

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2022/055447

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED. NO /YES
12/01/2024	
DATE	SIGNATURE

In the matter between:

DINEAM TRADE (PTY) LTD

Applicant

And

SUMALI INVESTMENTS 101 (PTY) LTD

Respondent

JUDGMENT

THUPAATLASE AJ

Introduction

[1] This is an application for the provisional winding up of the respondent, a private company with limited liability. The applicant company seeks that a rule nisi be issued calling upon the respondent company and all interested parties to show cause, if any on a date to be determined by the Court, as to why a provisional order should not be made a final winding up order and respondent to be placed, in the hands of the Master.

[2] The application is in terms of sections 345 (1) (a) read with section 344 (f) of the Companies Act 61 of 1973 (old Act) read together with item 9 of Schedule 5 of the Companies Act, 71 of 2008, (alternatively in terms of section 81 (1) (c) (ii) of the Companies 71 of 2008 (the Act).

Parties

[3] Applicant is DINEAM (PTY) LTD, a private company with limited liability, duly incorporated and registered in accordance with the company laws of the Republic of South Africa. The registered office of the applicant is situated at Shop 2 148 Archery Road, Clairwood Kwa-Zulu Natal.

[4] Respondent is SUMALI INVESTMENTS 101 (PTY) LTD, a private company with limited liability and duly registered and incorporated in accordance with the laws of the Republic of South Africa.

Condonation

[5] The replying affidavit is out of time and an application to condone the late filing of the affidavit was made in terms of Rule 27(3) which provides that: 'The Court may, on good cause shown condone any non-compliance with these Rules'. The courts have consistently refrained from attempting an exhaustive definition of what constitutes good cause for the exercise of its discretion, though the authorities are in agreement that condonation should not be easily refused. In *GROOTBOOM v NATIONAL PROSECUTING AUTHORITY* 2014 (2) SA 68 (CC) at 76H-C the Constitutional court with reference to *BRUMMER v GOLFIL BROTHERS INVESTMENTS* 2000 (8) SA 237 (CC) and *VAN WYK v UNITAS HOSPITAL* 2002 (8) SA 472 (CC) held that: 'However the concept interest of justice is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes the nature of the relief sought, the extent and causes of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasised that the ultimate determination of what is in the interest of justice must reflect due regard to all relevant factors but is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant'.

[6] I am satisfied that that the interest of justice favours that condonation be granted. It is true that liquidation of a company brings about serious legal and financial consequences for the liquidated company. The complexities in this application required legal advice and the respondent cannot be faulted for requiring adequate representation. In the context of this application the delay was not inordinately long.

Issues for adjudication

[7] There are numerous disputes of facts from the papers. These are broadly that:

- (a) Respondent's alleged inability to pay its debts as contemplated by section 345 (1) of the Act. The issue is whether the respondent is indebted to the applicant. The respondent denies such indebtedness to the applicant.
- (b) Respondent's solvency. The respondent denies that it is either commercially or factually insolvent.
- (c) Respondent denies that it will be just and equitable to be liquidated.

Respondent's alleged inability to pay its debts.

[8] In the founding affidavit the applicant sought to establish that respondent is unable to pay its debts. The affidavit states that in 2011, applicant and respondent entered into a written agreement for the purchase of a unit in a sectional title scheme.

[9] The applicant alleges that the respondent intentionally and fraudulently misrepresented to the applicant that it was the owner of the property being sold and that it had the necessary capacity to develop and register sectional title. It is alleged that the respondent was aware as to who the rightful owner of the property was. The alleged misrepresentation induced the applicant to enter into a sale agreement and to pay purchase price to the respondent.

[10] The total purchase price was R 2 299 360.00 excluding value added tax (VAT) and with inclusion of 14% VAT the purchase price totalled the sum of R 2 621 270.40. The purchase price was to be paid in three tranches directly to the respondent as follows:

- "1. In cash within 7 (seven) days from signature by the Purchaser, of the letter of intent to purchase the unit to the seller a sum of R 50 000.00.
- 2. The balance of the deposit up to 50% (fifty percent) after deduction of the payment made in terms of clause 5.1 to be paid on or before end of Oct. 2011 – R 1 009 680.00.

