

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

SIGNATURE

DATE: 10 September 2021

CASE NO: 2019/28318

In the matter between:

TE CONNECTIVITY SOLUTIONS GMBH

Appellant

and

TIS INVEST (PTY) LTD

Respondent

JUDGMENT

WEINER J

Introduction

[1] The applicant, TE Connectivity Solutions GmbH ('TEC'), sought the winding-up of the respondent TIS Invest (Pty) Ltd ('TIS') on the basis that TIS is indebted to the

applicant in the amount of €1 127 174.59, together with interest thereon. It bases the application on the fact that TIS is unable to pay its debts and is, in terms of s 345(1)(a) of the Companies Act 61 of 1973 (the '1973 Act'), commercially insolvent.¹

Application for postponement

[2] At the hearing of this matter TIS applied for a postponement which I refused, stating that the reasons would be incorporated into the main judgment. I set out the reasons hereunder.

[3] Two days before the final winding-up was to be heard on 23 July 2021, TIS launched an application for the winding-up application to be postponed. The purpose was for TIS to file a further affidavit in order to:

- (a) Respond to the allegations contained in the 'Joint Provisional Liquidation Report' (the 'Report') dated 10 May 2021, which was referred to in TEC's replying affidavit dated 17 May 2021;
- (b) Deal with any new issues arising from the allegations made in relation to the financial position of TIS, as documented in the Report.

[4] In order to ascertain whether a postponement was warranted and could be justified by TIS, this Court took heed of the chronology of events preceding this application.

[5] On 26 August 2021, Bhoola J granted an order for the provisional winding-up of TIS, with a return date of 5 October 2020. TIS failed to file reasons as to why a final order should not be granted. The provisional order was extended on 5 October 2020 to 23 November 2020, again on 23 November 2020 to 3 February 2021, and again on

¹ Section 345(1)(a) of the 1973 Act provides:

(1) A company or body corporate shall be deemed to be unable to pay its debts if—

- (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; ...

3 February 2021 to 12 May 2021. Despite these extensions, no affidavits were filed by TIS.

[6] On 27 April 2021, TEC's attorneys, Werksmans Attorneys, ('Werksmans') addressed an email to TIS's attorneys, Ledwaba Mazwai Attorneys ('Ledwaba Attorneys'), in terms of which Werksmans advised that it intended to apply for a final order on 12 May 2021. Werksmans requested Ledwaba Attorneys to advise whether TIS was persisting with its opposition and if so, when an affidavit would be filed. TIS filed its affidavit on 30 April 2021. On 17 May 2021, TEC filed its replying affidavit.

[7] At no point after TIS filed its replying affidavit did Ledwaba Attorneys raise any issues in respect of TEC's referral to the Report in the replying affidavit, nor was the accuracy of the Report placed in issue. On 31 May 2021, TEC filed its heads of argument and practice note and on 14 June 2021, TIS filed its heads of argument and practice note. In its heads of argument, TIS made reference to the Report in support of its contention that it is 'not a suitable candidate to be wound up'.

[8] On 24 June 2021, TEC served its notice of set down on TIS and proceeded to enrol the matter on the opposed motion roll for the week 19-23 July 2021. It had been allocated for hearing on 23 July 2021. A letter of confirmation was sent to Ledwaba Attorneys on 12 July 2021. On 14 July 2021, Ledwaba Attorneys addressed a letter to Werksmans, informing them that:

- (a) On 9 July 2021, all three counsel briefed for TIS had withdrawn from their briefs due to the provisional liquidators' refusal to make payment of the legal fees for the winding-up application;
- (b) Ledwaba Attorneys had been instructed to bring an urgent application for an order to compel the provisional liquidators to pay the fees, which application was in the process of being finalised. It had also been instructed to brief new counsel to argue the liquidation application. It was hoping to do so by 15 July 2021;
- (c) If a postponement was required as a result of this, Ledwaba Attorneys had been instructed to apply for it.

[9] There was no mention of the Report in such correspondence. Werksmans replied to the letter on 15 July 2021 stating:

- (a) Any application to postpone should precede the application to compel the liquidators to pay counsel's fees, and should be brought urgently so that it could be heard on 23 July 2021 before the winding-up application;
- (b) Times for filing of affidavits were proposed, with the application for postponement to be filed by 16 July 2021.

[10] TIS stated that it could not file the application on the suggested date, but undertook to file its application for postponement by 20 July 2021, but only delivered same on 21 July 2021.

[11] TEC contended that all of these events lead to the conclusion that TIS is simply employing delaying tactics for which TIS had not provided a full explanation. It was further submitted that any further affidavit filed in relation to the Report would not take TIS's case any further, because this crisp issue in the winding-up proceedings is whether or not TEC has demonstrated, on a balance of probabilities, that:

- (a) It is a creditor of the TIS in the amount of at least R200;
- (b) The applicant is commercially insolvent.

