

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

Case No.: 3463/2019

Date Heard: 30 July 2020

Date Delivered: 31 July 2020

In the matter between:

BENJAMIN JOHANNES SCHEFFER

Applicant

and

**ART HOLDINGS INTERNATIONAL (PTY) LTD
t/a GEORGIU FUTURE INVESTMENTS
(Registration number: 2017/108312/2017)**

Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] The applicant seeks the provisional winding-up of the respondent. The application is opposed by the respondent.

[2] It is alleged by the applicant that the respondent is indebted to it at least in the sum of R312 522.51, which indebtedness it is alleged arises from the sale of a motor vehicle in circumstances which I shall deal with more fully, below. A further indebtedness in the sum of R76 123.72 is alleged to exist. That indebtedness is said to arise from the circumstances which gave rise to the sale of the vehicle concerned.

Background

[3] In the following paragraphs I deal with the facts against the background of which this application must be determined. Those facts are largely common cause. To the extent that there are disputes of fact I do not regard those disputes to be material.

[4] The respondent trades as a dealer in second-hand motor vehicles, using the trading style of Georgiou Future Investments, from premises situated at 124 Hurd Street, Fernglen, Port Elizabeth.

[5] In January 2019 the applicant responded to an advertisement placed by the respondent for the sale of a Jeep motor vehicle ("the Jeep"). This vehicle was advertised for sale at a purchase price of R300 000.00.

[6] The applicant visited the respondent's dealership where he was attended to by Mr Philip Georgiou and Mr Andrew van Eeden. The applicant advised them that he was unable to purchase the Jeep without trading in his Volkswagen and Amarok

motor vehicle ("the Amarok"). The latter vehicle and been purchased by the applicant with the assistance of financing from Standard Bank to whom he was still substantially indebted in respect of the vehicle, to the extent of some R366 153.97.

[7] The respondent's abovementioned representatives were keen on accepting the Amarok as a trade-in, according to the applicant. Further, according to the applicant, the respondent offered him a trade-in price for the Amarok in the sum of R290 000.00. The sum was substantially less than his indebtedness to Standard Bank in respect of the Amarok and accordingly it was agreed with the respondent that it would arrange finance for his purchase of the Jeep with Wesbank for the sum of R350 000.00. The excess in respect of the purchase price of the Jeep would be utilised to settle his indebtedness to Standard Bank. Ultimately the respondent arranged for financing the sum of R375 000.00.

[8] The applicant states that it was agreed with the respondent that the additional sum of R25 000.00 would be paid to him. In the end R10 000.00 of the sum was used to install a better sound and navigation system in the Jeep. R15 000.00 was paid to him by the respondent.

[9] The respondent disputes the agreement to pay the applicant the sum of R25 000.00. The sum was to be used to install "mag wheels" and tyres on the Jeep. According to it the applicant changed his mind in this regard and the sum of R23 452.14 was paid to him. The applicant, in reply, admits the payment of this sum to him, but says that it represents the aggregate of the abovementioned sum of

R15 000.00 and one instalment owed by him to Standard Bank in respect of the Amarok. As will be apparent nothing turns on this dispute, which is not material and does not affect my determination of the matter.

[10] The respondent denies that it accepted the Amarok as a trade-in. It seems, rather, that it advised the applicant that it would not make commercial sense for him to trade in this vehicle. It persuaded him to leave the vehicle with it, on consignment, and allow the respondent to sell the vehicle on his behalf.

[11] There was some delay in the delivery of the Jeep to the applicant. What precisely occurred in this regard is also in dispute but, again, nothing turns on this dispute.