3. The balance of the deduction of payment made in clauses 5.1 and 5.2 to be paid on or before end of November 2011 – R 1 149 680.00.

All payments were made into the Investec Bank Account of the respondent.

[11] The estimated date for the occupation was 31 December 2012. This was contingent upon respondent having consulted with its architect to sanction such occupation. It was specifically recorded that the date was only an estimation, and the seller would not be held to this date should there be a delay caused by factors out of the seller's control.

[12] Notwithstanding that the applicant made payments as agreed, the respondent has to date failed or refused and/or neglected to effect transfer of the property into the name of the applicant. The respondent has provided various reasons for the delay or failure to effect such a transfer. Among the reasons is that there were difficulties experienced in opening sectional title register.

[13] It is evident from a trail of correspondence between the applicant's attorneys and nominated conveyancers of the respondent that there have been numerous attempts to try and resolve the issue of transfer. It was after these numerous exchanges that the applicant caused an attorney's letter to be transmitted to the respondent demanding a refund of the purchase price together with interest. According to the applicant it became clear that the respondent was unable to effect transfer. The applicant contends that it has validly cancelled the agreement alternatively that the contract was void due to fraud allegedly committed by the respondent.

[14] On 30 June 2022, the applicant caused a letter of demand in terms of section 345(1) of the old Act to be served on the respondent, demanding a refund of the full purchase and interest thereon. The letter was delivered to the respondent at both its registered place of business as well as at the domicilium address. The service was duly effected by the sheriff.

[15] The respondent has to date not refunded the purchase price as demanded. According to the applicant, the respondent has not offered any explanation for such failure nor has it provided any bona fide defence why payment was not forthcoming. The applicant submits that in the circumstances the respondent was both factually and commercially insolvent.

[16] The applicant further submits that it will be just and equitable to wind up the respondent so that it could be placed under the Master and a liquidator. The liquidator will then be in a better position to take control of any assets and business of the

respondent. Also the liquidator will be in a position to investigate the flow of funds collected including the payment by the applicant or other beneficiaries. According to the applicant the respondent continues to act fraudulently.

[17] In its answering affidavit the respondent denies that it is factually and commercially insolvent and further denies allegations of fraud. The respondent denies that it will be just and equitable to wind up the company.

[18] Regarding allegations of fraud, the respondent explains that it is the holding company of Xtraprops 204 (Pty) Ltd as it holds 100% of the issued shares. The respondent insists that it is the owner the property. The respondent denies that it is unable to pay its debts.

[19] The respondent has placed on record that it has put up security by depositing a sum of R 2 299 360.00 into the trust account of its attorneys of record. The money is to be retained in that account until the finalization of any legal proceedings that the applicant is contemplating to institute. This the respondent further submitted proof that it was neither commercially nor factually insolvent as alleged by the applicant. A proof of such payment is attached to the replying affidavit.

[20] The respondent further deals with its failure to respond to a section 345 (1) letter of demand. The respondent explains that upon receipt of the letter it sought legal advice and the erstwhile attorneys advised that the applicant was pursuing a wrong legal process to recover its alleged indebtedness. It was only after the present attorneys of record were engaged that a correct legal advice was obtained, and the respondent acted appropriately.

[21] In respect of the amount of indebtedness the respondent states that upon completion of the unit in question (Shop C5 Stellar Wholesale City), the applicant took occupation of the shop by renting it out for a period of 10 years. The respondent estimates that rental collected by the applicant to be around R 1 856 496.46. The calculations based on the assumption that given the size of the shop; the applicant would have rented it out at around R 12 000.00 per month with 5% annual escalation. It is submitted that in the event the respondent's indebtedness is proved, such amount should be set off.

[22] The respondent further reveals that subsequent to the tenant of the applicant absconding, it let out the shop C5 as a measure to mitigate its loss. According to the respondent a sum of R 205 646.48 was collected on behalf of the applicant for rental

and was offered to the applicant who has refused to accept it. The respondent denies there was any fraud involved when such collection was made.

