IN THE KWAZULU-NATAL HIGH COURT, DURBAN ***REPORTABLE***

REPUBLIC OF SOUTH AFRICA

CASE No: 684/2012

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

WAYRAIL INVESTMENTS (PTY) LTD Respondent

JUDGMENT

Delivered on 20 December 2012

Vahed J:

[1] This matter served before me on the opposed motion roll on 24 October 2012 which was the extended return day of an Order provisionally winding-up the respondent which was made by Mnguni J on 18 April 2012. The final Order is opposed and detailed and lengthy affidavits have been exchanged. The applicant has complied with the procedural formalities for a final Order in that publication and the requisite service of documents have been effected. That much is not in dispute.

[2] On the papers two principal issues emerge for resolution. The first relates to the authority of the deponent to the respondent's answering affidavit. This issue was not persisted in by Mr *Harcourt SC* who appeared for the applicant. Nothing more needs to be said on this score.

[3] That left the only real issue in the case, which related to whether the respondent was *solvent* within the meaning of that term as it is employed in item 9(2) in schedule 5 to the Companies Act, 71 of 2008 and in section 81 of that Act.

[4] That issue brought into sharp focus the concepts of *solvent*, *insolvent*, *commercially insolvent* and *inability to pay debts* as they have come to be known and employed in our law when considering whether a company is insolvent and liable to be wound-up.

[5] It is common cause in this matter that the respondent's assets, fairly valued, exceed its liabilities. It is also common cause, or not seriously in dispute, that the respondent cannot make payment of its ongoing obligations because it does not have sufficient cash resources (or readily available resources) with which to do so.

[6] In what follows, unless the context indicates otherwise, I shall refer to the Companies Act, 71 of 2008 as "the 2008 Act" and to the Companies Act, 61 of 1973 as "the previous Act". The 2008 Act repealed, in its entirety, the previous Act, but, in certain transitional arrangements, retained its applicability in certain given circumstances. The winding-up of *insolvent* companies is one such circumstance.

[7] The present application is based, in the main, on the respondent's inability to pay its debts and its winding-up is sought in terms of the provisions of the previous Act read with Item 9 of Schedule 5 of the 2008 Act.

[8] Section 81 of the 2008 Act provides as follows:

81 Winding-up of solvent companies by court order

(1) A court may order a solvent company to be wound up if-

(a) the company has-

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141 (2) *(a)*, on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that-

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2) *(b)* or *(c)* (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

(ii) it is otherwise just and equitable for the company to be wound up;

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and-

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that-

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the company's assets are being misapplied or wasted; or

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that-

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act 69 or 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

(2) A shareholder may not apply to a court as contemplated in subsection (1) *(d)* or *(e)* unless the shareholder-

(a) has been a shareholder continuously for at least six months immediately before the date of the application; or

(b) became a shareholder as a result of-

(i) acquiring another shareholder; or

(ii) the distribution of the estate of a former shareholder,

and the present shareholder, and other or former shareholder, in aggregate, satisfied the requirements of paragraph *(a)*.

(3) A court may not make an order applied for in terms of subsection (1) *(e)* or *(f)* if, before the conclusion of the court proceedings-

(a) any of the directors have resigned, or have been removed in terms of section 71, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based; or

(b) one or more shareholders have applied to the court for a declaration in terms of section 162 to declare delinquent the directors, if any, responsible for the alleged misconduct, and the court is satisfied that the removal of those directors would bring the misconduct to an end.

(4) A winding-up of a company by a court begins when-

(a) an application has been made to the court in terms of subsection (1) *(a)* or *(b)*; or

(b) the court has made an order applied for in terms of subsection (1) *(c)*, *(d)*, *(e)* or *(f).'*

[9] Item 9 of Schedule 5 of the 2008 Act provides as follows:

'(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the Gazette, may –

(a) determine a date on which this item ceases to have effect but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).'

[10] Relying principally on the authority in this division of *Business Partners v Yellow Star Properties 1061 (Pty) Ltd*, an unreported decision of *Radebe* J in case number 7188/2011 KZND delivered on 13 July 2012 and *HBT Construction & Plant Hire CC v Uniplant Hire CC* [2011] ZAFSHC 216, Mr *Harpur SC*, who appeared for the respondent argued that *solvent*, where it appeared in both in section 81 and in item 9 of Schedule 5 of the 2008 Act, meant and referred to factual or actual solvency. In other words, it did not include commercial insolvency. Thus, he continued, the applicant's reliance on the previous Act was not competent because the respondent was *solvent* and if the applicant wanted to secure its winding-up, it had to bring itself within the confines of section 81 of the 2008 Act.

