alleged that he has made no further attempts to make arrangements with Kgame or Ndimande to discuss settlement of the matter, despite the multiple opportunities extended to him by the applicant to do so.

[15] It is alleged that as a result of the breach of the loan agreement, the full amount outstanding in terms thereof became immediately due, owing and payable. The respondent is therefore indebted to the applicant in respect of the loan agreement in the amount of R834,950.33 together with interest thereon at rate of prime per annum (currently 7.00%) plus 0.9%, calculated daily and compounded monthly in arrears from 21 September 2021 to date of payment, both days inclusive,. A certificate of balance confirming the aforesaid indebtedness was attached to the founding affidivat.

[16] It is submitted that PEM continues to incur expenditure in the form of rates and taxes, insurance, electricity and water expenses and its liabilities are increasing at a rapid rate. It

is argued that the failure by PEM to make payment to the applicant, despite demand, leads to the only reasonable inference, namely that PEM is unable to pay its debts within the meaning of the s 345 of the Act.

[17] PEM opposes the application and submit that sufficient security for the loan was provided to the applicant, as the value of the property in 2012 was just above R2,500 000.00. This property is now valued at just over R4,500 000.00, due to the improvements made on it as well as the rezoning of the property. It is argued that the security held by the applicant and the amount owed may still be recovered if PEM and/or Mr Tshabalala fail to meet their financial obligations.

[18] The respondents allege that PEM has been unable to make payment to the applicant, due to a situation beyond its control, which situation had a material adverse effect on PEM's financial position. On 26 March 2020 the President of South Africa, placed the whole country under strict lockdown as a result of the Covid-19 pandemic. In terms of the lockdown regulations, the government prohibited all travel for leisure and business, sale and consumption of alcohol on and off premises, eating at restaurants and visiting of tourism destinations. PEM could not conduct its business of a restaurant, sell alcohol and host events for a period of more than 8 months. As a result, PEM did not generate any income and both PEM and Mr Tshabalala could not meet their financial obligations. It is alleged that the applicant had always known that PEM is involved in the hospitality sector, which has been grossly affected by the Covid-19 regulations. It is submitted that the applicant was obliged in these circumstances to review and/or suspend the enforcement of the terms of the loan agreement, and/or allowing PEM a payment reprieve for the period to which the lockdown restrictions were applicable.

[19] The respondents submit that although PEM's financial situation has not improved since the lockdown, they have always been prepared to enter into an acceptable payment plan with the applicant. That is if the applicant was prepared to implement the provision of clause 10.1.34 read with clause to 10.2.3 and 10.2.10 of the standard terms and conditions of the agreement. It is further submitted that the applicant is estopped from enforcing the loan agreement or cancelling it, unless it first implements those provisions in the loan agreement.

[20] The respondents aver that they wanted to negotiate a payment plan with the applicant, but that the applicant insisted on at least 50% payment of all its credit facilities held by PEM. This demand was impossible to achieve given the fact that PEM's business has suffered immensely during the lockdown period. The respondents still tender payment in respect of the outstanding amount and the arrears owing, on monthly instalments to be agreed upon between the parties, and the applicant is requested to 'negotiate in good faith' with PEM and 'not to impose payment terms that would render fruitless any attempts to settle the arrears owing'.

[21] It is submitted that before the lockdown was implemented PEM had 'always made payments religiously,' and only started defaulting on its financial obligations when the national state of disaster was announced and the strict lockdown regulations were enforced in the travel and tourism industry. It is averred that the applicant is the only creditor who refuses to accept a payment plan which is affordable to the respondents.

THE WINDING-UP

[22] The application is brought in terms of section 344(f), as read with section 345 of the Act, and as read with Item 9 of Schedule 5 of the 2008 Companies Act, based thereon that the respondent is deemed to be, and is in fact, unable to pay its debts.