[12] TEC contended that the indebtedness of TIS to TEC had been fully dealt with in previous affidavits exchanged between the parties. The Report was filed 10 days after TIS filed its answering affidavit and it had not sought to deal with it until the very last minute.

[13] In any event, TIS has now dealt in detail with the Report in its founding affidavit in the postponement application. TIS has placed before the Court the additional financial information it sought to introduce in a further affidavit, thereby remedying any prejudice which TIS claims it will incur should it not be allowed to file a further affidavit.

[14] It is trite that before granting a postponement and an extension in a provisional winding-up application, the reasons therefor must be properly scrutinised, in order to protect the creditors who are prevented by the provisional winding-up order from

enforcing their claims. It is necessary for the court to protect such creditors against the costs of legal fees, administration costs and other financial disadvantages which may occur if an extension were granted.²

[15] From the recent financial statements referred to in the Report, TIS has a retained income position of minus R6 804 002.54. It has no funds available; thus a costs order will not alleviate the prejudice caused to the body of creditors if the postponement were to be granted.

[16] In regard to the necessity for a postponement to deal with the Report, TIS has annexed a myriad of financial statements which it says were provided to it by the provisional liquidators. TIS contended that such documentation shows that it is in a solvent financial position and should not be liquidated. As will appear below, TIS has dealt extensively with the findings in the Report and a postponement will not assist them in taking the matter further.

[17] TEC submitted that TIS is hopelessly insolvent and a postponement cannot alter this factual position. It will only result in further administration costs being incurred, with the result that there will be a lower dividend for the body of creditors.

[18] Creditors have been waiting for over two years for TIS to be wound up for their benefit; if the business has value, this must be realised by way of a sale of the business by the liquidators and for the benefit of the creditors who are owed R49 336 614.60.

[19] Thus the applicant for postponement was refused.

Legislative background

[20] Commercially insolvent companies are wound-up in terms of Chapter XIV of the 1973 Act by virtue of Item 9 of Schedule 5 of the Companies Act 71 of 2008 (the '2008 Act'). In terms of s 344 of the 1973 Act, the winding-up of a company may be sought on a number of bases, including that it is unable to pay its debts (s 344(f)) and that it is just and equitable to do so (s 344(h)).

² *Ex Parte W J Upton Transport (Pty) Ltd; Man Truck & Bus (SA) (Pty) Ltd v W J Upton Transport (Pty) Ltd* 1985 (1) SA 312 (W) at 313.

[21] In terms of s 346(1)(b) of the 1973 Act, the winding-up of a company may be sought by a creditor, including a contingent or prospective creditor. The debt need only consist of a nominal amount. Where the respondent's indebtedness has, *prima facie*, been established, the onus is on such respondent to show that this indebtedness is disputed on bona fide and reasonable grounds.³

[22] In *Absa Bank Limited v Rhebokskloof (Pty) Ltd*,⁴ which passage was cited with approval by the SCA in *Murray NO and Others v African Global Holdings (Pty) Ltd*,⁵ it was held that:

'...The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

[23] Section 345(1)(a) provides that creditors who have little or no knowledge of a company's financial affairs, may apply for its winding-up based on an allegation that the company is commercially insolvent, by delivering a demand to the respondent company's registered address; if the respondent company fails or neglects to pay, secure or compound for the indebtedness, it is deemed to be commercially insolvent. In *Body Corporate of Fish Eagle v Group Twelve Investments Pty Ltd*,⁶ the court held that:

³ *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24; [2017] JOL 37585 (SCA) para 6.

⁴ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440E-H. See also R Sharrock et al *Hockley's Insolvency Law* 9 ed (2012) at 250-251 where it is stated that this approach has been tempered by the availability of business rescue proceedings; but winding-up is more appropriate where dispositions need to be set aside, or where there are legal disputes.

⁵ *Murray NO and Others v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152 (SCA); 2020 (2) SA 93 (SCA) para 31.

⁶ *Body Corporate of Fish Eagle v Group Twelve Investments Pty Ltd* 2003 (5) SA 414 (W) para 16.

'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts ... If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.'

[24] In *Murray NO*,⁷ reference is made to *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*,⁸ where the Supreme Court of Appeal ('SCA') stated that:

'For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).'

[25] In general, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged the debt owing to the creditor. In *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* the SCA noted that, '... the of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a "very narrow one" that is rarely exercised and in special or unusual circumstances only.'⁹

Factual background

[26] On 3 November 2016, TIS and TEC concluded a written co-operation, kitting and distribution agreement (the 'Agreement'), in terms of which TEC agreed to sell its processing and trade products to TIS. In turn, TIS would act as a non-exclusive distributor of the TEC products in South Africa.