[12] The following is common cause in respect of the Amarok:

- 12.1. during February 2019 respondent sold the Amarok to a third party for the sum of R332 500.00;
- 12.2. no portion of this amount has been paid to Standard Bank or the applicant. To date Standard Bank remains the title holder in respect of this vehicle;
- 12.3. only the sum of R23 452 .14, referred to above, has been paid by the respondent to the applicant;
- 12.4. the respondent contends that its failure to pay any portion of the purchase price of the Amarok to Standard Bank or the applicant is justified in the circumstances. Those circumstances are, however, far

from clear and cannot be discerned from the respondent's opposing affidavit. I shall deal more fully with this, below;

- 12.5. a demand for payment to the applicant was addressed by's attorneys to the respondent on 4 September 2019, to which was responded by the respondent's attorneys on 20 February 2020. The response was a denial of indebtedness. The letter is not a model of clarity but it appears from the letter that the respondent contended an entitlement to withhold payment to the applicant or to Standard Bank of the sum it had received in respect of the sale of the Amarok and would only pay over such sum to Standard Bank on receipt of an exact settlement figure in respect of the Amarok. This was confirmed in argument to be the principal "defence" raised by the respondent in its opposing affidavit;
- 12.6. the applicant has continued to pay Standard Bank monthly instalments in this regard. A total of R76 123,72 had so been paid to Standard Bank. This is the sum referred to in paragraph [2] above.

Statutory background

[13] The applicant contends that it is entitled to the provisional winding-up of the respondent as the respondent is unable to pay its debts, alternatively, on the basis that it would be just and equitable for the respondent to be placed under provisional winding-up.

[14] In terms of item 9 of schedule 5 to the Companies Act, 71 of 2008 the provisions of chapter XIV of the Companies Act, 61 of 1973 continue to apply to the winding-up and the liquidation of companies under the Companies Act, 2008.

[15] Section 344(f) of the Companies Act, 1973 provides that a company may be wound up by the court if the company is unable to pay its debts as described in section 345 of the Companies Act, 1973.

[16] Section 345(1)(c) of the Companies Act, 1973, in turn, provides that a company 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.

[17] In terms of section 346(3) of the Companies Act, 1973 an application for the provisional winding-up of a company shall be accompanied by certificate by the Master, issued no more than 10 days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

[18] Section 81 of the Companies Act, 2008 allows for the winding-up of solvent companies on the basis that it is just and equitable to do so. In view of the

conclusion that I have reached in this matter it is unnecessary for me to elaborate any further on the provisions of this section.

Discussion

[19] The respondent is clearly indebted to the applicant in respect of the proceeds of the sale of the Amarok. The respondent has, however, raised two defences to the application. First, it contends that the security provided by the applicant in terms of section 346(3) of the Companies Act, 1973 is “stale” as it was furnished more than 10 days prior to the date of the application and that this makes the application fatally defective. Second, it disputes the applicant’s entitlement to an order of provisional winding-up in respect of the respondent, contending principally that it is not indebted to the applicant and that its alleged indebtedness is disputed on grounds founded in good faith.

[20] The first defence can be relatively easily disposed of. The certificate of the Master confirming the furnishing of security, in terms of section 346(3) of the Companies Act, 1973 must be “*issued not more than ten days before the date of the application*”. The words “*date of the application*” have been interpreted to mean the date on which the notice of motion, setting out the relief sought, is signed. See *De Wet NO v Mandelie (Edms) Bpk* 1983 (1) 544 SA (TPD) at 545H-546A. The notice of motion in this matter was signed on 3 December 2019. The certificate contemplated by the section was issued on 4 December 2019. It can thus not be said to be “stale”.

[21] Grounds for the second defence are hardly apparent from the respondent's opposing affidavit. In this regard I emphasise the following:

- 21.1. the respondent was fully paid for the Jeep;
- 21.2. the common cause facts referred to in paragraph [12] above support the contentions of the applicant;
- 21.3. thus, the applicant was entitled to the full benefit of any sum realised from the sale of the Amarok;
- 21.4. it is, furthermore, of no consequence whether the Amarok was traded in with respondent or was sold by it on consignment on behalf of the applicant. In neither event would the respondent be entitled to retain the proceeds of the sale other than with the agreement of the applicant. No such agreement is alleged;
- 21.5. to the extent that a defence can be discerned from the opposing papers of the respondent it appears that such defence amounts to a contention that the respondent was entitled, indefinitely, to hold the proceeds pending advices from the applicant as to the exact extent of his indebtedness to Standard Bank. It was correctly conceded in argument that the amount owing to Standard Bank had been furnished in the applicant's founding affidavit. Thus the response to the applicant's demand for payment sent by the respondent's attorney on 20 February 2020 after receipt of the application is disingenuous where it again cites the absence of such information as a reason for withholding payment. That contention, in my view, is so far-fetched that it can be easily

rejected. Why not simply pay the amount it held to Standard Bank particularly as such payment would enable it to meet its obligation to the purchaser of the Amarok;

21.6. on its version the respondent was acting as the agent of the applicant in respect of the sale of the Amarok. It was therefore obliged to follow instructions of the applicant as to the disposal of the proceeds of the sale. On the one hand it contends that it was holding the proceeds of the sale pending instructions from the applicant as to his indebtedness to Standard Bank. On the other hand, it says that it was under no obligation to the applicant to pay Standard Bank;

21.7. any notion that the respondent could continue to hold the sale of the proceeds of the Amarok indefinitely must have been dispelled by the applicant's demand sent out on 4 September 2019 by his attorney. It is of no consequence whether this demand complied with the provisions of section 345(1)(a) or not. It is clear in its terms, namely that the applicant required payment of his money, which was being held by the respondent. The demand was ignored for some five months and was only responded to the day before Mr Georgiou deposed to the opposing affidavit on behalf of the respondent. In the response no discernible legal grounds are set out as to why the respondent was entitled to continue to hold the applicant's money despite clear instructions to the contrary and having been furnished with the amount owing to Standard Bank in the applicant's founding affidavit;

21.8. the response to the demand and the respondent's opposing affidavit are obfuscatory in the extreme and are not indicative of a defence to the applicant's claim, raised in good faith.

[22] The allegation that the respondent is unable to pay its debts is pertinently made by the applicant in his founding affidavit. The respondent, on the other hand, does not deal pertinently with this allegation. It contents itself with a denial that the respondent is insolvent. An inability by a company to pay its debts does not necessarily equate to its factual insolvency. Insolvency is not the test in winding-up proceedings.

[23] The respondent's persistent refusal to pay the applicant, directly, or Standard Bank, on his behalf, the proceeds of the sale of the Amarok, in the face of the demand of 4 September 2019 and in the face of this application, in circumstances where he has not set out any legal basis for continuing to hold the applicant's money, satisfactorily proves to me that the respondent is unable to pay its debts. If, as the respondent says, its indebtedness to the applicant is disputed in good faith, why did he not demonstrate such good faith by, for instance paying the amount it held to Standard Bank or by paying the money into the trust account of its attorney to be held pending determination of the alleged dispute?

[24] The purported defences raised by the respondent were nothing more than attempts by it to conceal its inability to pay its debts.

Conclusion

[25] I am therefore satisfied that the applicant has made out a case for the relief it seeks in terms of the notice of motion.

[26] The following order will thus issue:

1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court.
2. A rule *nisi* is issued with return date on Tuesday, 25 August 2020 at 9:30 calling on the respondent and interested parties to show cause why the respondent should not be placed under final winding-up.
3. This order is to be served as follows:
 - 3.1 by the sheriff on:
 - 3.1.1 the respondent at its principal place of business;
 - 3.1.2 the employees of the respondent at its principal place of business;
 - 3.1.3 the South African Revenue Service;
 - 3.2 on creditors of the respondent by one publication in each of *The Herald* and *Die Burger* newspapers.
4. The costs of this application will be costs in the liquidation.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv P du Toit instructed by Greyvensteins Inc, Port Elizabeth

For Respondent: Adv I Lambrechts instructed by Deon van der Merwe Attorneys
Inc c/o Wouter Minnie Attorneys, Port Elizabeth