

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 50247/2021

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 03 July 2024

WJ du Plessis

In the matter between:

SEAVIEW DEVELOPMENTS CC

APPLICANT

and

CORNUTI SAVOY CC

RESPONDENT

JUDGMENT

DU PLESSIS AJ

- [1] This is an application brought by Seaview Developments (Pty) Ltd for the provisional winding-up of Cornuti Savoy CC, in terms of ss 344(f) and 344(h) of the old Companies Act¹ (the “Old Companies Act”) read with s 69 of the Close Corporations

Act² (the “Close Corporations Act”). The application has its origin in a lease agreement between the parties. The matter is complicated by various other relationships between the parties and the fact that the members of each entity are related to one another: the director of the Applicant is the mother of the member of the Respondent.

- [2] On 17 May 2024, the Friday before hearing this matter on the Monday, Mr Carrara, the sole member of the Respondent, made an application in terms of s 131(1) of the Companies Act for an order placing the Respondent under business rescue. They state that once a court application is “made” to commence business rescue proceedings, liquidation proceedings are immediately suspended until the court decides on the application. Therefore, they state that the liquidation application is suspended. Thus, the court must decide whether such an application has been “made” and, if not, whether the provisional liquidation application should succeed.

Background

- [3] To understand the issues, the following brief background is necessary. In the written Lease Agreement (the “Agreement”), the Respondent rents premises from the Applicant to conduct his restaurant business. The Applicant states that the Respondent is indebted to the Applicant for R3 615 325 for arrear rental and R559 143 for the Municipal Account.
- [4] Before this written lease agreement, a settlement agreement was made an order of the court in 2015 between the Applicant’s member and other parties, including the member of the Respondent. It provided that the Respondent would remain in the premises, that there would be a lease agreement entered into between the parties, that the Respondent’s member and his brother would have a pre-emptive right to purchase the property or the members interest in the Applicant, that the Respondent

² 69 of 1984.

would pay all its debts and that the Applicant would transfer property situated in Johannesburg to the sole member of the Respondent within a reasonable time.

- [5] The Respondent avers that the Applicant refused to comply with the Respondent's right of first refusal and that the Applicant also refused to cause the registration and transfer of the Johannesburg property. The transfer of the house to the member of the Respondent will enable the member to raise the monies necessary for the Respondent to pay the Applicant.
- [6] The Applicant, in turn, states that the right of first refusal only exists between the member of the Respondent and the Applicant, and as such, it is not enforceable against the Applicant in this application.
- [7] The Respondent states that the written Agreement terminated through efflux of time around 31 July 2018, and it did not renew the lease as per clauses 9 and 10 of the written Agreement, but it continued to occupy the premises in terms of an agreement concluded between the parties which obliges the Respondent to pay certain monthly rental amounts. Since then, various payments, but not all payments, were made.
- [8] This prompted the Applicant to, on 20 August 2021, request the Sheriff to serve a Letter of Demand on the registered address of the Respondent, requesting payment of R4 906 468 within 21 days. The Respondent's previous attorneys sent correspondence to the Applicant's previous attorneys denying that they are indebted, amongst other reasons, because the Applicant did not place the Respondent in *mora* as required by clause 27 of the Agreement. The notice of breach was then delivered, where the Respondent was required to rectify its breach by making a payment of R4 174 468 within 14 days. The Respondent did not comply, and the agreement was cancelled by notice on 23 September 2021.
- [9] The Applicant then instituted the winding up application in October 2021, stating that their demand for the payment was not met as provided for in s 344(f) of the Old Companies Act as read with s 69(1)(a) of the Closed Corporations Act and that it is

just and equitable to wind up the Respondent as per s 344(h) of the Old Companies Act.³

