

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



CASE NO: 41288/2014

DATE OF HEARING: 14 MAY 2015

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

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DATE

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SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

and

JEFF & BRAAM TRUCK PARTS CC

Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

1. The applicant launched winding up proceedings against the respondent on the basis that the applicant is a creditor of the respondent. After hearing the application I ordered a final liquidation order and that the costs of the application shall be costs in the liquidation. I reserved the reasons for my decision. These are therefore my reasons for the order.
2. The respondent did not dispute its indebtedness to the applicant and in the amount so alleged, neither the arrears. The indebtedness is therefore common cause. As at January 2013 the applicant required of the respondent to pay an amount of R2 714 500.91. This was not forthcoming.
3. The authorities require of a respondent in an application for winding up to, dispute the applicant's claim, on bona fide and reasonable grounds. See *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 AD. On the respondent's version it is disposing of assets to pay off debts. The respondent submitted that it is not just and equitable for the court to grant the order sought. It submitted, with reference to *Apco Africa (Pty) Ltd v Apco Worldwide Incorporated* 2008 (5) SA 615 SCA, that "just and equitable" was held to afford courts with wide discretionary powers and requires a "broad conclusion of law, justice and equity as a ground for winding up". Whilst this is so it requires that such discretion to be applied to facts that warrant such discretion.

4. In this application, save for the respondent raising and labouring on its point in limine, to which I will return below, and submitting that the applicant ought to have considered various other remedies instead of embarking on liquidation proceedings, the respondent has not set out any grounds or facts that may remotely be construed as disputing the applicant's claim, on bona fide and reasonable grounds. In the absence of *bonafide* and reasonable grounds of opposition, I cannot consider that the applicant should have taken alternative steps to enforce payment of the debt.
5. It was submitted that the applicant could, and should have considered initiating business rescue proceedings in respect of the respondent's business. Whilst this may be technically possible, I find it absurd to expect that a creditor would embark on such proceedings for and on behalf of its debtor, let alone on the current facts.
6. It was submitted that I should have regard to the downward trend of the South African economy and that the new Companies Act is aimed at keeping companies afloat instead of being liquidated. These submissions are nothing short of desperate attempts to shift the focus away from the real issue that the respondent cannot be permitted to continue operating on the basis it does and ought to be wound up. It bears mentioning that the respondent has permitted its deregistration by CIPC by failing to submit annual returns.

7. The respondent, in limine, submitted that the applicant did not comply with the provisions of section 346 (4A) of the Companies Act 1973, Act No. 61 of 1973. The respondent submitted, incorrectly so that compliance of such section required service of the application on all persons and entities listed in the section before bringing the application to court. This is clearly incorrect. The section is aimed at requiring compliance with the provisions of the section at any stage prior to judgment in the application.

8. The respondent relied on *E B Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* 2013 ZASCA 167. This decision has been reported as 2015 (2) SA 526 SCA. The applicant submitted quite correctly that the respondent's submissions, with reference to this decision are incorrect. Wallis JA held the following at 532 paragraph 11 F and further:

[11] Section 346(4A) requires that the application papers be furnished to various people, namely, every registered trade union that represents the employees; the employees themselves; SARS and the company itself, unless there are grounds for the court to dispense with the last of these. Unlike the previous sub-section, which requires that the papers be lodged with the Master 'before' lodging with the Registrar of the high court, s 346(4A) only requires that the application papers be furnished to these persons 'when' the application has been presented to the court. That difference in terminology is significant as it conveys that the application papers do not have to be furnished to the

specified persons until after the application has been lodged with the Registrar. There is a good reason for this. It is only once the papers have been lodged that a case number will have been allocated and a date of set-down determined in the event of there being no opposition and these will be reflected in the notice of motion. If the application is to be heard as a matter of urgency the grounds therefor and the date of hearing will then appear from the application papers, which would not be the case if they had to be served before lodging them with the registrar of the court that will hear the application.

- [12] The contrary conclusion in *Corporate Money Managers (Pty) Ltd & others v Panamo Properties 49 (Pty) Ltd* overlooked the difference in wording between ss (4) and (4A), and is incorrect. The application papers can be furnished to the named persons at any time after lodging with the Registrar provided that they have been furnished to the identified persons prior to the grant of a final order. That ensures that the purpose of the section will be fulfilled. It is unnecessary to determine finally what a court should do if the papers are furnished to one such person on the day of the hearing or only shortly before. The court should in general satisfy itself that the persons who are entitled to be furnished with the papers have had an adequate opportunity to consider the application and decide whether to intervene. It is also unnecessary to spell out the circumstances in which a court should be prepared at the stage when a provisional winding-up order is sought to grant an order notwithstanding the fact that the application papers have not yet been furnished to employees. Ordinarily this should be done before a provisional order is granted but reasons of urgency or logistical problems in furnishing them with the application papers may

provide grounds for a court to allow them to be furnished after the grant of a provisional order.

[13] Like the earlier sub-sections, there can be little doubt that the section imposes an obligation on the applicant to furnish the application papers to the persons named in the section. That accords with the section's purpose. For example the inclusion of SARS in the list is dictated by its role in protecting South Africa's tax base and ensuring that in the public interest all taxes properly levied are collected. There are obvious reasons why it should know about applications for winding-up or sequestration. The reasons for requiring that the application papers be furnished to employees and their representatives have already been mentioned. The section says that the application papers 'must' be furnished to the named persons. In the traditional language of the law that is peremptory.

9. I am satisfied that the applicant has complied with the provisions of section 346 (4A) and with the various affidavits filed in compliance thereof.
10. In respect of the uncertainty and different interpretations given by our courts to commercial insolvency and factual insolvency, the applicant submitted that this has been brought an end by the decision in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 SCA, where Willis JA held as follows:

- “[17] Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(1) thereof.
- [18] In view of the long established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company, it must be presumed that the legislature was aware of this fact. The principle that Parliament is presumed to be acquainted with the interpretation of earlier legislation by the court, applies where there has been a settled and well- recognised judicial interpretation before the relevant legislation was passed.
- [19] It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend to alter the law as it had previously stood. Accordingly, it must be presumed that the legislature deliberately refrained from defining ‘solvency’. It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect. The meaning of those terms must be one that leads to a sensible and business-like result.
- [22] Consequently, in order for a solvent company to be wound-up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound-up in

accordance with chapter 14 of the old Act, as is provided for in sub item 9(i) of schedule 5 of the new Act.

[23] The confusion which has arisen as to when a company may be wound-up in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense.

[24] Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See *Johnson v Hirotec (Pty) Ltd*. It follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act.

11. I was requested to consider issuing a final order instead of a provisional liquidation order because a provisional order would not take the matter any further and the respondent would not, under the

circumstances be able to return on the return date in any different position. I am inclined to agree. The practice in this division is that the courts have wide discretion to issue final orders of liquidation where the circumstances justify such an order. I have had regard to the decision in *Johnson v Hirotec* 2000 (4) SA 930 SCA where Melunsky AJA held as follows:

“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.”

12. Consequently, I make the following order:

12.1 The respondent is placed under final liquidation.

12.2 The costs of this application shall be costs in the liquidation.

AVVAKOUMIDES, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for Applicant:

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Instructed by: Tim Du Toit Incorporated

Representation for the Respondent:

Counsel Adv: Q. A. Van der Heever

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