

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>13/01/2023</u>	
DATE	BARIT AD

CASE NO: 62512/2020

In the matter between:

**The Land And Agricultural Development Bank
of South Africa**

Applicant

and

Dinala Africa (Pty) Ltd

Respondent

JUDGEMENT

Introduction

- [1] This is an application by the Land and Agricultural Development Bank of South Africa seeking that the estate of the respondent Dinala Africa (Pty) Ltd be placed under a final winding up order, or alternatively to be placed in provisional liquidation in the hands of the Master.
- [2] The Land and Agricultural Development Bank of South Africa ("The Land Bank") is a juristic person trading in terms of the Land and Agricultural Development Bank Act 15 of 2002.
- [3] Dinala Africa (Pty) Ltd ("Dinala") is a private company with registration no. 2016/331881/07 an entity duly registered in accordance with the Company Laws of the Republic of South Africa.
- [4] The applicants' case is that:
 - (a) Dinala is unable to satisfy its debts as and when they are due and thus commercially insolvent
 - (b) Dinala is in dire financial straits and is conducting business in insolvent circumstances
 - (c) Dinala is deemed to be insolvent within the meaning of Section 344 (f), read with the provisions of Section 345 (1) (a) and 345 (1) (c) of the Companies Act 61 of 1973
 - (d) It would be just and equitable to wind-up Dinala

- [5] The applicants believe that it would be correct for either a final winding up Order of the respondent in terms of Section 344 (h) of the Companies Act of 1973 be granted or alternatively that the matter be placed in the hands of the Master pending a return date.
- [6] Dinala does not deny that there is a liability to the Land Bank, however, offers numerous reasons as to why the matter should not result in one of the two alternative orders that the Land Bank is seeking.

The Debt

- [7] The debt arose from various loans and advancements of moneys to Winsbeslis Vyf (Pty) Ltd (the "principal debtor"). Dinala bound itself jointly and severally as surety and co-principal debtor in solidum with the principal debtor for the repayment on demand of all or any sum or sums of money which the principal debtor may from time to time owe or be indebted to The Land Bank. The Land Bank states that with arrears of R15 million Dinala requested a restructuring of its indebtedness. A notice in terms of Section 345, of the Companies Act, was delivered to Dinala's registered address.

The Application

- [8] The crux of the matter is:

Firstly, whether Dinala is factually solvent.

Secondly, whether a winding up order would be just and equitable given the circumstances of the matter.

The Law

[9] The Companies Act 61 of 1973, makes certain provisions. Section 344 f states

“A company may be wound up by the Court if the company is unable to pay its debts as described in Section 345.”

Section 344 h states:

“A company may be wound up by the Court if it appears to the Court that it is just and equitable that the company should be wound up”.

Section 345 deals with when the company is deemed unable to pay its debts – with Section 345 (1) (c) stating:

“A company or body corporate shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts”

[10] *ABSA Bank Ltd v Rheebooskloof (Pty) Ltd and Others* (4) SA 436 (c) at p440 f, the following was stated:

“The concept of commercial insolvency as a ground for winding up is imminently 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 already 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 in order to 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 a company unable to pay its debts within the meaning of Section 345 (1) (c) as read with Section 344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.”

[11] In the matter of *Murray NO and Others v African Global Holdings (Pty) Ltd and Others*, 2020 (2) SA 93 (SCA) at para 31:

“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 therefore to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?”

The current situation

[12] The response of Dinala, is that the application of the Land Bank should fail due to certain current circumstances affecting their current inability to pay.

Further, Dinala has raised certain defences:

- (a) That the respondent is factually solvent
- (b) The founding Affidavit is not properly commissioned
- (c) The applicant is not properly authorised
- (d) Relevant agreements were not annexed

- (e) Interest rates charged on the loan by the applicant is incorrect
- (f) Certain certificates, with respect to balances owing, were not annexed
- (g) That the applicant is opposed to mediation
- (h) That a winding up order would not be just and equitable in the circumstances

Rate of Interest

[13] Dinala takes issue with the accuracy of the Certificate of Balance of The Land Bank. This is on the basis that same reflects an incorrect rate of interest. The Land Bank maintains that this does not effect the capital amount outstanding and payable by Dinala to The Land Bank. This, method of defence, was raised in *Prudential Shippers Ltd v Tempest Clothing Co (Pty) Ltd and Others* (1976) 2 (SA) 856 W at 861 F. In that matter McEwan J remarked:

"In most cases of applications for winding-up it will not assist the respondent to show that the claim upon which the applicant relies to give him locus standi falls to be reduced by the elimination from it of excessive finance charges. The very suggestion carries an implicit admission that there is a portion of the claim that is payable. The Company's Act does not require an application for winding up order to have a claim for a minimum amount, such as is required in the case of a petition for sequestration in terms of Section (9) (1) of the Insolvency Act."