[27] TEC supplied TIS with products during July 2017 to April 2019 in the total amount of €1 768 479.93. Payment by TIS was due within thirty days from the date of each invoice.

⁷ *Murray NO v African Global Holdings* (note 5 above) para 23.

⁸ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2013] ZASCA 173; 2014 (2) SA 518 (SCA) para 16.

⁹ *Afgri Operations* (note 3 above) para 12.

[28] TEC alleged that TIS breached the Agreement by failing to make payment to TEC. During May 2019, in order to reduce the amount owed by TIS, TEC agreed to the return of products to the value of €641 305.00, which reduced the debt owed by TIS to €1 127 174.59, together with interest. The debt remains unpaid by TIS.

[29] On 12 April 2019, TEC's attorneys, Werksmans addressed a letter to TIS in terms of s 345(1)(a)(i) of the 1973 Act (read with Item 9 Schedule 5 of the 2008 Act) demanding payment of the amount owing.

[30] In response to the demand, on 19 May 2019, TIS's attorneys advised that the goods which been delivered by TEC were, despite having been ordered by TIS, not supposed to have been delivered. On 3 June 2019, TIS addressed a further letter to TEC in which TIS advised that it had identified key issues which had led to a 'governance breakdown' in a number of areas of TIS, which had in turn resulted in certain of the debts of TIS being unpaid, such unpaid debts including that of TEC. The letter which is signed by the acting CEO of TIS, Ms Motaung, set out that:

- (a) The previous CEO of TIS had been replaced;
- (b) The company had determined 'what caused the cash flow issues of the company'; and
- (c) A 'cash flow plan' was being prepared which identified €900 000 in back orders that would be processed.

[31] In the letter, Ms Motaung also sought to conclude an agreement with TEC in terms of which any funds which were received by TIS (for future TIS stock sales) would be paid to a third party with 'instructions to pay a fixed percentage of such receipts to TE Connectivity.' It was further stated that—

'The effect of this will be that TE Connectivity will have security that a portion of all future sales by TIS go to repayment of TIS's outstanding accounts to TE Connectivity, and thereby allowing TIS's credit balance to be reduced to normal trade terms over time.'

[32] It was thus clear that TIS was unable to pay the full amount owed to TEC, but was seeking to continue trading and pay a portion of funds to TEC and thereby reduce the debt 'over time'. The period of time was, however, unspecified.

[33] According to Mr Andrew Meerburg,¹⁰ the reason that TIS was unable to pay its debts was because the previous CEO ('Mr Moloko') had diverted over R15 million from the company into his other businesses.

[34] On 9 July 2019, Mr Meerburg provided TE Connectivity with a written payment plan. The plan recorded that TIS was 'undercapitalized' and required that TEC provide further credit in order for TIS to supply its outstanding orders. It also required further stock to be provided on credit to the value of R4,9 million. The arrear debt would be ring-fenced and settled over an undefined time period. TIS did not dispute its debt to TEC.

[35] TEC stated that the proposed terms were not acceptable as the proposal would not result in the payment of the debt; it only sought to require TIS to incur further debt of R4,9 million.

[36] TIS did not make any payments to settle the debt and on 14 August 2019, TEC launched the winding-up application.

The respondent's defence to the application for winding-up

[37] In the answering affidavit, TIS alleged that the stock delivered to it was not in accordance with the purchase orders that were placed with TEC. In addition, some stock that was delivered was not ordered by TIS. This allegation was raised for the first time in the answering affidavit. At no time during the meetings or correspondence was this issue raised by TIS's representatives.

[38] To deal with this issue, TEC set out the process involved prior to stock being delivered to TIS. Firstly, TIS would provide TEC with a purchase order ('PO') which shows the stock ordered as well as the delivery date. In response to the PO, TEC provides an Order Acknowledgement ('OA') to TIS. TEC then processes the order and arranges for delivery of the stock, to be delivered on the date reflected in the PO provided by TIS. TEC contended that each PO and corresponding OA constituted a binding contract between TEC and TIS. TEC contended that each PO and OA relied

¹⁰ Described as the CEO of Agilequity and appointed as consultant and interim chief financial officer of TIS.

upon by TEC was valid and binding. TEC stated that it fulfilled its obligations in terms of each of the contracts.

[39] TEC thus submitted that, having established the indebtedness, the onus fell on TIS to raise a bona fide dispute in respect thereof, which it had failed to do.

[40] On 17 September 2019, after the winding-up application was launched, Ms Motaung (the deponent to the answering affidavit in this application) launched an application for TIS to be placed in business rescue. In such application, Ms Motaung confirmed that:

- (a) TEC was a creditor of TIS;
- (b) TIS was unable to pay its debts;
- (c) Numerous creditors of TIS had not been paid;
- (d) The total debt owed by TIS to its creditors was R53 414 956.37. Included in this amount, as well as the list of creditors provided by Ms Motaung, is part of the debt owed to TEC in the amount of R16 424 292.55, which amount is listed as being outstanding and overdue;
- (e) TIS was financially distressed and commercially insolvent.