[23] Section 344 of the Act provides the circumstances in which a company may be wound up by the Court. Subsection (f) provides that a company may be wound up by the Court if it is unable to pay its debts as described in Section 345, which in turn provides:

'345. When company deemed unable to pay its debts.—

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

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—

(i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or

(c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.'

[24] In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*,¹ the Supreme Court of Appeal ("SCA") discussed the difference between factual insolvency and commercial insolvency. It is apt in the circumstances to quote the remarks in some detail:

'[16] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities)....

[17] That the company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a Court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money — and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities

¹ 2014 (2) SA 518 (SCA)

than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies ...

[23] ... The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound up in terms of the new Act or the old Act....

[24] Factual solvency in itself is accordingly not a bar to an application to wind up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See *Johnson v Hirotec (Pty) Ltd*. It follows that a commercially solvent company (whether factually solvent or insolvent) may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act."

[25] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. This is known as the "Badenhorst-rule". Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on the respondent to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.²

[26] PEM does not dispute its indebtedness to the applicant and admits that it is unable to make payment of the debt. PEM, however, opposes the application and raises three defences: (a) The applicant has sufficient security for its claim against the respondent; (b) The applicant was required to impose the provisions of clause 10.1.34, read with clause 10.2.3 and 10.2.10 of the standard terms and conditions of the loan agreement, as the PEM's failure to honour the loan agreement occurred as a result of a situation beyond

² *Afgr Operations Ltd v Hamba Fleet Pty Ltd* ZASCA 24 (24 March 2017) at [6].

everyone's control; and (c) The Covid-19 Pandemic and the lockdown had a negative impact on PEM's business which resulted in the default.

The First Defence: The Property

[27] The fact that there is security for the applicant in the form of the property and that PEM's assets exceeds its liabilities, is no defence to the winding-up application. In *Absa Bank Ltd v Rhebokskloof Pty Ltd and Others*,³ the court held that '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 s345(1)(c) as read with s344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

[28] In *Murray NO and Others v African Global Holdings Pty Ltd and Others, (African Global Holdings)*,⁴ the SCA clarified what is meant by "liquid assets" or "readily realisable assets".

'[29] 'Liquid assets' in this context mean assets that are available to the company for the purpose of meeting its obligations. These will include not only cash on hand, but receipts that it can expect to receive in the ordinary course; overdraft or other banking facilities that can be used to make payment of debts when they fall due; or assets, such as shares, bonds or book debts, that can be realised

³ 1993 (4) SA 436 (C) p440 F-H.

⁴ 2020 (2) SA 93 (SCA).

quickly so as to generate cash with which to pay debts. When, for whatever reason, a company is unable to access any liquid assets it is illiquid and unable to pay its debts as they fall due...

[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company— '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? Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.'

[29] The SCA in *African Global Holdings* confirmed that in respect of a company which has assets and seeks to oppose its winding-up, the test to be applied is whether were those assets to be sold, the company would thereafter be able to continue normal trading. In the event that following the sale the company would be unable to continue normal trading, the company should be placed in winding-up. In respect of a company which has assets, a distinction must be drawn between a company which can realise those assets and still carry on its business (its normal trading), and a company, the realisation of the assets of which would result in its being unable to carry on its business. In the circumstance in which the company has assets, but the sale of which would although paying the debt render the company either unable to carry on its business or result in the company being too crippled to carry on its business, the proper (and in fact only) approach is to order the winding-up.

[30] The defence raised by PEM falls squarely within the judgment of *African Global Holdings*. The property is the main asset of PEM and is the premises from which it runs its

restaurant and bar. If the property is sold it would in effect be the end of PEM's business, as PEM would be unable to continue its normal trade. In *African Global Holdings* the Court held that in the event that following the sale of the company's property, the company would be unable to continue its normal trading, the company should be placed in winding-up.⁵

The Second Defence: Clause 10.1.34

[31] PEM alleges that, as a result of the pandemic, the applicant was obliged to review the terms of the loan agreement. In support of this defence it rely on clause 10.1.34 of the standard terms and conditions of the loan agreement.

