



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 7044/2019

(1)	REPORTABLE ☒ NO ☐ YES
(2)	OF INTEREST TO OTHER JUDGES: ☒ NO ☐ YES
(3)	REVISED. [REDACTED] 02/02/2021

In the matter between:

ANOOSHKUMAR ROOPLAL N.O.

APPLICANT

And

**MML FOODS SERVICES PROPRIETARY
LIMITED**

RESPONDENT

JUDGMENT

NAUDÉ AJ:

- [1] The Applicant acts in his *nomine officio* capacity as liquidator of VBS Mutual Bank (in liquidation) ("VBS"). The Applicant applies for a final winding up of the Respondent on the basis that the Respondent is unable to pay the debts owed to its creditors. The application is brought in terms of **Section 344(f) and 345(1)(a)(i) of the Companies Act 61 of 1973** ("the Old Companies Act") read with the transitional provisions of **Item 9 of Schedule 5 of the Companies Act 71 of 2008**. There are also additional facts manifested, in terms of **Section 344(h)** of the Old Companies Act, in terms whereof the Applicant applies that the Respondent be wound-up.
- [2] VBS was placed under curatorship on 10 March 2018 and was placed in liquidation by an order of the Gauteng Division, Pretoria on 13 November 2018. The powers of the Applicant as the liquidator of VBS was extended in terms of the court order on 13 November 2018 to include *inter alia* the taking of any legal action considered

necessary in the interest of VBS and the institution of proceedings in respect of any matter affecting the VBS estate.

- [3] The Respondent is indebted to VBS in the total amount of R35,6 million, being money lent and advanced by VBS to the Respondent in respect of a business overdraft credit facility made available to the Respondent through the company's VBS Classic Business Account and a motor vehicle finance agreement. In respect of the VBS Classic Business Account an amount of R19 039 249.33 was due and owing and in respect of the Respondent's motor vehicle finance account an amount of R16 564 404.59 was due and owing.
- [4] The Respondent has failed to comply with the agreements and has despite a statutory demand delivered in terms of **Section 345 of the Old Companies Act**, to its registered address on 6 August 2019, neglected to pay the due sum, or to secure or compound for it to the reasonable satisfaction of VBS. It is common cause that the Respondent failed to respond to the aforesaid letter. The Respondent in his answering affidavit denies having received the

statutory demand, however in the Respondent's Heads of Argument it is stated that the Respondent did indeed receive the notice.

- [5] It is common cause that on 2 August 2016, VBS duly represented by its authorised representative, approved the Respondent's application for an overdraft facility to make available the amount of R1 million to the Respondent. The facility was renewable annually and it was to be made available through the Respondent's VBS Account 10012473001 ("the facility agreement"). In terms of the facility agreement, the Respondent, *inter alia*, undertook to pay the facility regularly, interest and other related charges and VBS was entitled on 10 (ten) days' written notice of default, to cancel the facility and to claim the full outstanding amount. A certificate of indebtedness signed by "any authorized employee" of VBS shall constitute *prima facie* evidence of the outstanding balance owing.
- [6] VBS fell prey to an elaborate fraudulent scheme perpetrated on it by some members of its management and their related entities. The Applicant alleges that the Respondent benefitted from the fraudulent

scheme perpetrated upon VBS. As part of the fraudulent scheme perpetrated against VBS, a fictitious credit of R19,000,000.00 was made into the Respondent's VBS Account on 30 March 2017. The fictitious credit was not real payments or deposits made into the Respondent's VBS Account and it was nothing other than mere false entries.

- [7] It is submitted by the Applicant that on 19 March 2017, and at the instance of Mr. Tshifhiwa Matodzi (VBS former board chairperson and integral to the Fraudulent Scheme), a meeting was held with Mr. Mukhodobwane (VBS's former head of treasury) and Mr. Truter (VBS's former chief financial officer) during which meeting Mr. Matodzi informed Mr. Mukhodobwane and Mr. Truter that he required certain overdrawn VBS accounts to be removed from the bank's balance sheet. Such overdrawn VBS accounts were to be "cleared" with the effect that their outstanding balances would be removed.

- [8] On 29 March 2017, Mr. Matodzi sent the Eagle Canyon List to Mr. Mukhodobwane with the instruction that the overdrawn VBS accounts listed therein be cleared by the financial year end, being 31 March 2017. It appears from the list, the Respondent was one of the intended beneficiaries of the Fraudulent Scheme and the resultant clearing of its then overdrawn account on 30 March 2017 with a fictitious credit of R19,000,000.00.
- [9] The fictitious credit from the Respondent's VBS Account was removed in order to reflect the Respondent's true indebtedness to VBS from time to time. A Restated Statement of the Respondent's VBS Account, as the true reflection of the transactions on the Respondent's VBS account, reflects the Respondent's indebtedness to VBS. On 7 October 2019, VBS issued a certificate of indebtedness signed by its Collections Manager, certifying, that the amount of R19,039,249.33 was outstanding as at 31 December 2018 on the Respondent's overdraft account.