Applicant's submission

[23] In its replying affidavit and heads of argument the applicant takes issue respondent's failure to bring a substantive condonation application notwithstanding plaintiff being 18 days out of time. The applicant submits that in the circumstances the application should be regarded as unopposed. As per para's 5 and 6 *supra*, the issue of condonation has been decided in favour of the respondent based on interest of justice.

[24] *Ex abundanti cautela* the applicant deals with the merits of the case to illustrate that it is entitled to relief sought. The applicant contends vehemently that the respondent has to date not responded to section 345(1) letter. The applicant further dismisses as a ruse the security by the respondent. According to the applicant the money deposited into the trust account of the respondent's attorneys is for its own benefit. The applicant maintains its stance in both the founding and answering affidavit that the respondent has committed fraud.

The legal principles

[25] In the founding affidavit the applicant sought to establish that respondent is unable to pay its debts. The reason being that despite demand to fully refund the applicant the purchase price, the respondent has failed or neglected to make such payment. The approach to determine whether the party has failed to pay a debt, payment of which is due is cogent prima facie proof of inability to pay its debts. See *PAYSLIP INVESTMENT HOLDINGS CC v Y2K TEC LTD* 2001 (4) SA 781 (C) at 787A where the court quoted with approval the case of *ROSENBACH & CO (PTY) LTD v SINGH'S BAZAARS (PTY) LTD* 1962 (4) SA 593 (T) at 597H that: 'A company which is not in financial difficulty ought to be able to pay its way from current revenue or readily available resources.

[26] In terms of section 345(1) (a) a company will be deemed to be unable to pay its debts where a creditor who has a claim of not less than R 100.00 which is then due, has served on the company, leaving at its registered office, a demand requiring the company to pay the sum and the company has for three weeks thereafter neglected to pay the sum or to secure for it to the satisfaction of the creditor.

[27] In terms of section 345(1) (c), before a company can be deemed to be unable to pay its debts, this fact needs to be proved to the satisfaction of the court.

[28] In order for section 345(1) to operate, the debt has to be due and payable. The debt must not be disputed by the respondent bona fide and on reasonable grounds. See *KALIL DECOTEX 1988 (1) SA 943 (A)* and *VAN ZYL NO v LOOK GOOD CLOTHING CC 1996 (3) SA 523 (SECLD)*.

[29] The conclusion of law that a respondent is deemed unable to pay its debts following on its receipt of section 345(1) (a) letter is one which may be attacked by the respondent. See *TER BEEK v UNITED RESOURCES CC AND ANOTHER 1997 (3) SA 315 (CPD)*.

Analysis

[30] As indicated the respondent is disputing indebtedness to the applicant. It is often said that the respondent has the 'onus' of satisfying the court that the alleged debt is disputed on bona fide and reasonable grounds.

[31] In *COMMONWEALTH SHIPPERS LTD v MAYLADN PROPERTIES (PTY) LTD(UNITED DRESS FABRICS (PTY) AND ANOTHER INTERVENING 1978 (1) SA 70 (D)* at 72D - E, Milne J held: 'Perhaps it may be said that if there is prima facie a valid claim by the applicant so as to make a creditor within the meaning of sec. 341 (1) (b), then it is for the respondent to disturb that prima facie situation by showing a dispute bona fide and reasonable grounds. Overall, however, it seems to me that the position must be that, in order to establish that the applicant has locus standi to bring the application, it must show, on a balance of probabilities, that it is a creditor (where of course that is the ground relied upon to establish its locus standi). I am in respectful agreement with the aforesaid dictum of Milne J, which has been approved by the Appellate Division in *KALIL v DECOTEX (PTY) LTD AND ANOTHER* (supra) at 980E. It therefore appears to me that it would be preferable to refer to this duty, of a respondent that the alleged debt is disputed on bona fide and reasonable grounds, as an evidential burden and not an onus. Be that as it may, it should be borne in mind as explained by Thring J in the *HULSE-REUTTER* case (supra) at 219F-G that respondent merely has to satisfy the court that the grounds which are advanced for its disputing the debt are not unreasonable. The learned judge further emphasised that it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it would rely at a trial. It is sufficient if the respondent bona fide alleges facts which, if proved would constitute a good defence to the claim made against it.'

