REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:YES
(3)	REVISED: YES
	25/08/2022
....	....
SIGNATURE	DATE

CASE NO: 4937/2021

In the matter between:

SINOKHULE DEVELOPMENT CONSULTANTS (PTY) LTD Applicant

and

MBOMBELA HOUSING ASSOCIATION Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an Application for the provisional winding-up of the Respondent ("MHA") in terms of Section 343(1)(a) of the Companies Act, 61 of 1973 ("the Act"). Item 9 of Schedule 5 of the Companies Act, 71 of 2008, provides that all insolvent companies will be liquidated under Chapter 14 of the Act. The basis of the application is that MHA is unable to pay its debts as and when they arise as contemplated in Section 344(f) of the Act.

[2] Briefly, MHA opposes the application on the ground that the agreement that it concluded with the Applicant ("Sinokhule") anticipates that any amount that it owes to Sinokhule will only become due and payable upon it receiving payment from SHRA. Accordingly, continues the argument, since MHA has not received any payment from its sources, payment is not due, notwithstanding the fact that it owes the amount to Sinokhule. On the other hand, and as a preliminary point, Sinokhule has raised the fact that the resolution on which the deponent to the answering affidavit relies for his authority is signed by him alone aside his claim that he has been authorised by all the directors of MHA.

FACTUAL MATRIX

[3] The terse background against which the liquidation application arises is fully canvassed below. The facts upon which this claim is founded are generally common cause. In a letter dated 20 October 2020, MHA appointed Sinokhule as Project Managers for the development of a Social Housing Development of Mbombela Housing Association in Sonheuwel Extension 12. The appointment letter was subsequently followed by a conclusion of a written agreement between the parties on 29 October 2020. The agreement was for the pre-feasibility stage of the project. In terms of the agreement

Sinokhule was to provide required services and render reports to MHA to enable it to settle its submission to SHRA.

[4] All quotations and appointments would form part of the submission of MHA to SHRA. Once the funding from SHRA has been approved, a fee claim for services rendered could be submitted. In terms of the letter of appointment MHA would advise the professional team in writing once the above approval has been received. According to the letter of appointment it was only at that stage that formal invoices could be submitted to MHA. Certain payments were to be made by MHA to Sinokhule on specific intervals during the subsistence of the agreement. Additionally, MHA had agreed to make payment of certain retainer amounts to Sinokhule. I proceed to describe the intervals below:

4.1	Stage 1 Inception (5%)	**R61 334.98**;
4.2	Stage 2 Concept and Viability (25%)	**R306 674.89**;
4.3	Stage 3 Design Development (25%)	**R306 674.89;**
4.4	Stage 4 Documentation and Procure (15%)	**R184 004.93**;
4.5	Stage 5 Contract Admin and Superv (25%)	**R306 674.89**; and
4.6	Close-out (5%)	**R61 334.98**.
TOTAL		**R1 226 699.56**.

[5] It is not disputed that Sinokhule has discharged its obligations arising in terms of the agreement. MHA on the other hand, admits that it has failed to effect payment to Sinokhule and that at least an amount of **R61 334.98** remains due and payable. MHA does not dispute having received invoices containing the amounts claimed by Sinokhule. On 18 August 2021 and noting that MHA was not making payment, Sinokhule caused a

letter of demand for payment in terms of Section 345(1)(a)(i) of the Act to be served by the sheriff at the registered address of MHA. The sheriff served the letter on 24 August 2021.

[6] On the basis of the above, Sinokhule states that:

6.1 MHA is unable to pay its debt after service upon it of a demand in accordance with the Provisions of Section 344 and 345;

6.2 MHA is unable to pay its debt as provided for in Section 345(1)(c) as it is indebted to Sinokhule in an amount of not less than one hundred rand, which amount is due and payable.

[7] The demand aforesaid in terms of Sections 344 and 345 of the Act notwithstanding, MHA has still not paid the amount it owes to Sinokhule nor has it in the alternative, provided security for the amount nor has it compounded for the said amount. In consequence, Sinokhule submits that in terms of Section 345(1)(a)(i) of the Act, MHA ought to be deemed to be unable to pay its debts.