[32] The clause relied upon is of no assistance to PEM, as that clause provide the applicant (and not PEM) with the right to review the terms of the credit assessment and to suspend the obligations of *the applicant* (emphasis added). The obligations of the applicant relate to the disbursements of funds and not to PEM's obligations to make repayment of the funds already disbursed.

[33] PEM also contends that the applicant is estopped from relying upon and from enforcing the terms of the loan agreement. The reliance on estoppel is misconceived. The essential elements of estoppel are: a representation by words or conduct of a certain factual position; a reliance upon the correctness of the facts represented; the party so acted to its detriment; and the representation was negligently made.⁶

[34] In the answering affidavit, there are no allegations to support estoppel. There was no representation by any person as to a certain factual position, nor is any detriment alleged by the respondent or to PEM. There is no basis for the applicant to be estopped from relying

⁵ See also *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd* 1954 (1) SA 231 (E) at 239 B-D.

⁶ Amler's Precedents of Pleadings, 8th edition, p186.

upon the terms of the loan agreement. The conclusion of the loan agreement together with its terms is admitted by PEM and is common cause between the parties. The debt owed by PEM to the applicant in respect to the loan agreement is also admitted. As a result, the defence must fail.

The Covid-19 Pandemic

[35] Where no *force majeure* clause exists in a contract, the common law would assist a party, in a similar fashion as a *force majeure* clause. This protection is known as ‘supervening impossibility’. PEM alleges that the Covid-19 pandemic resulted in a supervening impossibility, and as a result of pandemic and lockdown, it is excused from repaying the loan.

[36] The Disaster Management Act, as well as the regulations published as a result thereof, addressed the need to reduce the movement of people and the capacity of gatherings during the pandemic and to reduce the spread of Covid-19 and its variants. The Disaster Management Act did not in any way deal with or expunge parties’ obligations to make repayment of loans or to perform in respect to commercial agreements. The Department of Trade and Industry did, however, issue Covid-19 ‘Block Exemption for the Property Retail Sector’ (GG 43134) on 24 March 2020. The purpose of the regulation was to enable the property retail sector to minimise the detrimental impact of the lockdown in relation to its financial obligations. The regulation allowed landlords and tenants to enter agreements for, among others, payment holidays and/or rent discounts for tenants and to limit evictions.

[37] The defence raised by PEM was also raised by the respondent in the matter of *Slabbert NO and others v Ma-Afrika Hotels (Pty) Ltd.*⁷ In that matter the SCA upheld an appeal of the

⁷ 2022 JDR 3193 (SCA)

Western Cape High Court and granted an ejectment order in favour of the appellant. Although the matter dealt with a lease agreement and not a loan agreement, the facts are similar. In 2020, the respondent (Ma-Afrika) fell into arrears with its rental payments and related charges for one of its properties, Rivierbos Guest House in Stellenbosch. The lease agreement did not contain a *force majeure* provision. Ma-Afrika's primary defence was that, as a result of the pandemic and the lockdown, it was impossible to perform its obligations in terms of the lease. It set out the periods during which it was alleged that it did not earn any revenue and the occupancy rate for the whole of the period the lockdown regulations were in operation. The High Court dismissed the application for eviction, but it ordered Ma-Afrika to pay the amount claimed with interest. The SCA stated that on the facts, it was unnecessary to decide whether the restrictions in force between 26 March and 20 September 2020 constituted a supervening impossibility of performance that discharged Ma-Afrika from liability to pay the full rent, but found that the period after 20 September 2020 was "on a different footing", as there was no government-imposed bar to trading at that stage. Molemela JA (as she was then) held as follows:

'It stands to reason that even if it were to be accepted in the respondent's favour that the Covid-19 regulations which prevented or restricted trade were behind the respondent's default in the payment of rental, there was no justification for such default beyond 20 September 2020 despite the diminished commercial ability that may have resulted from the Covid-19 pandemic. As I see it, the doctrine of impossibility of performance could not conceivably have been triggered beyond 20 September 2020.'⁸

[38] The Court was therefore satisfied that the Covid-19 regulations post 20 September 2020, when there was no government bar to trading, did not entitle the tenant to remission of rental. It held that '[u]nder these circumstances, the question raised for consideration by

⁸ Ibid para 25

the High Court – namely, whether the right to cancel the lease and claim eviction from the premises was unaffected by the trust’s alleged inability to perform (by providing beneficial occupation) – simply does not arise.’ The Court also left open the question whether the Covid-19 regulations operating up to mid-September 2020 constituted a supervening impossibility entitling the tenant to remission of rental.

[39] The applicant relies on the judgment of *Nedbank Limited v Groenewald Familie Trust (Groenewald)*,⁹ in support of its argument that the Covid-19 regulations and the restrictions brought about by the pandemic, did not constitute a supervening impossibility. The facts in Groenewald were briefly as follows: Nedbank and the Trust had concluded a loan agreement and a mortgage bond had been registered in favour of Nedbank. The defendants breached the terms of the loan agreement and fell into arrears. Nedbank sought an order for summary judgment and the defendants alleged that as a result of the lockdown, it was impossible to perform in terms of the agreement.

[40] The court considered the nature of the agreement and held that as a result of the agreement being a loan and mortgage, that ‘the defendants undertaking to make payments timeously were not dependant on the first defendant’s businesses being able to generate an income (emphasis added). The agreement was thus disassociated from the business.’¹⁰ In regards to the defendant’s repayment obligations, the court held:

‘The Covid-19 pandemic and its crippling effect on the economy and businesses in general must be recognised when considering matters where it caused persons to default on their obligations. Not doing so would undermine the severe effect the pandemic had and continues to have. It would, however, be untenable that persons in default with a means of avoiding or minimising their failure to honour their obligations be allowed to use the pandemic as a shield to deprive creditors of what they

⁹ *Nedbank Limited v Groenewald Familie Trust & others* (3809/2020) [2021] ZAFSHC 150 (2 June 2021).

¹⁰ *Nedbank Limited v Groenewald Familie Trust & others* at [14].

are rightfully entitled to. I find that the restrictions brought about by the pandemic did not constitute a supervening impossibility in the present circumstances'.¹¹ (emphasis added)

[41] The Trust also alleged that Nedbank was required to restructure the loan. In regard to this defence, the court held:

'The point taken by the Defendants that the Plaintiff refused to restructure their debt holds no merit as a defence. A restructuring of the terms of a loan, usually involves variation of the existing agreement. Where one party is unwilling to amend the agreement, which it is entitled to, the defaulting party cannot be permitted to rely on the refusal of the innocent party to waive its rights under the agreement as a defence to resist summary judgement'.¹²

[42] I agree with the reasoning and the result in *Groenewald*. The facts are, however, distinguishable from the facts *in casu*. In the present matter it is common cause that the purpose of the loan was to enable PEM to refinance, expand and renovate the property. The applicant was further aware that the property is being utilized as a restaurant and a bar. A case can be made that making payments timeously were *dependant* on PEM's businesses being able to generate an income and that the agreement in the present matter is not disassociated from the business.¹³

[43] PEM, however, failed to provide sufficient facts in support of this defence. It did not set out the periods PEM was not allowed to operate under the different lockdown levels and the impact of those specific periods on its business. It also failed to produce any financial statements for that period to show the connection between the lockdown and its ability to make timeous payments. In its heads of argument, PEM mentioned that there were two

¹¹ *Nedbank Limited v Groenewald Familie Trust & others* at [17].

¹² *Nedbank Limited v Groenewald Familie Trust & others* at [23].