[10] The Respondent opposes the application on the bases that it alleges that a third party, Venmont Holdings (Pty) Ltd ("Venmont"), made payment to the Applicant, in favour of the Respondent's VBS Classic Business Account, in an amount of R19,000,000.00 on the 30th of March 2017, thereby extinguishing its indebtedness at that stage. The Respondent submits that it is therefore not indebted to the Applicant. According to the Respondent, it continued to make payment to Venmont up to the stage where VBS was placed under curatorship. The Respondent submits that no summons was issued against the Respondent by either Venmont or VBS.

[11] In respect of the Motor Vehicle Finance Account, the Respondent submits that he did not enter into the agreement, nor did he receive any of the vehicles. The Respondent denies the signature on the agreement. The Respondent's denial of the agreement however amounts to a bare denial. The Respondent denies ever having concluded the agreement, that the signature on the agreement is that of one of its representatives and ever having received the motor vehicles. The Respondent however failed to adduce any evidence

whatsoever to prove that the signature on the agreement was not that of any of the directors of the Respondent, alternatively that the vehicles were not received.

[12] The Applicant submits that it appears *prima facie*, that the Respondent in the very least, is indebted to VBS in the amount of R19,039,249.33 in relation to the admitted Facility Agreement considering the certificate of indebtedness issued to that effect.

[13] As the Applicant applies for a final winding-up order, the application must be determined on the basis of the rule as set out in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A)** at 634E to 635C. Rogers J in **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WC)** at par [9] stated as follows:-

"The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-

Evans rule (Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) para 4; Golden Mile Financial Solution CC v Amagen Development (Pty) Ltd [2010] ZAWCHC 339 paras 8-10; Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & Another 2012 (2) SA 28 (GSJ) para 14).

- [14] The respondent bears a rebutting onus to show that its indebtedness to VBS is disputed on *bona fide* and reasonable grounds. In **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980C-D Corbett JA held as follows:-**

“Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.”

- [15] The court in **Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 606A-D, per Davis J,**

cited with approval the following extract on the proper meaning of “*bona fide* dispute on reasonable grounds”:-

“A debt is not bona fide disputed simply because the respondent company says that it is disputed. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression “genuine dispute” connotes a plausible contention requiring the same sort of consideration a “serious question to be tried”. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis that an honestly held belief that it is not payable, and is not disputed, merely for the purpose of delay or obstruction. “Genuine” in this context does not mean not fabricated for the purpose of the proceedings or not just thought up or brought forward without genuine belief: there can be no genuine dispute if there are not substantial grounds for disputing the debt.”

- [16] It is alleged by the Respondent that during 2017, it entered into an agreement with Venmont represented by a Taki Mmbi, in terms of

which Venmont lent and advanced the amount of R19 million to the Respondent, which amount was utilized to pay the debt owed to VBS. The Respondent further alleges that the amount of R19 million was to be repaid to Venmont in monthly installments of R182 083.33.

[17] I find this defence of the Respondent dubious and absurd. Instead to servicing its overdraft facility on the fairly common and agreed terms set out in the Facility Agreement, the Respondent borrowed money to pay its credit facility debt obligations. The Respondent merely deferred its debt.

[18] It is astonishing that the Respondent's whole compounded debt defence, assuming it to be true, entirely took place within VBS's bank accounts. The Respondent's companies and Venmont, are alleged to have made cross-payments (essentially intra-bank transfers) into one another's VBS accounts.

- [19] Mr. Phophi Mukhodobwane, deposed to an affidavit which independently detailed how the Fraudulent Scheme was orchestrated against VBS from within. Mr. Mukhodobwane avers in his affidavit that the Respondent and Venmont were, together with three other companies, exposures of a company called Vele Investments.
- [20] Significantly, in its answering affidavit, the Respondent in relation to the Applicant's version of the fraudulent scheme and the fictitious credit, simply raised a bare denial and technical points which I find to be without any merit. The Respondent's factual insolvency was denied in bald and unsubstantiated terms, without any facts being put up substantiating such denial or evidencing the Respondent's commercial solvency.
- [21] A real dispute of fact arises, *inter alia*, where a court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the facts said to be disputed. See **PMG Motors Kyalami (Pty) Ltd (in liquidation) v**

**Firststrand Bank Ltd, Wesbank Division 2015 1 All SA 437 (SCA);
2015 (2) SA 634 (SCA).**

- [22] The Respondent's counsel in argument attacked the credibility and foundation of the Applicant's averments in his founding papers. Yet, in its answering papers, the Respondent failed to meaningfully discharge the facts set up by the Applicant. The fraudulent scheme perpetrated on VBS and the affidavit provided by Mr. Mukhodobwane has already been addressed in various decisions. (See **VBS Mutual Bank (in liquidation) v Madzonga (2507/2018) [2018] ZAGPJHC 515 (3 August 2018)** and **VBS Mutual Bank (in liquidation) v Ramavhunga and Another (25062/2018) [2019] ZAGPJHC 273 (23 August 2019)** as well as **Annooshkumar Rooplal N.O v Tigraphase (Pty) Ltd unreported GJ Case Number 30611/2019 (11 September 2020)**). As in the present instance, no countervailing evidence was presented on those issues, and am I in agreement with the approach adopted therein.