[11] After I had reserved judgment in the matter Mr *Harcourt* drew attention to the decision of *King* AJ in *Standard Bank of SA Ltd v R-Bay Logistics CC* [2012] ZAKZDHC 69 which had been handed down in this division on 31 October 2012.

[12] In *R-Bay Logistics*, *King* AJheld, on the identical issue, that *solvent*, for the purposes of Item 9 of Schedule 5 of the 2008 Act, meant, at the very least, commercial solvency. In other words, a company with an excess of assets over liabilities but which could not discharge its debts as and when they arose in the ordinary course of business was one properly liable to be wound up in terms of Item 9 of Schedule 5 of the 2008 Act. In that regard, *King* AJ held as follows:

'[25] I have already said that the concept of "commercial insolvency" in the sense that a company is unable to meet its obligations when they fall due, is one which is well known in company law and is enshrined in Section 344(f). I have also said that such commercial insolvency requires the application of a test which is quite different to that which one must apply to establish actual insolvency. That being so, it would be quite incongruous for the legislators to require an applicant to establish the actual insolvency of a respondent company merely in order to entitle that applicant to bring an application for winding-up, making use of the provisions of Section 344(f), which requires the application of a completely different test.

[26] To my mind, this offers compelling evidence that what the legislature intended, when it used the term "solvent" in Item 9 was that a company must be solvent in at least the commercial sense, before any winding-up of that company could take place under Part G. For present purposes, it is not necessary for me to determine whether, for Part G of the new Companies Act to apply, it would have to be established that the company was also actually solvent.

[27] There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is enough for a Court to find that the required case under

Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f).

[28] I believe that my view is also reinforced by the provisions of Section 79(3) of the new Companies Act (which is in Part G), read together with Item 9(2). It will be noted that, under Item 9, only certain of the sections which form part of Chapter 14 of the old Companies Act are said not to be applicable in the case of the winding-up of a solvent company. What is noteworthy is that Section 345 of the old Companies Act still applies even to the winding-up of a solvent company under the provisions of the new Companies Act. Bearing in mind that commercial insolvency (ie: inability to pay current debts) is not one of the grounds mentioned in Section 81 of the new Companies Act, for the winding-up of a solvent company, the question arises as to why the legislature saw fit to preserve the operation of Section345 of the old Companies Act even when the winding-up of a solvent company is under consideration by the Court. The provisions of section 69 of the Close Corporations Act, which mirror those of section 345 of the old Companies Act, were also preserved when the Close Corporation Act was amended, to take account of the provisions of the new Companies Act.

[29] I believe that the explanation is contained in Section 79(3) of the new Companies Act. It provides that, if during the course of an application to wind-up a solvent company, brought under the provisions of Section 81, it is determined that the respondent company is or may be "insolvent" the Court may order that the company be wound up as an "insolvent" company in terms of the laws referred to in Item 9. What the section contemplates is that if the "solvency" of the respondent company is in doubt, its winding-up can be dealt with on the basis contemplated by Section 344 of the old Companies Act. The only apparent purpose of preserving the operation of Section 345 of the old Companies Act, even when one is dealing with the winding-up of a "solvent" company is, it seems to me, that it provides the basis for a Court to come to the conclusion that the respondent company is or may be "insolvent", as contemplated by Section 79(3). As far as I can see, Section 345 of the old Companies Act has no other relevance in relation to any application to wind-up brought under the new Companies Act. I accordingly conclude that, in determining whether a respondent company is, or may be, "insolvent" as contemplated by Section 79(3), the Court would be entitled to have regard to evidence that the respondent company was unable to pay its debts, as contemplated by Section 345 ofthe old Companies Act. In other words, the word "insolvent" in Section 79(3) is intended to refer to a respondent company which is or may be commercially insolvent. Again, whether that word also encompasses the notion of actual insolvency need not be decided for present purposes.'

[13] After *R-Bay Logistics* was drawn to his attention, Mr *Harpur*sought an opportunity to deliver additional written submissions and these were

received in due course. In contending that *R-Bay Logistics* was wrongly decided Mr *Harpur*sought to draw a distinction between the concept of inability to pay debts as a requirement for winding-up under the previous Act and the concepts of *solvency* and *insolvency* under the 2008 Act. He argued that the shift in the 2008 Act to the "new" concepts of *solvency (or insolvency)* and *liquidity* meant that in the 2008 Act *solvent* could only mean that provided for in section 4(1)(a) of the 2008 Act; ie. the*solvency* portion of the *solvency and liquidity test*.