¹³ Also see *Standard Bank Namibia Limited v A - Z Investments Holdings (Proprietary) Limited* 2022 JDR 0043 (MN), in which the court held that the mortgage loan agreement was not conditioned subject to the defendants' business generating an income or not.

other directors of PEM (who are also sureties) that have been assisting with payments on behalf of PEM and who were still willing to assist in paying the loan agreement and the arrears. Those facts, however, do not form part of the papers before this court and the applicant did not have an opportunity to consider it. Therefore, those facts cannot be considered. PEM further failed to indicate whether it approached the applicant for a 'payment holiday', or to provide sufficient details about its attempts to negotiate a settlement of the arrears.

[44] Even worse for PEM is the allegation from the applicant (albeit in reply), that even prior to the lockdown it was in arrears with its payments on the loan agreement and therefore not in good standing. In *Firststrand Bank Limited v Pillay*,¹⁴ a matter in which a defaulting creditor had sought to rely on the Covid-19 lockdown as a basis for supervening impossibility, the court per Baqwa J dismissed the defence and stated that 'the said breach did not begin with the lockdown, he was in breach even before the lockdown began, yet he opportunistically clutches on the consequences generally arising from the impact of covid and the lockdown regulations to raise them as a defence.'¹⁵

[45] Due to lack of information, the defence of supervening impossibility did not arise and could not be considered by this court.

Discretion under section 347 of the Act

[46] After the hearing and during the preparation of this judgment, the court requested the parties to deliver supplementary heads of argument in respect to two issues: One, the applicability of section 347 of the Act on the present application. Two, the remarks made by Surtherland J (as he then was) in *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity*

¹⁴ *Firststrand Bank Limited v Pillay* 2021 JDR 1815 (GP).

¹⁵ *Firststrand Bank Limited v Pillay* at [19].

Group (Pty) Ltd and Another (Newcity).¹⁶ Only the applicant subsequently delivered supplementary heads or argument, for which I am grateful.

[47] Section 347 provides that: '(1) 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...**' (emphasis added)

[48] In *Newcity* the court utilized s 347 and discharged the provisional order:

'[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."

[49] The court then proceeded to make an order which provided for the sale of certain *Newcity* properties to settle and pay the debt owed to ABSA Bank. This order was granted on the basis that it was only the ABSA debt which was unpaid and that all other debts were being met. It also took into consideration that there were sufficient properties which could be sold in order to satisfy the ABSA debt in full and allow the company to then continue as a going concern (that is considering that the other debts were being paid).

[50] I am satisfied that the facts in the present matter are distinguishable from those in *Newcity*, and that the approach adopted by that court would not be suitable in the current circumstances. In *Newcity* the court had available the relevant facts as to the other debts

¹⁶ [2013] 3 ALL SA 146 (GSJ)

which *Newcity* was paying and the other funds available to satisfy the ABSA debt in full as these facts were set out in the business rescue application. In the present application, PEM has not set out whether there are any other debts which are paid or unpaid, the amounts of such debts and the amounts of the arrears. It has also not set out whether there is cash available to satisfy the applicant's debt in full and any information regarding the financial position of PEM.

[51] In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings*¹⁷ the court referred to *Newcity* and held as follows:

'[17] The extent of this discretion was the subject of some debate. Mr Van Coller referred to the traditional view that where a company is unable to pay a creditor's claim the latter is *ex debito justitiae* entitled to a winding-up order and that the court's discretion to refuse is narrow (*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597E – F; *Sammel and Others v President Brand Gold Mining Co Ltd* E 1969 (3) SA 629 (A) at 662F; *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440H – 441B). Although the *ex debito justitiae* maxim has been repeated in recent cases, there are other decisions holding that the legislative policies underlying the new Act require the discretion to be viewed more broadly in favour of saving ailing companies (see *Absa Bank Ltd v Newcity Group (Pty) Ltd and Other Cases* F [2013] 3 All SA 146 (GSJ) paras 29 – 33; *Dippenaar NO and Others v Business Venture Investments No 134 (Pty) Ltd* [2014] 2 All SA 162 (WCC) paras 45 – 46). Where there are competing applications for liquidation and business rescue, the policy considerations underlying the business rescue procedure must inevitably derogate from the traditional approach. The two cases just mentioned extended this approach to circumstances where, although there were not competing business rescue applications, there was evidence that the companies could be saved by transactions of which particulars were furnished." (emphasis added)

¹⁷ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 44.