ISSUES

[8] There are three issues that stand for determination. First is the point in *limine* concerning the admissibility of the answering affidavit. This was brought about as a result of the answering affidavit signed by one director despite the allegation that authority has been given to the deponent by his co-directors. Second is that whether or not MHA is commercially insolvent. Requiring it to be placed under provisional liquidation, as Sinokhule believes it should. Third, whether or not the submission of the invoices by Sinokhule was premature in terms of the provisions of the agreement.

LEGAL FRAMEWORK

[9] Section 344(f) of the Act is headed: Circumstances in which company may be wound-up by Court. It provides that a company may be wound-up by a Court if the company is unable to pay its debts as described in section 345. Section 345(1) and (2) of the Act in relevant parts describes when a company or body corporate shall be deemed unable to pay its debts. It lays down that:

(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 at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any Body Corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(iii) …

(iv) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

[10] Sinokhule seeks the provisional liquidation of MHA on the ground of commercial insolvency because it is unable to pay its debts. It is therefore necessary to draw a distinction between factual and commercial insolvency. The former refers to an instance where the liabilities of a Respondent debtor exceed its assets. Commercial insolvency, on the other hand, denotes a situation where a Respondent debtor is illiquid that it cannot

pay its debts. This is aside from the fact that the assets of such a Respondent debtor exceed its liabilities. See, *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd.* [1]

[11] In *Afgri Operations Limited v Hamba Fleet (Pty) Limited*[2] the Court stated that a Court's discretion must be exercised judicially and must not lose sight of the specific principle that generally, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the Respondent company that has not discharged that debt. Where it is common cause between the parties, as is the position in this matter, that MHA has failed to liquidate an established debt or one that it has admitted, the discretion of this Court whether to grant the application or not is limited. See, Afgri Operation limited *supra* at Para 12. Accordingly, the discretion of a Court to refuse to grant a winding-up order in circumstances where an unpaid creditor applies is very limited and infrequently exercised. It will only be applied in special or unusual circumstances.

[12] It was further stated in the Afgri Operations Limited case *supra* that the question of onus is important. The onus of proving that the Respondent is indebted rests with the Applicant. Once the Respondent's indebtedness to the Applicant for a winding-up order has, *prima facie*, been established, it becomes incumbent upon the Respondent to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds. If one accepts the test set out in the English cases upon which the Respondent has relied, the Respondent would have to show that its counterclaim was "genuine".

[13] Winding-up proceedings are not to be used to enforce payment of a debt especially in those instances where a debt is disputed on *bona fide* and reasonable grounds. Where there has been a *prima facie* establishment of a Respondents indebtedness, the onus is on it to demonstrate that this indebtedness is indeed disputed on *bona fide* and reasonable grounds. See, *Afgri Operations Limited supra and Kyle & Others v Maritz and Pieterse Incorporated*[3].

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[1] [2014] 1 All SA 507 (SCA) at Para 16
[2] [2017] JOL 37585 (SCA) at Para 12
[3] 2002 (3) ALL SA 223 (T) AT 13

ANALYSIS

VALIDITY OF THE ANSWERING AFFIDAVIT

[14] Sinokhule has put in issue the legal status of the answering affidavit. It does so as the deponent claims to be acting on behalf of MHA. MHA is a non-profit making organisation ("NPO)" run by a board of directors. The resolution from which the deponent ostensibly derives his authority to represent MHA is signed by him alone bringing into doubt his authority emanating from a manifestly invalid resolution that cannot possibly allow him to depose to the affidavit on behalf of MHA.

[15] Uniform Rule of Court 7(1) provides that:

"Subject to the provisions of sub rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[16] The resolution is *ex facie* defective as it is signed by one director, the deponent, who claims that he has been authorised by his co-directors. The point is how can he claim to have been given authority when the other directors constituting the board, which is responsible for the discharge of duties and obligations of MHA did not sign it? Rule 7(1) *supra* is explicit and unambiguous that the deponent in circumstances such as in *casu* would not have authority. In short, the answering affidavit is invalid and should be declared pro-non *scripto* and the application should be regarded as unopposed and an order in favour of Sinokhule granted.

[17] Ordinarily, the conclusion above should be the end of the road for MHA. That said and while I am persuaded that the affidavit is invalid as a result of the resolution signed by the deponent alone, a challenge to authority should generally comply with Rule 7(1) in that

it ought to be served within 10 days of a party becoming aware of the lack of authority. I have no knowledge of when Sinokhule became aware of the lack of authority and in any event, Sinokhule did not deliver a notice in terms of Rule 7(1) notifying MHA of the issue.