- [23] Where fraud is manifest in the purpose and use of a company as it is in the present instance concerning the Respondent, a company in the position of the Respondent may also be wound-up by the court in terms of **Section 344(h) of the Old Companies Act**, if it appears to be just and equitable that the company be wound-up.
- [24] Given the extent of VBS's looting from which the Respondent has benefited, there is in my view, in addition, a compelling, just and equitable ground for the court to grant a winding-up order against the Respondent in terms of **Section 344(h) of the Old Companies Act**.
- [25] It was argued by the Applicant's counsel that the principal duty of the courts is to suppress fraud whereof it is the more pernicious when it is close and disguised. It was argued that consequently, the contingency of granting a final winding-up order in the circumstances of this case is unassailable, as the court will wind-up a company on the ground that it is just and equitable to do so if the company was promoted for the purpose of perpetrating a fraud or deception. It is

precisely what happened in the present case. The Respondent was established with the purpose to defraud VBS at the dishonest expense of VBS depositors.

[26] In my view, the Respondent has failed to discharge the rebutting onus which rests on it to show that its indebtedness as claimed by VBS is disputed on *bona fide* and reasonable grounds. The Respondent has also failed to show that it is factually solvent. In addition, in my view, the Respondent should be wound-up on the ground that it is just and equitable to do so.

[27] The question arises whether a provisional winding-up order should be granted or a final winding-up order. In **Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (In Provisional Liquidation) – 1983 (3) SA 815 (O)** at p823A-B confirmed that in our law and practice a company is practically invariably first liquidated provisionally before it is thereafter liquidated finally and that the *rule nisi* calls upon “all interested parties to show cause why

a final order of liquidation should not be granted against the company”.

- [28] The above practice is however not inflexible as was found by the **Supreme Court of Appeal** in **Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA) at 933H-934C**, *inter alia* that:

*“The remaining question is whether this Court should issue a provisional or a final order of winding-up. The Act does not require a final order to be preceded by a provisional order, but in **Kalil v Decotex (Pty)Ltd and Another 1988 (1) SA 943 (A) at 976 A-B, Corbett JA** referred to the practice, which he regarded as well-established, of granting a provisional order of winding-up and a rule nisi calling upon persons concerned to show cause why a final order should not be granted. From the information given to us by counsel it would seem that there is no longer a uniform practice in this regard throughout the country. According to the Practice Manual of the Transvaal Provincial Division, a judge of that Division appears to have a wide discretion to grant a provisional or a final winding-up order, as the case may require, and is under no constraint to issue a*

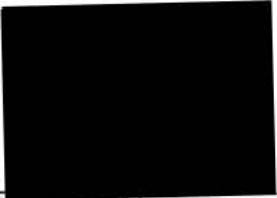
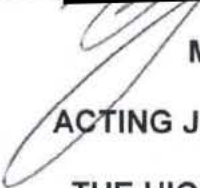
provisional order as a matter of course. This Court should ordinarily apply the rules of practice of the division from which the appeal emanates and, adopting this principle, there is no reason why, in an appropriate case, this Court should not grant a final order. This is such a case. The respondent opposed the grant of a winding-up order in the court a quo and in this Court. The issues have been fully ventilated and the respondent has put nothing forward to persuade us that further relevant facts would be forthcoming if a rule nisi were issued."

- [29] In my view, in this case, there are sufficient facts not in dispute or disputed facts which are not material, and which are also not real and genuine disputes of fact, on which relief can nevertheless be granted. Those facts which are in dispute would therefore be accepted as facts in favour of the Respondent. The court is of the view that this approach is consistent with the law expressed in various cases on this issue. In my view there is therefore no reason why a provisional order should be granted and not a final winding-up order.

[30] The normal principle is that the costs of the application form part of the costs of the winding-up. There is no reason to deviate from this principle.

[31] I therefore make the following order:-

1. The Respondent, MML Foods Services (Pty) Ltd, be and is hereby placed under final winding up in the hands of the Master of the High Court.
2. The costs of the application will be costs in the winding-up.



M. NAUDÉ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 15 OCTOBER 2020

JUDGMENT DELIVERED ON: 2 FEBRUARY 2021

For the Applicants: Adv. S. L. Mohapi

Instructed by: Werksmans Attorneys
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