[52] I agree with counsel for the applicant, Mr Gibson, that there is no evidence furnished by respondents in this application to show that the company could be saved. The bald and unsubstantiated submissions by the respondents are insufficient and are not evidence on which the court can rely to grant any order other than an order for the winding-up of the respondent. Moreover, although section 347 provides the court with a discretion to make 'any other order it may deem just', PEM has not provided the court with the necessary facts as to whether there are any other creditors, whether PEM is making a profit, or whether PEM has funds available to settle the debt owed to the applicant in full.

CONCLUSION

[53] Section 345(1)(a) provides for a rebuttable presumption of commercial insolvency. It assists creditors who have no or little knowledge of a company's affairs, to apply for its winding-up based on commercial insolvency, by delivering a statutory demand to the respondent company's registered address and if the respondent company fails or neglects to pay, secure or compound for the indebtedness, it is deemed to be commercially insolvent. The SCA in *Hamba Fleet* held that where the respondent's indebtedness has been established prima facie, the onus is on the respondent to show that its indebtedness is disputed on bona fide and reasonable grounds.¹⁸

[54] In *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*,¹⁹ the court held that a company that has failed on demand to pay a debt which is due, is cogent prima facie proof of an inability to pay its debts. The court held: '... the Court can wind up a company if it is commercially insolvent, that is, if it is unable to meet its current liabilities, including contingent and prospective liabilities as they come due. The proper approach in deciding

¹⁸ *Hamba Fleet* supra para 6.

¹⁹ *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D).

the question whether a company should be wound up on this ground appears to me, in the light of what I have said, to be that, if it is established that a company is unable to pay its debts in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency in that it is unable to pay its debts'.

[55] The debt owed to the applicant is not disputed by the respondents. PEM has admitted that it is unable to pay the debt. The service of the statutory demand, the indebtedness of PEM has been established *prima facie*, with the result that the onus is on PEM to show that it is not insolvent. PEM has placed no financial information before the court from which it could allege that it is not insolvent. It can, therefore, be accepted that PEM is insolvent. The sale of the property would not remedy PEM's insolvency as it trades and operates its business from the property, with the result that the sale of the property would in effect be the end of PEM's business, leaving it unable to continue normal trading. PEM further failed to set out sufficient facts to consider the supervening impossibility defence. In general, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a respondent company that has not discharged the debt. The discretion of the court to refuse to grant a winding-up order where an unpaid creditor applies therefor, is a very narrow one that is rarely exercised and in special or unusual circumstances only.²⁰

[56] If a provisional order of liquidation is made, the applicant needs only to demonstrate a *prima facie* case in favour of the applicant. It has succeeded in doing so. Under the circumstances a provisional order is granted.

²⁰ *Hamba Fleet* supra para 12.

THE MONEY JUDGMENT

[57] Mr Tshabalala has bound himself as surety and co-principal debtor for the debt of PEM. His obligations are therefore co-equal with those of PEM, the principal debtor. In *Millman v Masterbond Participation Bond Trust Managers (Pty) Ltd*,²¹ Friedman JP held that the surety's debt becomes enforceable as soon as the principal debtor is in default. And if the surety has also bound himself as co-principal debtor, then his debt becomes enforceable at the same time as the principal debt.²²

