



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 5270/2023
In the matter between:

KLIPRIVIER GEDEELTE 8 (Pty) Ltd

Applicant

and

BEES WINKEL (Pty) Ltd

Respondent

CORAM: MB NEMAVHIDI AJ

HEARD ON: 09 MAY 2024

DELIVERED ON: 4 JULY 2024

***JUDGMENT BY:** MB NEMAVHIDI AJ

Introduction

[1] The applicant seeks a provisional order, and thereafter a final order of winding-up of the respondent. The evidence presented on behalf of the applicant is primarily deposed by its sole director on Mr. Petrus Van Heerden (Mr. Van Heerden). He is the erstwhile director of the respondent.

[2] The *locus standi* of the applicant to prosecute the relief sought is premised on the

preposition that the applicant is purportedly a creditor of respondent. The applicant has, as its provenance, a written agreement concluded between the respective parties on 31 March 2022 (the sale agreement). The applicant sold its 30% shareholding to the respondent for an amount of R2 200 000.00 (R2.2m). The applicant received R1.1m from the respondent and contends that respondent is indebted to it in the amount of R1.1m which constitutes the balance of the purchase price in terms of the sale agreement.

[3] The applicant alleges that the respondent is insolvent as it cannot pay its debts. This demand was addressed by the applicant to the respondent in accordance with the provisions of s 345 of the Companies Act 61 of 1973 (the Act).

[4] The respondent opposes the relief sought in the main by the applicant on the following grounds:

- (a) The sale agreement is in truth and in fact void and or unenforceable;
- (b) The defense of declaring the sale agreement void is in terms of s 218 of the Act;
- (c) A further defense in terms of Section 48(6) of the sale agreement can be reversed;
- (d) The sale agreement is stayed, alternatively suspended, up and until the respondent is in a financial position to resume payment until the arbitration (or litigation in any other forum) has been finalized in terms of s 48(5) of the Act.

Brief Background

[5] The respondent is an online livestock auction platform incorporated in 2017. The applicant was a director of the company and a 30% shareholder. In 2021 a dispute arose between the directors of the respondent regarding the manner in which the respondent's affairs were conducted. This resulted in the sale of the applicant's 30% shares to the respondent in 2022. The share value of the applicant's shares amounted to R2.2m payable as follows:

- (a) R500 000,00 payable to the applicant upon signing of the documentation to effect the transfer of shares,
- (b) R50 000,00 per month until such time the balance of R1.7m has been paid to the applicant. The first payment to be made on or before 7 May 2022.

The respondent managed to make twelve payments of R50 000,00, to the total of six hundred thousand rand.

[6] On 3 April, the respondent transmitted a letter to the applicant indicating that it could not pay the amount of R50 000.00 and indicated that they would notify the applicant when they are ready to continue with the monthly obligations. The applicant then demanded payment of the accelerated amount of R1.1m as per the sale agreement. The respondent failed to comply with the applicant's demand and instructed his attorney to transmit a demand in terms of s 235 of the Act to the respondent.

[7] The memorandum of incorporation (MOI) and the shareholders agreement of the respondent required approval for the transaction by way of special resolution passed by 100% of the shareholders. This approval for the respondent to purchase the shares from applicant was not approved. The provisions of s 48(8), which are incorporated in the MOI and shareholders agreement, did not comply with s 48(8)(a) as it requires that a decision of the board of a company to attend to a share buyback must be approved by a special resolution of shareholders of such a company if any of the shares forming part of the buyback will be acquired from a director or prescribed officer of the company.

[8] The liquidity test in terms of s 46 of the Act together with the provisions of s 4 of the Act was never complied with. Based on the financial statements, the company was never able to pass the liquidity test for the transaction to be enforceable. There was no independent report in terms of s 114 of the Act. It is a requirement in terms of s 48(8) which is incorporated in the shareholders agreement.

[9] The personal financial interests of Mr. van Heerden, the director of respondent and seller of the 30% shares, was not in compliance with the requirements stipulated by s 75(3) of the Act. The respondent argues that as a result of non-compliance with the MOI and the provisions of the Act, the sale agreement is void.

The test for liquidation applications

[10] In this division, in the matter of *Standard Bank of South Africa Ltd v Danie Thomas Boerdery*,¹ Daffue J addressed the legal principles applicable in instances where an applicant seeking a provisional winding up order, alleged that it is an unpaid creditor of the respondent who could not obtain payment and the respondent, in its opposition, disputed the validity of the applicant's claim. He held that in adjudicating the dispute, a

¹ *Standard Bank of South Africa Ltd v Danie Thomas Boerdery* [2013] ZAFSHC 32.

court was bound to consider all affidavits placed before it and '[i]f an applicant's claim is bona fide disputed by the respondent on reasonable grounds, on application for a sequestration or winding up order cannot succeed.' Corbett JA put it as follows in *Kalil v Decotex*:²

'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.'³

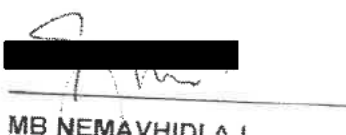
In *Investec Bank Ltd v Lewis*⁴ Grisel J confirmed that it is unnecessary for the Court to make a final determination as to the legal validity of the defence. It is sufficient to find that the indebtedness of the respondent is disputed on *bona fide* and reasonable grounds.⁵

[11] Although there is no onus on the respondents to establish that they are solvent, the respondent's case should be met in an adequate and reasonably convincing manner in order that the dispute can be said to be *bona fide* and predicated on reasonable grounds.⁶ In the circumstance, I am satisfied that the indebtedness of the respondent is disputed on *bona fide* and on reasonable grounds.

Order

[12] In the result I make the following order:

1. The application for provisional winding up of the respondent falls to be dismissed.
2. The applicant to pay costs on a Rule 67A scale B.


MB NEMAVHIDI AJ

² *Kalil v Decotex* 1988(1) SA 943 A.

³ *Ibid* at 980B-D.

⁴ *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C).

⁵ *Ibid* at 119F-G.

⁶ See the unreported decision of *Hannover Group Reinsurance (Pty) Ltd and Another v Gungudoo and Another* [2010] ZAGPJHC 65; [2011] 1 All SA 549 (GSJ).

Appearances

For the Plaintiff:

Instructed by:

Adv AA Basson

C/O Hendre Conradie INC

(Rossouws Attorneys)

Bloemfontein

For the Fourth Defendant:

Instructed by:

Adv S Tsangarakis

Symington and De Kok Attorneys

Bloemfontein