[41] On 13 December 2019, the business rescue application was dismissed by Dippenaar J, with costs.¹¹ It was held that Ms Motaung had failed to make out a case that a reasonable prospect existed for TIS to be rescued.

[42] Despite having conceded in the business rescue application that TIS is financially distressed and commercially insolvent, and despite Dippenaar J having found that TIS cannot be rescued, TIS has continued to oppose this application on what TEC describes as 'unsustainable grounds'.

[43] TEC thus contended that TIS is currently trading in insolvent circumstances and is diverting funds (which should be used to pay its debts, including the debt of the applicant) to other entities which are owned and /or controlled by the directors of TIS.

¹¹ *Motaung v TIS Invest (Pty) Ltd and Others* [2019] ZAGPJHC 533. Judgment was delivered on 13 December 2019.

It is also alleged that TIS is unlawfully transferring the assets of TIS, to the prejudice of TIS's creditors. In this regard, TEC relied on *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd*,¹² where Wunsh J held:

'...where a company (a) has closed a number of branches of its business, (b) has retrenched staff to a considerable extent, (c) has virtually closed its head office, (d) is diverting funds which should be used to pay its debts to an overseas concern on grounds which are not satisfactorily explained, (e) to excuse the non-payment of its liabilities sets up a contrived and baseless counterclaim, and (f) has transferred assets outside the ordinary course of business, it is just and equitable that the creditors should be protected from further losses and that it should be prevented from disposing of assets and incurring further liabilities.'¹³

[44] In my view, the concessions made by Ms Motaung in the business rescue application that TEC is a creditor of TIS and that TIS is commercially insolvent, nullifies the belated attempt to dispute the orders and the deliveries. Such concessions invalidate the submissions by TIS that the defences raised are genuine or bona fide.

[45] In dealing with the Report, TIS seeks to show that TEC is solvent and should not be wound up. TEC challenges the conclusions arrived at by TIS. TEC contended that the retained income position of TIS as at 14 July 2021 amounted to minus R6 804 002.54; it has been trading at a loss for a sustained period of time, thus demonstrating commercial insolvency. TEC contended further that TIS is relying on the post-liquidation financial position, which does not present an accurate picture of its ongoing financial situation. In this regard, TEC points out that:

- (a) TIS is currently trading under the protection of a moratorium against any legal proceedings; it therefore does not have the pressure of having to pay its creditors. Because TIS is in provisional liquidation, it has managed to build up cash reserves of approximately R2 million as there is no immediate pressure to pay suppliers. Some suppliers have agreed to pay TIS once they get paid.
- (b) The expenses listed in the profit and loss report do not accurately portray what TIS would ordinarily be paying for its expenses had it not been placed under provisional liquidation. For example, a lower rental was negotiated between the

¹² *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 All SA 268 (W) at 279i-280a.

¹³ See also *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T) para 48.

provisional liquidators and the landlord of the premises from which TIS is operating.

- (c) In addition, the provisional liquidators have negotiated preferential payment terms with contractors such as Vodacom. Thus, TIS will be paid quicker than they would under normal payment terms. Therefore, TIS's liquidity appears to have improved – but these preferential payment terms will only exist for as long as TIS remains in provisional liquidation and is trading under the control of the provisional liquidators.
- (d) Other costs such as interest on liabilities, costs of the liquidation, costs incurred for the repair of the building premises (which TIS has recently vacated) have not been accounted for in the profit and loss account.

[46] Thus, it is submitted that the financial position described by the acting CEO of TIS, Mavis Leoma Motaung ('Ms Motaung'), in her founding affidavit and the facts alleged in the postponement application, in relation to the Report are inaccurate; the majority of the documents relied upon relate to the post-liquidation trading period of TIS, and do not take into consideration the solvency position of TIS pre-liquidation.

[47] In my view, TEC has shown that it is a creditor of TIS; the debt is not disputed on bona fide or reasonable grounds; TIS is trading in insolvent circumstances and is both factually and commercially insolvent; and assets of TIS have been diverted to the prejudice of TIS's creditors, including TEC.

Accordingly, the following order is made:

1. The respondent is placed under final winding-up in the hands of the Master of the High Court.
2. The costs of this application are to be costs in the winding-up.



SE WEINER

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 10 September 2021.

Date of hearing: 23 July 2021

Date of judgment: 10 September 2021

Appearances:

Counsel for the applicant: Adv. JE Smit; Adv. C Gibson

Attorney for the applicant: Werksmans Attorneys

Counsel for the respondent: Adv. M Meyer

Attorney for the respondent: Ledwaba Mazwai Attorneys