[58] Mr Tshabalala also renounced the benefit of excussion. A creditor who has commenced action against the principal debtor is not bound to proceed to final excussion, but may, even after judgment, turn his sureties surety, who are such without the benefit of excussion because the surety is bound until payment of the debt.²³ In *Consolidated Textile Mills Ltd v Weiniger*,²⁴ the court held as follows:

'As a co-principal debtor the defendant's liability is co-equal in extent with that of the principal debtor (Union Government v Van der Merwe, 1921 T.P.D. 318) and the defendant can be sued for any debt incurred by the company to plaintiff in respect of goods supplied, as soon as that debt becomes due. It will not even be necessary to excuss the company before suing the defendant, and subsequent liquidation of the company can in no way affect this right to sue. Even in his capacity as a surety, having renounced the benefits of excussion, defendant would not have been able to resist a claim by plaintiff prior to the liquidation of the company in respect of such a debt which was due, and he would not have to wait for any dividend to be declared in the principal debtor's insolvent

²¹ *Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) and Others* 1997 (1) SA 113 (C).

²² *Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) and Others* at p123 A-B.

²³ Caney, at p135.

²⁴ *Consolidated Textile Mills Ltd v Weiniger* 1961 (3) SA 335 (O).

estate before suing the surety (Rogerson, N.O v Meyer and Berning, 2 M.38; Lindley v Ward, 1911 CPD 21).²⁵ (emphasis added)

[59] The applicant's claim against PEM and the likely liquidation of PEM therefore is of no consequence to the applicant's claim against Mr Tshabalala as surety to PEM. PEM is in breach of the loan agreement and as a consequence, the applicant is entitled to pursue its claim against Mr Tshabalala as surety and co-principal debtor, who has expressly renounced the benefit of excussion.

[60] PEM's debt and Mr Tshabalala's debt as surety to the applicant has increased from R834,959.33 to R994,514.78 between 21 September 2021 and 3 June 2022. The updated certificate of balance was attached to the papers.

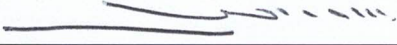
[61] Mr Tshabalala has not raised a valid defence to the applicant's claim. Accordingly, the applicant is entitled to judgment.

[62] In the result the following order is made:

- 1 **Case number 2021/46585:** The application is granted.
- 2 Judgment is granted in favour of the applicant against the respondent, for payment of the sum of R834 950.33 together with interest thereon at rate of prime per annum (currently 7%) plus 9% calculated daily and compounded monthly in arrears from 21 September 2021 to date of payment, both days included.
- 3 The respondent to pay the costs of this application on an attorney and client scale.
- 4 **Case number 2021/46586:** The application is granted.
- 5 Phumelele Events Management (Pty) Ltd is hereby placed under provisional liquidation.

²⁵ *Consolidated Textile Mills Ltd v Weiniger* p338.

- 6 All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the second respondent on 11 July 2023 at 10:00 am or so soon thereafter as the matter may be heard.
- 7 That service of the provisional order of liquidation be effected:
- a. on the respondent at its registered office address;
 - b. on the office of the South African Revenue Services;
 - c. on any registered trade union, as far as the Sheriff can reasonably ascertain, representing any of the employees of the respondent;
 - d. on the employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's premises, or if there is no such access to the premises by the employees, by affixing a copy to the front gate of the premises from which the respondent conducted any business at the time of the presentation of the application papers;
- 8 That the provisional order of liquidation be published in the Government Gazette and The Star newspaper, alternatively, the Citizen newspaper;
- 9 The costs of the application be costs in the liquidation of the respondent.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

(Submitted electronically, therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 June 2023.

APPEARANCES

Counsel for the applicants:	Advocate Christopher Gibson
Attorney for the appellant:	Werksmans Attorneys
Counsel for the respondent:	Mr T. Hadebe
Attorney for the respondent:	Hadebe Attorneys
Date of hearing:	6 February 2023
Additional heads of argument filed:	2 June 2023
Date of judgment:	9 June 2023