- [10] The Applicant states that s 345(1)(a) of the Old Companies Act creates a rebuttable presumption that the company that does not pay its debts after it is due and a demand is made is insolvent. Thus, if the Respondent admits to indebtedness over R100 after a demand made by the Applicant, then the Applicant is entitled to succeed in a liquidation application, as the conclusion in law is that the Respondent cannot pay its debts. In terms of the Old Companies Act s 345(1) and 344(f), an unconditional payment must be made to avoid liquidation.
- [11] The Respondent argues that this application is made when there is a *bona fide* dispute of indebtedness or, at the very least, the Applicant launched the application for the payment of the monies.
- [12] The Respondent also states that it is not insolvent. The restaurant in Plettenberg Bay is a seasonal business and has survived a financial crisis and a global pandemic so far – its longevity bears testimony to the business's success. It states that it can meet its monthly obligation towards the creditors. It states in its answering affidavit that it employs 35 members of staff who are entirely dependent on their employment with the Respondent. It sets out its income and expenditure.
- [13] The Respondent further argues that no case has been made for the winding-up as there was non-compliance with s 69 of the Close Corporations Act, which requires that a letter of demand be served on a corporation for a sum “then due”. Based on *Alton Coach Africa CC v Datacentre Motors t/a CMH Commercial*,⁴ the words “then due” means that it must be “due and payable” in the sense that the creditor is entitled to claim the immediate payment thereof. As the claim for the debt rests on clause 27 of the Agreement, which states that if the Respondent fails to pay amounts due in

³ 61 of 1973.

⁴ 2007 (6) SA 154 (D).

terms of the lease and remains in default for fourteen days after receiving a written notice, the Applicant will be entitled to cancel the contract. The Applicant did not place the Respondent in *mora*; in other words, inform them that performance in terms of the contract is due and owing until 6 September 2021, and the contract was cancelled on 23 September 2021. However, the statutory demand in terms of s 69(1) of the Closed Corporations Act was served *before* that, on 20 August 2021. The Respondent states this means there was non-compliance with s 69, as the statutory demand can only be issued for debts due and payable at the date of demand.

- [14] The Applicant states that this argument is fundamentally wrong. The debt consists of unpaid rental, and it is apparent from clause 13 of the Agreement that the rental is payable monthly in advance, as with most rental agreements. Rental is not only due and payable once a letter of demand has been sent and the agreement terminated. What is more, this is neither here nor there, states the Applicant, as an unpaid creditor is entitled to a winding-up order once it is established that the Respondent cannot pay its debts. This can be proved in any manner, and the unsatisfied demand is sufficient for s 345(1)(a) of the Companies Act, the equivalent of s 69 of the Closed Corporations Act.
- [15] Even so, the Respondents say there is no case made out in terms of s344(h) of the Old Companies Act in that liquidating the Respondent will be just and equitable. The Applicant states that it is listed as an additional ground, and if the court finds that the first ground for liquidation is established, then there is no need to make a finding on this ground.
- [16] As for the business rescue application, the Respondent argues that the application is “made” once the application has been issued, served on the company and the CPIC and each affected person has been notified in the manner prescribed. The Respondent argues that the application has been “made” because it was served on both the Applicant and Respondent, the Applicant’s attorneys, the Companies and Intellectual Property Commission (the “CPIC”) and the Master. On the day of the hearing, the Applicant submitted from the Bar that the Respondent has employees

and that the evidence in the founding affidavit filed for the business rescue application regarding the Respondent's business operations and its financial status differs from what is contained in their answering affidavits to the winding up application.

- [17] The Respondent replied that it does not have employees; it only has "contract" employees and that they don't fall under the "employees" who need to be notified in terms of s 131(2) of the Companies Act.⁵ The Applicant disagreed, stating they are still entitled to notice, and failure to give notice means the application is not "made". The Applicant pointed out that the property is rented for conducting a restaurant by the Respondent's admission and that a restaurant has "employees". This much was admitted in the initial answering affidavit, where the Respondent stated that at any time, employees, approximately 35 members of staff, are entirely dependent upon their employment with the Respondent.
- [18] The Respondent argues that motion proceedings are about the resolution of disputes based on common cause facts and that in the case of a dispute of fact arising, the *Plascon-Evans*⁶ rule applies. Thus, the version that the court has on oath is the Respondent's supplementary answering affidavit. It states that the Respondent's business is holding leases and licenses in its name as part of a greater group of companies and has the potential to earn income through management fees. A business rescue process can facilitate a full return for the Applicant, the sole creditor of the Respondent. The Respondent has limited operating costs as it does not owe interest or maintenance costs. Based on this evidence, the only other affected person for purposes of the Business Rescue application is the Applicant. The application has thus been "made".
- [19] The court thus firstly needs to determine whether there was compliance with s 69 of the Closed Corporations Act, after which it must determine whether the Applicant

⁵ 71 of 2008.

⁶ As per *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

made out a case in terms of s 344 and 345 of the Old Companies Act. The court must simultaneously determine whether a business rescue application was “made”, in which case the liquidation proceedings would be suspended.

The law

(i) Liquidation application

[20] S 69(1)(a) and (c) of the Closed Corporations Act sets out the circumstances under which a corporation is deemed to be unable to pay its debts, namely

if (a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

[...]