[18] I proceed to deal with the merits of the application merely as a matter of caution in case I find myself forced to grant leave to appeal on the point in *limine*. Were that to happen, I might deprive the court of appeal of the views and opinion of this Court on the merits of this application. It is solely against that background that I continue to have regard to the merits herein below.

<u>IS MHA UNABLE TO PAY ITS DEBTS</u>

[19] Here the issue is whether or not MHA is unable to pay its debts as and when they arise as envisaged in Section 345 of the Act. Sinokhule has met all the jurisdictional factors mentioned in Section 345 and these are the following:

19.1 Sinokhule must be a creditor of MHA;

19.2 MHA is indebted to Sinokhule in an amount well in excess of **R100.00** as it has admitted that it owes Sinokhule an amount of at least **R61 334.98**, which is due and payable;

19.3 Sinokhule has served a demand at the registered address of MHA calling upon it to settle the amount by which it is indebted;

19.4 MHA disputes neither the service nor the manner in which the demand was served upon it;

19.5 MHA has for three weeks since the service of the demand neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of Sinokhule;

19.6 MHA is unable to pay its debts.

[20] On a consideration of the above alone, Sinokhule is entitled to the order it seeks, provisional liquidation of MHA. It must be recalled that where a debtor has admitted indebtedness to a creditor and inability to pay, the Court has virtually no discretion to exercise in favour of the debtor but to grant the order as prayed for. See, the Afgri Operations Limited case *supra.* The assertion of MHA that the invoices of Sinokhule were prematurely presented to it as the agreement stipulates that they should only be submitted on approval of funding by SHRA cannot find favour with this Court. I agree with Counsel for Sinokhule that MHA is not being *bona fide* and reasonable as required by Afgri Operations Limited and Kyle and Others cases *supra* as it hides behind the clause without any demonstration of submission of the quotations and appointments to SHRA. The difficulty with the contention advance by MHA is that it is possible for it to sit on the invoices for an inordinate amount of time even to the extent of jeopardizing prescription of the claim of Sinokhule while the latter has incurred expenses to execute on the mandate.

<u>SUBMISSION OF INVOICES ONLY AFTER APPROVAL OF FUNDING BY SHRA</u>

[21] Besides, it is clear that the agreement that the parties concluded relates to a pre-feasibility stage of the project, which would then enable MHA to finalise all its documents for submission to SHRA. Sinokhule has executed on its contractual obligations insofar as it has enabled MHA to perfect its documents for submission. MHA does not show that it has submitted the documents to SHRA and that funding is awaiting approval. In this sense therefore MHA is not being *bona fide* and reasonable. Sinokhule is entitled not to be satisfied by the mere citation of the clause pertaining to invoices without more.

[22] I must accept the submission by Counsel for Sinokhule that provisional liquidation is not the end of the road for MHA. It still has opportunity to go back to the drawing boards and to come back on the return date of the rule nisi to show why it ought not to be finally liquidated. MHA should regard the return date as a possible new bill of health on its

continued existence. As such, it must endeavour to show why the rule *nisi* should not be confirmed.

[23] In the result, the application succeeds and I make the following order:

1. MHA is placed under Provisional Liquidation in the hands of the Master of the High Court.

2. A *rule nisi* returnable on 24 October 2022 is granted.

3. MHA and any other interested party are called upon on the return day to show reason why:

   3.1 A final Liquidation Order should not be granted;

   3.2 The cost of this application should not be cost in the administration of the liquidation of MHA;

   3.3 The Provisional Liquidation Order should not be served by the Sheriff on MHA at its registered office;

   3.4 The Provisional Liquidation Order should not be served on the office of the South African Revenue Service;

   3.5 The Provisional Liquidation Order should not be sent by registered mail to all known creditors with claims of more than R5 000.00 against MHA;

   3.6 The Provisional Liquidation Order should not be published in one edition of the "Lowvelder Herhald" and "Die Beeld";

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 25 August 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Adv HF Fourie**
Instructed by:	**Cronje, De Waal – Skhosana Inc**
Counsel for the Respondent:	**Mr D Gama**
Instructed by:	**D Gama Attorneys**
Date of Judgment:	**25 August 2022**