[14] In emphasising that distinction he focussed his argument on section 4 (the solvency and liquidity test) and the definition of *financially distressed*, both in the 2008 Act.

[15] Before dealing with that argument it is necessary to place in context the terms *solvency (or solvent)* and *insolvency (or insolvent)* as they have come to be treated judicially over time. I can do no better that repeat what *King* AJsaid in that regard in *R-Bay Logistics*:

'[13] The point raised by the Respondent has received judicial attention in only a few cases because the new Companies Act has been in force for only 18 months or so. During argument, I raised various matters with counsel for the parties, and, because the issue is novel, I afforded both counsel additional time to file supplementary arguments. They did so and I am grateful to them both for their input.

[14] Central to the issue raised by the Respondent is what is meant by "solvent" and "insolvent" where those terms are used in Item 9 and Part G. It has long been accepted that, in our law, a state of "insolvency" has two different meanings. Actual or literal insolvency involves a comparative measurement of the value of a company's assets and its liabilities. If the total value of those liabilities exceeds the total value of the assets, the company is actually insolvent. However, "commercial insolvency" recognises that, whether a company is actually insolvent or not, if it does not have sufficient cash resources to make payment of its ongoing obligations, as and when they fall due, the company is commercially insolvent.

***Ex Parte* De Villiers &Ano NNO: In re Carbon Developments** 1993 (1) SA 493 (A) at 502

Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA) at 933 (para 6) to 934 (para 8)

[15] The two concepts (i.e. actual insolvency vs commercial insolvency) are quite different. The former involves the mere assessment of the value of a company's assets and liabilities. The latter involves an assessment of the company's cash flow, to determine whether it has the immediate wherewithal to pay its current expenses, as they fall due.

[16] To my mind, the first question to answer is whether, in Part G and Item 9, the reference to a "solvent" or "insolvent" company is intended to relate to actual insolvency or so-called commercial insolvency.

[17] It seems clear that the legislature was mindful of the distinction between these two meanings when it passed the new Companies Act. Section 4 thereof deals specifically with a "solvency and liquidity test". That test has to be applied in various circumstances, under the new Companies Act, in which, putting it generally, the capital of a company is used or distributed for a purpose other than the conduct of the company's ordinary business. For present purposes, the details of the test, and the circumstances in which it is applied, are not relevant. What is relevant is that Section 4 spells out that the test for solvency involves a comparison of the value of a company's assets with that of its liabilities whilst the test for liquidity involves a consideration of the likelihood that the company will beable to pay its debts as they become due in the ordinary course of business.

[18] Sadly, the new Companies Act does not define "solvent" or "insolvent" in relation to the winding-up of a company. As far as I can detect, those terms are used only in Part G (dealing with the winding-up of "solvent" companies) and in Item 9 which deals with the law which is to apply to the winding-up of "solvent" and "insolvent" companies. Giving those words their ordinary meaning, one might well conclude that those terms refer to actual insolvency, as distinct from commercial insolvency.

[19] However, one needs also to consider the context in which those terms have been used in the new Companies Act. For many years, in our Company law, a reference to its "solvency" encompassed both actual insolvency and commercial insolvency, depending upon the context.

***Ex Parte* De Villiers &Ano NNO: In re Carbon Developments** 1992 (2) SA 95 (W) at 112 – 113

***Ex Parte* De Villiers (On Appeal** : See para 14 above) at pages 502 to 504

[20] What then did the legislature mean, in Part G and in Item 9, when it referred to a "solvent" company? Did it mean actual insolvency or commercial insolvency or, perhaps, both?

[21] To answer, I think it is first necessary to consider the apparentintention behind the transitional provisions encapsulated in Item 9. It seems clear that the legislature's ultimate objective is to replace the provisions of Chapter 14 of the old Companies Act, dealing with the winding-up of companies, with new legislation which would deal, separately, with "solvent" companies and "insolvent" companies. However, at the time that the new Act came into force, it made provision (in Part G) only for the winding-up procedure for "solvent" companies. For reasons which are not apparent, the legislature had not got round to creating any new legislation to deal with the winding-up of "insolvent" companies.

[22] It is therefore clear that Item 9 is intended to serve only as a stopgap, until such new legislation is passed. Item 9(4)(a) specifies that Chapter 14 of the old Companies Act must continue in force until such new legislation, dealing with "insolvent" companies, is actually in place.