[32] In *HELDERBERG LABORATORIES CC v SOLA TECHNOLOGIES (PTY) LTD* 2008 (2) SA 627 (C) it was held: 'in an application for the grant of provisional winding up order, a mere prima facie case has to be established by the applicant while the final order will only be granted if the applicant satisfies the court on a balance of probabilities that provisional order should be confirmed. Where an applicant, as in the instance case, relies on section 346(1) (b) of the Companies Act, it has to satisfy the court that it is a creditor within the meaning of the said subsection. It follows that, on the return date of a provisional winding-up order, the onus is on the applicant to prove on a balance of probabilities that it has the necessary locus standi as a creditor....

If, however, a respondent opposed an application for its liquidation on the basis of a dispute as to the existence of the debt, a difference in approach is called for. If the alleged debt is genuinely disputed on reasonable grounds, the attitude of our courts is that it would be wrong to allow such dispute to be resolved by utilising the machinery designed for winding-up proceedings, rather than ordinary litigation. In this event the court ought to refuse the granting of a winding-up order, whether it be a provisional or final order'.

[33] In *BADENHORST v NORTHERN CONSTRUCTION ENTERPRISES (PTY) LTD* 1956 (2) SA 346 (T) it was held that an application for the liquidation of a company should not be resorted to enforce payment of a debt which is bona fide disputed by the company. The liquidation of a company affects interests of all creditors and shareholders, and an order for its liquidation should not lightly be granted on the application of a single creditor.

[34] I shall proceed with alleged inability of the respondent to transfer ownership to the applicant. In *KOSTER v NORVAL* (20609/14) [2015] ZASCA 185 (30 November 2015) at para 4 it was held that: 'It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold'. The SCA quoted with approval *ALPHA TRUST (EDMS) BPK v VAN DER WALT* 1975 (3) SA 734 (A) at 743H-744A where Botha JA summarized the legal position as follows: 'Dit is duidelik dat vir 'n geldig koopkontrak volgens ons reg geen vereiste is dat die verkoper van die koopsak eienaar daarvan moet wees nie. Ofskoon dit die doel van die koopkontrak is dat die koper eienaar van die verkoopte saak moet word, is die verkoper egter nie verplig om die koper eienaar daarvan te maak nie. Hy moet die koper slegs in besit stel en hom teen uitwinning vrywaar. Dit beteken dat die verkoper daarvoor instaan dat niemand met 'n beter reg daartoe die koper wettiglik van die verkoopte saak sal ontnem nie, en dat hy, die verkoper in sy besit sal beskerm'¹.

¹ Loosely translated as: 'It is clear that it is not a requirement of our law for a contract of sale to be valid that the seller must be the owner of the thing sold. Although it is the purpose of the contract of sale that the

G R Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5th ed. states:

" As has been indicated elsewhere, although the parties to a contract of sale usually contemplate a transfer of ownership in the thing sold, this is not essential feature of the contract, and sales by non-owners are quite permissible" (p 23 para 3.1.1.)

" The delivery required of a seller is the delivery of undisturbed possession (*vacua possessio*) coupled with the guarantee against eviction. It is not necessary that the seller should pass the ownership, for the implied engagement of the seller is a warranty against eviction and not warranty of title, but he must divest himself of all his proprietary rights in the thing sold in favour of the purchaser. (P 66 para 6.2).

(See also De Wet & Van Wyk, *Kontrakreg en Handelsreg* 5th ed. Vol. 1 page 329)'.

The case of *ALPHA TRUST* supra was followed and applied in *VAN WYK V THE MEC: DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING OF GAUTENG PROVINCIAL GOVERNMENT* (1026/2018) [2019] ZASCA 149 (21 November 2019) at para 9.

