In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 101/2013

In the matter between :

Ithala Development Finance Corporation Ltd Applicant

and

Concrescore Vehicle Repair Specialists (Pty) Ltd Respondent

Judgment

Lopes J

[1] The applicant in this matter, Ithala Development Finance Corporation Ltd, seeks a provisional order of liquidation of the respondent, Concrescore Vehicle Repair Specialists (Pty) Ltd, on the grounds that the respondent is insolvent and unable to pay its debts in terms of the provisions of ss 344 and 345 of the Companies Act, 1973 ('the old Companies Act') read with item 9 of schedule 5 of the Companies Act, 2008 ('the new Companies Act').

[2] The following are common cause :

(a) during April and June of 2011 the applicant loaned and advanced to the respondent :

(i) the sum of R4 222 309 for the financing of the respondent's purchase of equipment;

(ii) R1 600 000 for working capital;

These loans were effectively to finance the running of a vehicle repair shop by the respondent;

(b) the respondent breached its obligations to repay the amounts of those two loans and the applicant issued summons out of this court under the cases numbered 7518/12 and 12368/12 respectively;

(c) the actions are defended by the respondent and I understand that summary judgment has been refused in both actions;

(d) there was, in addition, a further debt owed to the applicant in respect of a lease agreement concluded between the parties. This was also the subject of an action between the parties. That action has been settled in terms of a settlement agreement dated the 23rd August 2013 which was coupled by a consent to judgment by the respondent in the sum of R2 400 000. The consent to judgment can, however, only be lodged by the applicant in the event that the respondent fails to make certain payments in respect of the lease agreement debt;

(e) the applicant relies upon the respondent's failure to make payments in respect of the two loans reflected above and submits that the failure to pay those amounts, which in total exceeds R6 000 000, demonstrates the factual insolvency of the respondent together with the fact that it is unable to pay its debts in the normal course of its commercial dealings;

(f) a Deeds search conducted in the Deeds Office in Pietermaritzburg reflected that the respondent does not own any immovable property;

(g) the applicant also relied upon a letter addressed by three persons regarding the present financial standing of the respondent. One of those persons was the deponent to the respondent's answering affidavit. It is clear from the contents of that letter that the authors regard the respondent as being in a dire financial position and the letter reposes no confidence in the reader that the respondent would be able to pay its debts. The letter records :

> 'At the moment the business is not even breaking even, and the legal actions have exacerbated the situation. It (sic) evicted the business will not be able o (sic) function without a space. Effectively it will have to shut down. Ironically, the only way Ithala stands some chance to get its money back is when the business is trading because only then can it be able to repay its debts. The nature of the equipment and machinery which was brought is fitted on the ground and therefore removing it will damage it which will make it catch close to nothing if sold. Individual directors who are sureties for the debts have no asserts (sic) of value to even consider executing upon to recover the debts. In essence, if the business is closed, except to crush the directors' dreams of transforming the automobile industry and putting 30 employees out of work, the debts will remain unpaid, perhaps forever. We do not believe that what is happening now is at any of the party's best interests';

(h) in what can only be described as an extremely short and vague answering affidavit, the deponent, Mr Makhanya refers to the fact that the letter put up by the applicant was signed not only by himself but also by one Khumbulani Lembede, a fellow director of the respondent.

[3] I accept without hesitation that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by a respondent company. In regard to the requirement of a defence to a liquidation application, I refer to the dicta of Corbett JA in *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 980 B -C 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.’

[4] All that the respondent has stated as the basis for its defence is that the claims of the applicant under the loan agreements are defended. The deponent simply records that the applicant cannot seek an order to liquidate the respondent on claims which are disputed.

[5] Mr *Troskie* SC who appears for the applicant submitted that the advance of the loans is not denied and no explanation has been given regarding the non-payment of the instalments in respect of those loans. He submitted that on the basis of the loans and the failure to pay by the respondent, both the actual insolvency and the inability of the respondent to pay with the resulting conclusion of commercial insolvency, are established.

[6] Mr *Sibisi* who appeared for the respondent submitted that as the lease agreement had been settled between the parties it could not be taken into account by the court in concluding whether or not the respondent was insolvent. This is because the first payment in terms of the settlement agreement of the lease payments is only to be paid on the 1st October 2013. Purely for the purpose of this application I record that I have not taken into account the indebtedness of the respondent in respect of the lease agreement, despite the fact that the compromise which the respondent reached provides strong evidence of the respondent's inability to pay its debts. Ultimately, Mr *Sibisi* had to rely upon the fact that both the loan agreements are the subject of defended actions. In the light of the test as laid out in *Kalil* and the respondent's failure in any way to deal with the respondent's defences to its failure to pay the loans advanced by the applicant, I have no doubt that the applicant has established the requisites for a provisional order of liquidation of the respondent.

[7] In the premises I make the following order :

1. a rule nisi is hereby issued calling upon all persons to show cause, if any, to this court on the 18th October 2013 at 9.30am or so soon thereafter as the matter may be heard, why the respondent should not be finally wound-up;
2. this order is to operate with immediate effect as a provisional order winding-up the respondent;
3. service of this order is to be effected :

(a) by publication on or before the 4th October 2013 in both the Government Gazette and a daily newspaper published and circulating in KwaZulu-Natal;

(b) as required by the provisions of the Companies Act, 1973.

Date of hearing : 26^{th} August 2013

Date of judgment : 28^{th} August 2013

Counsel for the Applicant : A J Troskie SC (instructed by Ndwandwe& Associates)

Counsel for the Respondent : M Sibisi (instructed by Mhlanga Incorporated)