[23] Nothing in the new Companies Act has changed any of the provisions of Chapter 14 of the old Companies Act. Accordingly, for the purpose of winding-up an "insolvent" company, Section 344 thereof must still regulate the basis upon which it can be wound up. Of particular relevance in this case is Section 344(f) which requires an applicant to prove that the respondent company is unable to pay its debts, as contemplated in Section 345 of the old Companies Act.

[24] Accordingly, the legislature must have intended that, to wind-up an "insolvent" company, between the date of commencement of the newCompanies Act, and the implementation of intended new legislation, an applicant would have to establish one or other of the grounds for winding- up contemplated by Section 344, including, in particular, that the respondent company was unable to pay its debts.'

[16] I revert to Mr *Harpur's* argument as foreshadowed in paragraphs 13 and 14 above, and will consider, firstly, his reference to *financially distressed*, and thereafter, his reliance on section 4.

[17] The term*financially distressed* is employed in chapter 6 of the 2008 Act, which deals with the concepts of Business Rescue and Compromises with Creditors. Section 128 contains the definitions applicable only to chapter 6 and therein the term is described thus:

'*(f)* **'financially distressed'**, in reference to a particular company at any particular time, means that-

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'

[18] The first observation that I make is that that definition is applicable only for the purposes of chapter 6. In other words, it has been ring-fenced for application only in chapter 6.

[19] The second, and perhaps more important observation is that the definition includes a prospective assessment. Apart from possibly being presently unable to pay it debts, It has to be **likely** that in the six months immediately following the date the assessment is made the company **will** be unable to pay all of its debts as the become due and payable. That is something far different from a situation where a company **is currently** or **ispresently** unable to pay its debts within the ordinary course of business.

[20] Section 4 of the 2008 Act introduces the new concept of a solvency and liquidity test. It provides:

'4 Solvency and liquidity test

(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time-

(a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of-

(i) 12 months after the date on which the test is considered; or

(ii) in the case of a distribution contemplated in paragraph *(a)* of the definition of 'distribution' in section 1, 12 months following that distribution.

(2) For the purposes contemplated in subsection (1)-

(a) any financial information to be considered concerning the company must be based on-

(i) accounting records that satisfy the requirements of section 28; and

(ii) financial statements that satisfy the requirements of section 29;

(b) subject to paragraph *(c)*, the board or any other person applying the solvency and liquidity test to a company-

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; and

(c) unless the Memorandum of Incorporation of the company provides otherwise, when applying the test in respect of a distribution contemplated in paragraph *(a)* of the definition of 'distribution' in section 1, a person is not to include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.'

[21] Like the concept of *financially distressed*, section 4 also includes a prospective assessment. To satisfy the "solvency" portion of the test a company must be and must **appear** that **it will**, for a period of twelve months after the date on which the test is applied, be able to pay its debts as they become due in the ordinary course of business. To repeat myself: That is something far different from a situation where a company **is currently** or **ispresently** unable to pay its debts within the ordinary course of business.

[22] Section 4 of the 2008 Act also importantly designs a solvency ***and*** liquidity test (my emphasis). The two concepts of *solvency* and *liquidity* are conjoined and, for the purposes of the section, and of the other provisions of the Act which employ the section, are to be considered as a set of

circumstances, and not individually. In paragraph 17 of *R-Bay Logistics*, *King AJ* did not consider it necessary to examine the section in any detail. I, however do.

[23] I begin with the observation that, as best as I can tell, nowhere does the 2008 Act call for or provide for a separate *solvency test* or a separate *liquidity test*. As I have indicated above, the section 4 test is always employed as a joint investigation.

[24] In its definitions section (section 1) the 2008 Act says that the "'**solvency and liquidity test**' means the test set out in section 4(1)".

[25] In terms of section 13 of the 2008 Act a foreign company may transfer its registration to the Republic, *inter alia*, if immediately following the transfer of registration the company will satisfy the solvency and liquidity test.

[26] Section 44 of the 2008 Act provides for circumstances where a company may provide financial assistance for the subscription of securities. The board may only do so if immediately after providing the financial assistance the company would satisfy the solvency and liquidity test.

[27] Similarly, section 45 of the 2008 Act, in providing for circumstances where loans or other financial assistance is made to its directors, dictates that such assistance or loans are only possible if after providing the assistance the company would satisfy the solvency and liquidity test.

