

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 4769/2015
Date Heard: 15/09/16
Date Delivered: 20/09/16

In the matter between:

**FUTURE CORP (PTY) LTD
(REGISTRATION NO: 2011/138308/07)**

Applicant

and

**QINGQANI MA-AFRIKA CC
(REGISTRATION NO: 2006/07694/23)**

Respondent

JUDGMENT

LAHER, AJ

[1] This application for the winding up of the respondent is brought on the basis that the respondent is unable to pay its debts as contemplated by section 68(c) read with section 69 of the Close Corporation Act 69 of 1984 (hereinafter referred to as “the Act”) and on the basis that it is just and equitable that the respondent be wound up. On 26 May 2016 a provisional liquidation order was granted and this is the extended return day of the provincial liquidation order.

[2] It is not in dispute that the Applicant advanced certain amounts of money to the Respondent in terms of various agreements entered into between the parties during the period 30 June 2014 and 6 December 2014. The amounts advanced were to finance certain construction projects undertaken by the Respondent.

[3] By August 2015 the Respondent had only repaid part of the amount so advanced and a balance of R 675 964,71 remains due and payable. On 3 August 2015 the Applicant made written demand from the Respondent for the balance owing to it. Payment was called for by no later than 24 August 2015.

[4] The Respondent failed to make the payment as demanded. There were attempts to renegotiate payment of the amounts due, but these negotiations came to naught.

[5] The Respondent does not deny being indebted to the Applicant. The Respondent seeks to avoid being liquidated by placing its fate in the judicial discretion given to Courts hearing applications like this, to decide whether an entity should be finally liquidated or not.

[6] What is more, the Respondent alleges that were it not for these proceedings, payment might have been forthcoming on certain awards made in its favour arising from pay disputes it had with the Nelson Mandela Bay Development Corporation. In the result, the Respondent pleads with this Court not to grant a final order.

[7] As envisaged in terms of the provisions of Section 69(1) of the Close Corporations Act No 69 of 1984, the Applicant made demand requiring the Respondent to pay its indebtedness by no later than 21 days after being served with that demand.

[8] The Respondent failed to make the demanded payment and therefore the Applicant proceeded to launch the present application, claiming that the Respondent is unable to pay its debts. The Applicant therefore alleges that the Respondent is commercially insolvent.

[9] The Respondent alleges that it is not insolvent and in fact has several large monetary awards made in its favour and from which amounts Applicant's claim will be settled in full. Essentially the Respondent seeks time to do so by relying on the discretion this Court has in deciding on whether to liquidate an entity or not.

[10] The Respondent is calling on the Court to refuse the final relief sought or at least postpone the final liquidation of the Respondent until after it has been given additional time to recover the amounts awarded to it.

[11] The Respondent does not dispute being indebted to the Applicant in the amounts claimed. The Respondent does not dispute being in default of paying the amounts due to the Applicant.

[12] In the judgment of ***Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C)***, Berman J remarked at **440F** as follows:

"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 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 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. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 59 7E-F:

'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'

Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)".

[13] The aforesaid passage was referred to with approval in the more recent matter of FIRSTRAND BANK v LODHI 5 PROPERTIES INVESTMENT 2013 (3) SA 212 (GNP).

[14] The Applicant submits that on the various concessions made by the Respondent in respect of, particularly, being indebted to and being in default of payment to the Applicant, that the Applicant is entitled to its relief. The Applicant submits that the Respondent is, by definition, commercially insolvent.

[15] Firstly, the Respondent contends that it is not insolvent. The Respondent contends that this much is evident from a proper reading of the arbitrator's award in its favour, as well as the quantum of a pending dispute referred to the Public Protector's Office.

[16] Secondly, the Respondent contends that there is a sufficient body of fact and rationality in what it has on offer to result in a reasonable pragmatic programme of payments that this Court should exercise its discretion by not granting the Applicant final relief.

[17] I have had regard to the matter of ABSA BANK LIMITED v NEWCITY GROUP (Pty) Ltd AND ANOTHER RELATED MATTER [2013] 3 ALL SA 146 (GSJ), relied on by counsel for the Respondent, but am of the view that on the facts it is distinguishable from the present matter.

[18] In that matter, the Respondent placed before Court a detailed and comprehensive proposal that appeared, at least on the face of it, to plan a restructuring of its debt that would allow that Respondent to continue in existence on a solvent basis.

[19] Presently, there is nothing of the sort before this Court. At most, the Respondent is advancing that certain amounts already awarded and others that might still be awarded, will yield sufficient cash money to settle Applicant's claim.

[20] I am of the view that what has been advanced by the Respondent herein falls short of what had been done in the aforesaid NEWCITY matter and has not persuaded me to deprive the Applicant who is entitled, *ex debito justitiae*, to a winding-up order.

[21] If regard is further had to the extended period of time the Respondent has been in default of its payment of the amount(s) due to

the Applicant and the nature of and the relatively recent source of the funds it now relies on to settle its indebtedness to the Applicant, I hold the considered view that the Respondent is not only commercially but indeed factually insolvent.

[22] I therefore make the following order:

1. The Rule Nisi granted on 26 May 2016 is confirmed and the costs of this application be costs in the liquidation, including the reserved costs of 26 January 2016 and 9 February 2016.

RB LAHER
Acting Judge of the High Court

Counsel for the applicant, Adv T Zietsman instructed by Du Toit Attorneys.

Counsel for the respondent, Adv M Beneke instructed by Zolile Mgqeza Attorneys.

Date Heard: 15 September 2016

Date Delivered: 20 September 2016