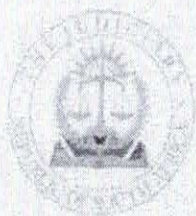


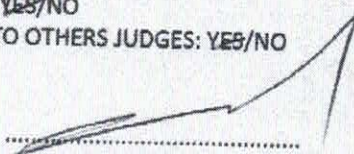
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 13072/2019

Heard on: 23, 25 and 26 March 2021

Date of judgment: 29 March 2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
29/3/21	
DATE	SIGNATURE

In the matter between:

BUSINESS PARTNERS LTD

Applicant

and

SOPHIA PROPERTY INVESTMENTS (PTY) LTD

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] In the classic novel *Catch 22* Joseph Heller writes about a paradoxical situation from which it is impossible to escape due to the prevailing circumstances. When an airman at war wants to be declared mentally unfit to serve, in order to escape his war duties, the medic Doc Daneeka explains that anyone wishing to escape from war must of necessity be sane, and therefore incapable of being declared mentally unfit. This is a so-called catch-22 situation.

[2] In this application respondent finds itself with a similar paradox, one to which there seems to be no solution. Applicant seeks the final winding up of the respondent on the basis that it is unable to pay its debts, and that it would be just and equitable to liquidate the respondent.

[3] Respondent is a property holding company. It does not trade, but it is the owner of a sectional title unit, section 2 in the scheme known as Wilson Park Phase 1, which is situated at Erf 260 Silvertondale Ext. 2 Township, City of Tshwane. Applicant is the bondholder over the property as security for two loans of R 1 665 600.00 and R 224 000.00 respectively, which applicant extended to respondent on 6 June 2017. Respondent defaulted on the loan repayments, and on 25 January 2019 it was in arrears with its monthly instalments in respect of the first loan in the sum of R 107 215.86. The balance on the loan as at that date was R 1 650 747.19. In respect of the second loan the respondent was also in arrears in the sum of R 230 141.04, with the balance on that loan amounting to R 243 312.68.

[4] On 14 November 2018 applicant caused a letter in terms of section 345 of the Companies Act, 1973 to be served on respondent. Respondent did not settle the debt within 3 weeks, and thus the respondent is deemed to be unable to pay its debts. It is, it seems, common cause that respondent was, and still is, unable to settle its debts as they fall due. It is therefore commercially insolvent.¹

[5] On 20 November 2018 respondent's director, Mr. Serguei Ivanov addressed a rather belligerent letter to applicant in which he admitted that the respondent could not maintain the agreed instalments, and he questioned why applicant was not prepared to reduce the instalments. In response applicant's attorney wrote to Mr. Ivanov proposing that respondent be granted until 31 March 2019 to sell the property on the open market. Applicant was prepared to accept payment of interest only until 31 March 2019, whereafter the arrangement would be reviewed. Respondent paid interest in December 2018, but then failed to effect payment in January and February 2019. This application was launched on 26 February 2019.

[6] On 4 July 2019 a provisional winding up order was granted, returnable on 17 February 2020. On the return date, at the request of both parties, the matter stood down and on 21 February 2020 a settlement agreement between them was made an order of Court. The settlement essentially required respondent to pay instalments of R 24 000.00 per month from 1 March 2020. The agreement provided that applicant would be entitled, in the event of breach of the agreement, to move for a final winding up order. Furthermore, respondent undertook to sell the property within nine months from 21 February 2020. The

¹ ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others 1993 (4) SA 436 (C)

net proceeds would be used to settle the debt, the costs of the provisional liquidators, and applicant's attorney/client costs of the winding up application, and in respect of a separate action instituted against Mr. Ivanov personally. Respondent effected payment in March and April 2020, but then made some payments but less than the agreed amount.

[7] Applicant gave respondent notice of its intention to move for a final order on 19 November 2020. The matter did not appear on the roll on that date, and the provisional order lapsed, only to be reinstated on an urgent basis on 4 December 2020. Respondent sought leave to appeal against the reinstatement of the order, but was refused leave to appeal. Respondent has taken no further steps in that application.

[8] The matter came before me on 21 January 2021. On the day before the hearing, 20 January 2021 respondent delivered a notice of intention to oppose the final order. I extended the rule *nisi* to 23 March 2021 to give respondent an opportunity to either settle the matter or to deliver an answering affidavit. On 23 March 2021 the matter was again before me. Respondent had still not delivered an affidavit opposing the application. Respondent advised me that the property had been sold and that guarantees for R 1 097 000.00 had been provided to applicant. In addition, respondent had paid R 273 284.11 and a further R 35 000.00 into its attorney's trust account to make up the shortfall on the capital. I directed respondent to file an answering affidavit by 24 March 2021, and I ordered that the matter be heard on 25 March 2021. On 25 March 2021 the parties indicated that the respondent's affidavit had been filed, together with an application for condonation for its late filing.