[28] Section 46 of the 2008 Act prohibits the board of a company from making a distribution unless, *inter alia*, ‘it reasonably appears that the company will satisfy the solvency and liquidity test after completing the proposed distribution’ and ‘the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution’.

[29] In section 47 of the 2008 Act the board of a company is authorised to offer a cash payment in lieu of making an award of capitalisation shares. It may not resolve to do so in the absence of applying and giving consideration to the solvency and liquidity test in certain defined circumstances.

[30] Section 77 of the 2008 Act makes provision for the liability of directors who failed to vote against a particular distribution. Such liability arises after, in the circumstances described in the section, the application of the solvency and liquidity test.

[31] In section 113 of the 2008 Act provision is made for two or more companies to amalgamate or merge. The amalgamated or merged company must, upon amalgamation or merger, satisfy the solvency and liquidity test and the section also prescribes by whom, when and how the test is to be undertaken. The implementation of the amalgamation or merger is dealt with in section 116, where again, in sub-section 7 thereof, reference is made to the

amalgamated or merged entity being required to satisfy the solvency and liquidity test.

[32] In terms of section 162(7) of the 2008 Act ' …a court may make an order placing a person under probation, if … while serving as a director, the person … was present at a meeting and failed to vote a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to [the] Act …'.

[33] In terms of section 164 of the 2008 Act a shareholder may demand that a company, against tender of such shares, pay such shareholder the fair value of all shares held in such company. The section provides that the making of such demand, the tendering of the shares and the payment by the company for the acquisition of such shares are not subject to the application by the company of the solvency and liquidity test.

[34] As best as I can make out, the sections of the 2008 Act that refer to and call for the application of the solvency and liquidity test set out in section 4, are those dealt with in paragraphs 24 to 33 above. To my mind, the solvency and liquidity test, as described in section 4, is a device or tool for the purposes of implementing the provisions or satisfying the restrictions imposed in or by those sections.

[35] Significantly, neither section 81 (or for that matter the whole of Part G) nor Item 9 of Schedule 5 of the 2008 Act refers to the solvency and liquidity test. It refers simply to a *solvent* company.

[36] Like *King* AJ, I too find it regrettable that the 2008 Act does not define the terms *solvent* and *insolvent*. However, going further than he did, I find that there is sufficient to conclude that the word *solvent*, where it appears in Part G and in Item 9 of Schedule 5 of the 2008 Act, means both factual or actual solvency **AND** commercial solvency in the sense that a company must currently or presently be able to discharge its liabilities as and when they fall due in the ordinary course of business. To my mind, and in grateful acknowledgement, I find *King* AJ's reasoning to be unassailable. I adopt it here in support of my view.

[37] To my mind, that conclusion is supported additionally by the fact that Item 9(2) of Schedule 5 of the 2008 Act retains, insofar as *solvent* companies are concerned, the applicability of section 345 of the previous Act. In addition to the consideration given to this aspect by *King* AJ, I am of the view that the deeming provisions of the previous Act were retained so as to enable creditors, who by and large have no access to the financial records of a company, to have access to a device that would entitle an otherwise *solvent* company, to be regarded as being *insolvent*(at the very least commercially) for the purposes of being wound-up in terms of the provisions of Item 9 of Schedule 5 of the 2008 Act.

[38] If I hold, as I do, that for the purposes Part G (which includes section 81) of the 2008 Act a company has to be solvent in both senses of the word, ie. both factually and commercially solvent, the question that arises is why then does section 81 also include, as a ground for winding-up a solvent company, the situation catered for in section 81(1)(b)?

[39] It will be remembered that section 81(1)(b) of the 2008 Act provides for a situation that allows a business rescue practitioner to apply for the company's winding-up on the grounds that no reasonable prospects of the company being rescued exist. He or she does so by virtue of the provisions of section 141(2)(a) of the 2008 Act which provides:

> '(2) If, at any time during business rescue proceedings, the practitioner concludes that—
>
> (a) there is no reasonable prospect for the company to be rescued, the practitioner must—
>
> (i) so inform the court, the company, and all affected persons in the prescribed manner; and
>
> (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;'

[40] Bearing in mind that in order to get into "business rescue", in the vast majority of cases, the company will have to be *financially distressed* the failure of business rescue will inevitably mean that at that point the company, at the very least, will be commercially insolvent. That that must be so is evident from the definition of *business rescue* in section 128 of the 2008 Act, which indicates that the object of the exercise includes either a situation where the company can continue to exist on a *solvent* basis **or** better results are achievable on ultimate liquidation. How then does it qualify as a

*solvent*company for the purposes of winding-up in terms of section 81(1)(b) if *solvent* means both actual and commercial solvency?