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation.

[21] The question is whether the debt became due only once the Applicant placed the Respondent in *mora*. The short answer is no. The debt was due monthly in advance per clause 13 of the agreement.⁷ There is no indication in the agreement or otherwise that this date was to be postponed or deviated from.⁸ Clause 27 clarifies that the agreement can be cancelled once the debt is due. There was thus compliance with s 69(1)(a) of the Closed Corporations Act.

⁷ See *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* [2017] ZASCA 111 para 11.

⁸ *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32 para 124.

[22] S 69 of the Closed Corporations Act should be read with s 344 and s 345(1) of the Old Companies Act. S 344 sets out the circumstances in which a company may be wound up by Court, namely if—

[...]

(f) the company is unable to pay its debts as described in section 345;

[...]

(h) it appears to the Court that it is just and equitable that the company should be wound up.

[23] For the court to determine whether a company cannot pay its debts for purposes of s 345(1), the Court shall also consider the company's contingent and prospective liabilities. In terms of s 345(1)(a), a company is deemed to be unable to pay its debts if it is indebted for at least R100 (then due), a creditor has left a demand for payment, and the company has neglected for three weeks thereafter to pay, secure, or compromise the claim to the satisfaction of the creditor.

[24] A company is also deemed unable to pay its debts in terms of s 345(1)(c) if it is proven to the satisfaction of the court that it is unable to do so. When deciding this, the court must consider the contingent and prospective liabilities of the company (s 345(2)). The court's discretion in such instances is a very narrow one.⁹

[25] The Respondent raised various disputes, as set out above. The Applicant argues that the Respondent tries to create disputes of fact where there are none. It is so that a liquidation application should not be made if there is a dispute about the debt, and often, debtors would attempt to avert a liquidation by disputing the validity of the debt. However, in *Soffiantini v Mould*¹⁰ the court stated

"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be

⁹ Afgri Operations Ltd v Hamba Fleet (Pty) Ltd [2017] ZASCA 24 para 12.

¹⁰ 1956 (4) SA 150 (E).

defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

- [26] Read with *Badenhorst v Northern Construction Enterprises (Pty) Ltd*,¹¹ where a respondent’s indebtedness has been *prima facie* established by the Applicant, the onus then moves on the Respondent to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.
- [27] By showing that the Respondent owes the Applicant monies in terms of the rental agreement, the Applicant has made out such a *prima facie* case for reasons alluded to below. The next question is whether the dispute(s) raised by the Respondent is based on *bona fide* and reasonable grounds.
- [28] The Respondent dispute that it is indebted for the amount claimed by the Applicant, but it does not dispute that it owes at least some of the money. There is thus a debt for purposes of the Act. The Respondent also does not dispute that there is a debt due, although it questions the amount. The Respondent, in answer, states that it is waiting for the transfer of Johannesburg in the name of the Respondent’s member to pay the debts. It does not, however, show how this will address the issue of indebtedness other than stating that that money will be used to cover the debt between the entities. However, the current Applicant and Respondent were not parties to the agreement for the house transfer; it was made between the members of each entity. Therefore, that agreement does not assist the Respondent.
- [29] The Respondent further states that it is not insolvent, setting out a calculation in the answering affidavit and attaching a spreadsheet as proof. This is not convincing. No other evidence is attached to back up the numbers on the spreadsheet. It is thus merely the Respondent’s say so that is before the court to rebut the Applicant’s *prima facie* case of indebtedness.

11 1956 (2) SA 346 (T).

[30] In short: None of the disputes raised by the Respondent is bona fide. Neither is the argument that the Respondent does not operate a restaurant business convincing. Thus, I am satisfied that the Applicant made a case for a provisional winding-up order. Since the Applicant has made out a *prima facie* case under s 344(f), s 344(h) does need to be considered.

(ii) Was the business rescue application “made”?

[31] As stated in the introduction, on the Friday before the hearing of the Monday, the Respondent purportedly “made” an application for business rescue by serving the application on the Respondent, on the Applicant’s registered address and its attorneys of record, on the CIPC and the Master.

[32] The purpose of business rescue is to facilitate the rehabilitation of a company in financial distress. It is based on the idea that the company’s problems will be attended to by an independent business rescue practitioner and that this practitioner would propose a plan to rescue the business. This must be understood in the context of s 7(k) of the Companies Act,¹² which states that one of its purposes is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”. A court will give preference to business rescue over liquidation, but only if there is a genuine attempt to achieve the aims of the Act¹³ and not to be abused by a company that has not prospects of financial recovery but merely wishes to obtain a temporary respite from creditors.¹⁴

¹² 71 of 2008.