Findings

[35] The basis of the application for winding-up is the alleged indebtedness of the respondent to the applicant. The applicant submits that it has become a creditor of the respondent following the purported cancellation of the sale agreement. The stated ground for such cancellation is that the respondent is unable to transfer the unit into its name, despite the purchase price having paid some ten years ago.

[36] This point cannot be sustained based on legal principles regarding sale of goods as enunciated in *ALPHA TRUST* supra. On the strength of the authorities quoted in this judgment, the point has been sufficiently ventilated. It is not required that the seller should pass ownership of the thing being sold. As stated in case law whilst the transfer of ownership may be contemplated, however, it is not the essential feature of the sale of goods.

[37] For present purposes it can be accepted that the respondent has raised a bona fide defence to the applicant's claim and as such the application for winding up cannot stand as per *BADENHORST*. As I have already stated *ex facie* the sale agreement

purchaser will become the owner of the thing sold, the seller is not obliged to give ownership thereof to the purchaser. He is only obliged to place the purchaser in possession and to warrant that he will not be evicted. This means that the seller guarantees that no-one with a stronger right thereto will deprive the purchaser of the possession of the thing sold and that the seller will protect the purchaser's possession of the thing'.

signed between the parties, I am unable to discern any prima facie fraud on the part of the respondent.

[38] Regarding the respondent's inability to pay its debts, respondent denies this to be the case. This denial is elaborated upon in the supplementary answering affidavit. Firstly, respondent indicates that it has deposited with its attorneys of record a sum of money in excess of R 2 million, this was done to negate any assumption that the respondent is commercially insolvent in a sense that is unable to meet its day-to-day liabilities. The money is not to be used until the finalization of the litigation proceedings launched by the applicant.

[39] The applicant has poured cold water into the alleged security by the respondent. In its supplementary affidavit the applicant points out that the security does not constitute payment and it therefore does not constitute a bar to the relief sought. In any event, so it is argued, the money is to be used for the benefit of the respondent.

[40] Applicant contends that the respondent has failed to provide proof of the source of funds that are held in the attorney's account purportedly as security. In *HELDERBERG* supra it was held that where an external party is willing to finance a company, this could be a demonstration of the ability to pay.

[41] It worth noting that the applicant is the only party seeking to have the respondent liquidated. It is clear that there are other creditors of the respondent. Their views have not been canvassed. As was held in *BADENHORST* supra liquidation of a company affects interests of all creditors and shareholders, and an order for its liquidation should not be granted lightly on the application of a single creditor. According to the papers 30 units were sold and the applicant estimates the money received from the sale of these units at R 60 million. I am not satisfied that on the papers the applicant has demonstrated that it is just and equitable to liquid the respondent.

[42] In its answering affidavit the respondent also indicated that for a period of at least 10 years the applicant took possession of the unit through a tenant. And that after the tenant had vacated the property, the respondent took initiative by renting out the property. The funds collected have been offered to the applicant who has refused to accept same. Nowhere in its affidavit is the applicant challenging the allegation it occupied the property for about 10 years through a tenant and received rental payments.

[43] The applicant baldly denies these allegations. A closer examination illustrates that the applicant only started to demand a refund of the purchase price by letter from its

attorneys dated 13 April 2021. This was 10 years since the sale agreement was concluded and purchase price paid. This is consistent with the version of the respondent that for 10 years the applicant had a tenant who paid rental.

[44] After a consideration of all the facts and arguments and counter arguments, I am not persuaded that respondent is unable to pay its debts as contemplated in section 344 (f) of the Act.

Order

Application dismissed with costs.



THUPAATLASE AJ
ACTING JUDGE OF
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 25 October 2023

Judgment Delivered: 12 January 2024.

For the Applicant: Adv. A Rossouw SC assisted by
Adv. M Jorge

Instructed by: Afzal Lahree Attorneys

For the Respondent: Adv. AF Arnoldi SC assisted by
Adv. C de Villiers

Instructed by: Delberg Attorneys