[41] On the other hand, and if *solvent*, for the purposes of Item 9 of Schedule 5 of the 2008 Act, means only actual solvency (and excludes commercial solvency), how would a business rescue practitioner apply to wind-up, in circumstances of failed business rescue, a company that is actually, but not also commercially, insolvent? I pose that question because, in the ordinary course, under the previous Act, a business rescue practitioner would have no standing to initiate winding-up proceedings.

[42] There is no easy answer to the problem.

[43] The one answer is to suggest that this is simply one of those cases where *solvent* or *solvency* must mean different things for the different purposes of the 2008 Act. I would, however, prefer to think otherwise. It is by far preferable to retain a consistent meaning for those terms throughout the 2008 Act. Retaining such consistency would also mean that there is also harmony with the intention, in the business rescue provisions, of aiming to restore a company to a *solvent* basis, which must, in the context, mean a situation where a company is commercially solvent.Maintaining such consistency would also support a better reason for retaining the applicability of section 345 of the previous Act to solvent companies.

[44] Another answer suggests that section 81(1)(b) exists only for those few, and I dare say, rare, instances where a *solvent* company (in both the

actual and commercial sense) is nevertheless unable to be *rescued* and the business rescue practitioner, notwithstanding its *solvency*, considers winding-up to be the preferred route, perhaps because in the circumstances that obtain she or he considers it just and equitable to do so.

[45] Yet another answer, regrettable as it may be, but one which I nevertheless prefer, is to conclude that unfortunate (or perhaps bad or clumsy) drafting has led to the inadvertent inclusion of the provision in section 81(1)(b). Insufficient attention has been given as to how the various sectionsand schedules of the 2008 Act harmonise and interact. The problem is therefore one for the legislature to fix.

[46] To address the issue in any other fashion would lead to even more absurd results. To my mind, any other treatment of the issue would result in a situation that is not reasonable and neither sensible nor businesslike. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17 – 26.

[47] Treated in that fashion, section 141(2)(a) can also then be given purpose and content. Applying the provisions of sub-item 3 of Item 9 of Schedule 5 of the 2008 Act, section 141(2)(a) can be regarded as being sufficient to vest a business rescue practitioner with standing to apply for the winding-up of an insolvent (including commercially) insolvent company under the provisions of the previous Act.

[48] Like *King* AJ, I regard, with due respect, *Business Partners* and *HBT Construction* (and similar decisions) to be wrong and they ought not to be followed.

[49] Having reached that conclusion, and notwithstanding my summary of the issues in paragraphs 2 and 3 above, there remains two peripheral issues that I must deal with.

[50] The respondent has disputed the debt due to the applicant and has indicated that, if the point was reached, the matter ought to be referred for the hearing of oral evidence to resolve that dispute. The underlying facts are these:

a. During October 2007 the respondent borrowed the sum of R1,2 million from the applicant which was advanced to the respondent against, *inter alia*, the security of a mortgage bond over its immovable property;

b. After the respondent fell into arrears with its repayments the applicant, during 2009, applied for the respondent to be wound-up;

c. The 2009 winding-up application was settled on the basis that the respondent would pay the full amount then outstanding by paying off the arrears then accumulated and then by continuing with normal repayments;

d. The respondent again fell into arrears resulting in the present application;

e. In the present application the respondent challenges debt due on the basis that it disputes that charges for legal costs and other expenses (like insurance premiums) were correctly debited to its account. The debiting of interest (insofar as the rate applied is concerned) going back to the inception of the loan is also placed in dispute.

[51] The applicant contends that these debits were agreed to either in terms of the original loan or in terms of the settlement when the earlier winding-up was avoided. As such they can be dismissed on the papers. I agree. In any event, a Court does not lightly refer a winding-up application for the hearing of oral evidence.

[52] Finally, there remains the general discretion to refuse a winding-up order. As the cases suggest, the discretion is a very narrow one, and in this matter I decline to exercise it. The respondent has shown no special considerations requiring me to act otherwise. See *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440J – 441J; *Services Trade Supplies v Dasco& Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428 B – F and *Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (N) at 147 E – H.

[53] In the circumstances I grant an Order finally winding-up the respondent.

Vahed J

CASE INFORMATION

Date of Hearing: 24 October 2012

Date of Judgment: 20 December 2012

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