The one aspect which stands out pertinently is that the admission by Dinala that the interest was not charged correctly, constitutes an admission that there is an amount owing. Further, if such interest rates were incorrectly charged the only way such could form a complete defence is if on a reconstruction of the debt, it was shown that if the correct interest rate had been charged, there would not be a debt in existence.

The Founding Affidavit

- [14] Dinala maintains that the Founding Affidavit was not properly commissioned. This Dinala basis on the he/she reference of the founding affidavit, not having one of the two pronouns crossed out. In *Malan vs Minister of Police NO and Others* (2013) (5) S.A. 563 para 20, such was dealt with by the Court. As such, the defence by Dinala, is unfounded, as same does not affect the contents of the affidavit and by its very nature, whether it is a man or a woman making the allegations contained therein, such does become obvious. This objection by Dinala has therefore no merit and as such this defence must fail.

General Defences

- [15] With respect to the other aspects, brought in by Dinala, as a defence, there are mainly technicalities which would not affect a correct, just and equitable order. Whether the Land Bank was opposed or not to mediation. Whether certain papers had been or not been annexed. In addition, the main defence appears to be that there was no authority on the part of The Land Bank to institute this action. However, this flies against the facts where it is noted that negotiations had existed between the parties, with respect to settling the matter. Hence, the attempt to use such technicalities must fail. In addition, The Land Bank has

answered each and every one of the allegations. I further believe that none of those allegations would affect the decision in this matter.

[16] Dinala admit that they are unable to pay the debts to the applicant, but state that this inability is a short- term predicament. Another aspect is the belief by Dinala that their assets are worth more than their liabilities. Further, Dinala alleges that the loans that it has from The Land Bank are less than half the value of the immovable property that it has and therefore the immovable property constitutes adequate security.

[17] The fact that is brought out by The Land Bank is that Dinala was unable to even pay a portion of the arrears amounting to R15 million. This being a small amount in comparison to the total indebtedness, leading to the conclusion that the assets of Dinala are just not realisable.

Discussion

[18] The Court, in this instance, is faced with a value judgement as to what is just and equitable (*Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 WLD).

[19] The question to be answered is whether Dinala, in this instance has got readily reasonable assets to meet liabilities as they fall due in the normal course of business. Simply stated, to pay what is due to be paid and continue at the same time to meet normal trading demands.

[20] In a recent case *BP Southern Africa (Pty) Ltd vs Intertrans Oil S.A. (Pty) Ltd and Others* (2017) 4 SA (592) para 80.

"Where a company is distressed, it is not always the solution to deny principal creditors , without whose preparedness to have extended working capital in the first place the business would not have existed at all, the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, the investment, the essential precursor to employment opportunities, will seek other pastures."

This, can be seen to be apt to the current matter before this court. The Land Bank in this instance is a supplier of working capital.

It is clear from the Founding Affidavit of The Land Bank and the response of Dinala, that Dinala is indebted to the applicant in the amount of approximately R62 million. There is therefore no doubt that the applicant is entitled to launch the application. The defences raised by Dinala have no merit, alternatively, have been adequately responded to by The Land Bank. In any event each of the defences raised by Dinala would not influence the outcome of this case.

[21] There is no satisfactory explanation as to why Dinala failed to pay The Land Bank. Reasons given are vague and, an attempt to cloud the situation with technicalities. No evidence has been given as to when payment could be made.

[22] Based on what is stated above there does not appear to be any factual defence based on the actual merits of the case before this Court. In terms of Section 345 of the Companies Act, Dinala has been shown not to be able to pay its debts.

[23] An order that the respondent be placed in provisional liquidation, in the hands of the Master, would therefore be just and equitable under the circumstances.

Judgement

[24] The Court is satisfied that a proper case has been made out and the following Order is made.

- (a) That an order for the provisional winding up of the respondent is granted in terms of the provisions of Section 344 (f) and Section 344 (h) of the Companies Act 61 of 1973, as amended, and read with the Companies Act 71 of 2008
- (b) That a *rule nisi* is issued, calling upon all persons concerned to appear and shall cause, if any, to this court on the 11th day of April 2023 why the respondent should not be finally wound up
- (c) That the order shall be served on the respondent at the respondent's registered address and a copy of this order shall be published once in the Government Gazette, and once in the Citizen newspaper and Beeld Newspaper
- (d) Cost of this application be costs in the liquidation

SIGNED AT PRETORIA ON THIS THE 18th DAY OF JANUARY 2023.



Barit AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances:

Applicant:

Advocate AJ Wessels

Instructed by: Van Greunen and Associates Inc

Respondent:

Mr QR Olivier

Instructed by: Olivier Attorneys