¹³ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* (2012) (2) SA 423 (WCC).

¹⁴ *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors intervening)* 2011 (5) SA 422 (GNP).

- [33] Business rescue proceedings may be commenced in terms of s 131 of the Companies Act either through a resolution adopted by the company's board of directors ('voluntary business rescue') or a court order ('compulsory business rescue'). In this case we are dealing with a voluntary business rescue. S 131(3) provides that each affected person has a right to participate in the hearing of an application.
- [34] A company that files such a resolution must, amongst other things, publish a notice of the resolution and its effective date to every affected person. An affected person includes s 128(1)(a)(iii) any of the company's employees not represented by a registered trade union, each of those employees or their respective representatives.
- [35] In terms of s 131(6), "[i]f liquidation proceedings have already been commenced by or against the company *at the time an application is made* in terms of subsection (1), the application will suspend those liquidation proceedings [...]" [own emphasis]. The crux of the question that this court must determine is whether such an application "has been made".
- [36] Subsection (1) refers to the court order to begin business rescue proceedings, either voluntary or compulsory, and in terms of voluntary liquidation, the requirements of publication of a notice of the resolution to "every affected person" then kicks in. The question before this court is whether the restaurant staff falls under "affected persons" and, if so, whether strict compliance with s 131(6) is required for an application to be made.
- [37] The interpretation of "has been made" was set out in *Lutchman N.O. v African Global Holdings (Pty) Ltd; African Global Holdings (Pty) Ltd v Lutchman N.O.*¹⁵ In this case, the Supreme Court of Appeal found that a business rescue application is made when it is issued and served on the company and the C

¹⁵ [2022] ZASCA 66.

- [38] IPC, and each affected person is notified of the application in the prescribed manner.¹⁶ Only once this is done does it trigger the suspension of liquidation proceedings that have already commenced.
- [39] The Supreme Court of Appeal stated that what is required is not merely issuing the proceedings but also serving the application on the Commission and affected persons. This is because the service and notification requirements in s 131(2) are not merely procedural but substantive requirements that form an integral part of making an application for an order.¹⁷ This requires strict compliance, as the business rescue proceedings can easily be abused.
- [40] The Respondent argues that the restaurant staff are contract employees and thus do not constitute “employees” for purposes of s 128(1)(a)(iii) and need not be served. This is even though they are referred to as employees in the Respondent’s answering affidavit.
- [41] However, even if I were to ignore that and accept the argument that they are contract employees, then by analogy, in terms of the Labour Relations Act,¹⁸ s 213 read with s 200A,¹⁹ they would fall under the category of “employees”. This means that for a

16 Para 28.

17 *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC* 2013 (6) 141 (KZP) para 11.3.

18 66 of 1995.

19 200A. Presumption as to who is employee.—(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present—

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

business rescue application to be “made”, the Respondent had to serve them in the prescribed manner. This did not happen. The liquidation application is, therefore, not suspended.

Conclusion

[42] The Applicant has made out a prima facie case for indebtedness that remains unpaid despite demands to do so. This activates the deeming provision in s 345(1)(a) of the Old Companies Act, which the Respondent did not rebut on the facts before the court. The Application for the winding-up of the Respondent must thus succeed.

[43] The business rescue application was not served on the employees of the Respondent as required by the Companies Act. The application is thus not “made”, meaning that the winding-up application is not suspended.

Order

[44] I, therefore, make the following order:

1. The Respondent is hereby placed under provisional winding-up in the hands of the Master.
2. The Respondent and any other interested parties are called upon to show cause why this court should not order the final winding-up of the Respondent on 11 November 2024 at 10:00 or so soon thereafter as the matter may be heard.
3. A copy of this order is to be furnished to the Respondent.

(e) the person is economically dependent on the other person for whom he or she works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

4. A copy of this order is to be published forthwith once in the Government Gazette and the Citizen newspaper.
5. The costs of this application are to be costs in the liquidation of the Respondent.


WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Mr NG Louw
Instructed by:	JV Rensburg Kinsella Inc
Counsel for the respondent:	Mr TV Mbuda
Instructed by:	Morgan Law
Date of the hearing:	20 May 2024
Date of judgment:	03 July 2024