[9] As far as condonation is concerned, respondent can give no better explanation for its delay in filing its affidavit than to say it had been, and still was, of the view that the matter could be settled. Respondent had decided to save on legal fees by not filing an answering affidavit. In **Tasima v Department of Transport and others**², and the Constitutional Court (in **Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)**)³ have held that an extension of time may have important consequences, and is not merely for the asking:

"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable"

[10] Respondent has not given reasonable explanation for its delay in delivering an answering affidavit. It did not oppose the provisional order, it knew in November 2020 that applicant was intent on proceeding with the application, and when the matter came before me in January 2021, applicant's counsel made it abundantly clear that applicant intended to seek a final order. There was nothing to suggest to respondent that the parties would necessarily reach agreement, and thereby stave off a final order. Respondent should have filed its answering affidavit timeously.

[11] I am therefore not inclined to grant condonation for the late filing of the affidavit. Respondent's counsel argued that the entire debt had been secured,

² [2016] 1 ALL SA 465 (SCA)

³ 2008 (4) BCLR 442

and that it would be unjust to nevertheless grant a final order. That contention is simply not correct. Although the capital might be secure, there are substantial costs that also have to be paid, and it seems to me that the funds available to the respondent is insufficient to cover the entire debt. I stood the matter down for one last time to 26 March 2021 so that the parties could attempt to reach agreement on the balance of the debt due to the applicant. They were unable to do so. That is the catch 22 in which the respondent finds itself. It cannot pay the capital owing without transferring the property to the purchaser, but that would leave the applicant without security for its costs. Applicant will not allow transfer of the property unless the entire debt is secured.

[12] A Court has a discretion not to grant a final winding up order, even when all the other jurisdictional requirements have been met. However, that discretion is a narrow one. In **SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk**⁴ the Court held as follows:

"As pointed out by DOWLING, J., in Service Trade Supplies (Pty.) Ltd. v. Dasco & Sons Ltd., 1962 (3) S.A. 424 (N) at p. 428:

"The cases show that the discretion of the Court where unpaid creditors seek a winding-up order against a company unable to pay its debts is in reality a very narrow one, just as its discretion to refuse a sequestration order of an application of an unpaid creditor in an insolvent estate is very narrow. In Effune v. Hancock, 1923 T.P.D. 355, a full Court decision on

⁴ 1973 (3) SA 371 (C)

appeal by a creditor against a refusal to grant a final winding-up order, at p. 364, DE WAAL, J., is reported to have said:

'Where a creditor alleges an act of insolvency, and proves his claim, he has the unfettered right to choose his form of execution, one of which is to sequester his debtor's estate',

and His Lordship goes on to indicate that any discretion the Court may have is a narrow one.

In the sphere of company law the same sort of approach is valid. The great weight of authority is that generally speaking an unpaid creditor has a right ex debito justitiae to a winding-up order against a company unable to pay its debts. See In re James Millward and Co. Ltd., 1940 Chancery 333, and Buckley on the Companies Acts, 13th ed., p. 450, where the learned author quotes the remarks of Lord CRANWORTH in Bowes v. Hope Life Insurance, 11 H.L.C. 389, which follow:

'It is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and inequity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding up.'"

[13] This approach was followed in **ABSA Bank Ltd v Rhebokskloof** (*supra*):

"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 Edtn) Vol. 2 p 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F."

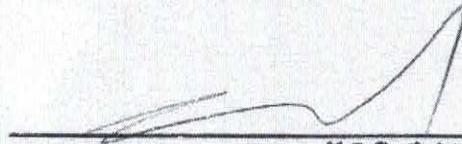
[14] I am acutely aware of the fact that in winding up applications there are most likely to be financial implications not only for the company being wound up, but also for the persons behind the corporate façade. Such hardship is often inevitable and devastating. However, I must also consider that applicant has waited more than two years for the debt to be satisfied. It has on a number of occasions tried to accommodate the respondent, without success. I have postponed the matter on three occasions to allow respondent to resolve its problems.

[15] Consequently, I do not believe that it is appropriate in these circumstances to exercise a discretion not to grant the final winding up order.

[16] I make an order in the following terms:

[16.1] Respondent is finally wound up in the hands of the Master of the High Court.

[16.2] The costs of the application will be costs in the liquidation.


JJC SWANEPOEL

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 March 2021.

COUNSEL FOR APPLICANT:	Adv. CL Markram-Jooste
ATTORNEY FOR APPLICANT:	Morris Pockroy Attorneys
COUNSEL FOR RESPONDENT:	Adv. A Granova
ATTORNEY FOR THE RESPONDENT:	Hack Stupel & Ross Attorneys
HEARD ON:	23, 25 and 26 March 2021
JUDGMENT ON:	29 March 2021

