IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO
14 August 2024 [redacted]
DATE SIGNATURE

APPEAL CASE NO: A06/2024

In the matter between: -

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD Appellant

VS

LEKGAWUTSANE CLOSE CORPORATION Respondent

Heard on: 17 May 2024

Delivered: 14 August 2024. This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 14 August 2024.

JUDGMENT

MAZIBUKO AJ (Mashile J and Oosthuizen-Senekal AJ concurring)

INTRODUCTION

[1] The litigation culminating in this appeal was launched in the court *a quo* by the appellant ("Scania Finance"), which sought a provisional winding up of the respondent ("Lekgawutsane") following the respondent's failure to make due payments arising from a financial lease agreement. The court *a quo* refused provisional winding up order as sought. Aggrieved by the court *a quo*'s decision, the appellant appealed the order and judgment.

FACTUAL BACKGROUND

[2] According to Lekgawutsane, in 2019 it entered into an instalment sale agreement in terms of which it purchased a truck from Scania Southern Africa (Pty) Ltd ("*Scania SA*"), subject to finance approval. It signed an offer to purchase two trucks in March 2020, even though it ultimately settled for one. Lekgawutsane states further that it purchased the truck for R1 890 000 plus VAT of R283. 500. It paid an amount of R543,375.00 in addition to the finance charges and interest due.

[3] Lekgawutsane does not dispute its indebtedness to Scania Finance, albeit that insofar as it is concerned, such indebtedness emanates from an instalment sale agreement and not a lease agreement. To this end, it has attached an invoice raised by Scania SA showing a sale of the truck to Scania Finance.

[4] The agreement on which Scania Finance founded these liquidation proceedings is a lease finance, which Lekgawutsane signed when the truck was delivered to it. When Lekgawutsane defaulted on its monthly payments, Scania Finance delivered a Section 69(1)(a) demand as envisaged in the Close Corporations Act[1] ("The Close Corporation Act"). Despite the delivery of the demand and expiry of 21 days, Lekgawutsane failed to satisfy the demand. In consequence of the aforesaid, Scania Finance terminated the lease agreement and repossessed the truck. Scania Finance subsequently embarked on these current proceedings.

THE DECISION OF THE COURT *A QUO*

[5] What was before the court *a quo* was that Lekgawutsane and Scania Finance concluded a lease agreement, which the parties signed. The question was whether Scania Finance had made a prima facie case for the liquidation of Lekgawutsane.

[6] Scania Finance based its winding-up application on:

6.1 Lekgawutsane was unable to pay its debts in terms of section 69(1)(a) of the Close Corporation Act[2] ('The Close Corporation Act') read with item 9 of Schedule 5 of the Companies Act;

6.2 Lekgawutsane was unable to pay its debts in terms of section 69(1)(c) of the Close Corporation Act[3] read with item 9 of Schedule 5 of the Companies Act.

[7] The court *a quo* refused the application on the basis that the claim was genuinely disputed by Lekgawutsane on reasonable grounds because there

[1] Act 69 of 1984.
[2] Act 69 of 1984.
[3] Number 1, *supra*.

was lack of consensus on the nature of the transaction when the parties concluded the lease agreement.

ASSERTIONS

[8] It was argued on behalf of Scania Finance before the Court *a quo* that despite the delivery of the demand and expiry of 21 days, Lekgawutsane had failed to make payments in terms of the lease agreement. As such, it was proper that Lekgawutsane be deemed unable to pay its debts as contemplated in the Close Corporations Act. Lekgawutsane was represented by a seasoned and astute businessperson who, it should be assumed, had perused the documents given to him prior to appending his signature.

[9] Lekgawutsane argued that it purchased the goods in terms of the instalment sale agreement. It signed the instalment sale agreement with Scania SA. Subsequently, it realised that it was in arrears on a lease agreement when it received the demand in terms of the Close Corporation Act from Scania Finance. It refused to pay, arguing that the agreement it concluded with the appellant resulted from a misrepresentation by Scania Finance. Lekgawutsane sought, it maintained, to purchase the truck from Scania SA based on an instalment sale agreement and not a lease agreement.

ISSUES

[10] The issue before this Court is whether the court *a quo* was correct to refuse the provisional application to liquidate Lekgawutsane, especially given that Scania Finance needed to demonstrate a *prima facie* case only.

LEGAL PRINCIPLES

[11] It is a well-established principle that an appellate court may interfere with the

exercise of discretion in the true sense by a court of the first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.[4]

[12] In order to succeed with a provisional winding-up application, Scania Finance was required to establish a *prima facie* case in terms of Section 69 of the Close Corporation Act,[5] read with item 9 of Schedule 5 of the Companies Act. Scania Finance only needs to satisfy the court that it has a claim of more than R200.00 against Lekgawutsane, which has remained unpaid for more than 21 days after demand.

[13] It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes about a debt's existence or non-existence. Put differently, winding-up proceedings ought not to be resorted to enforce a debt that is genuinely disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.[6]

[14] Section 69 of the Close Corporation Act,[7] read with item 9 of Schedule 5 of the Companies Act, reads:

> *"(1) For the purposes of section 69(1), a corporation shall be deemed to be unable to pay its debts 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*

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[4] *Trencon Construction Pty (Ltd) v Industrial Development Corporation of South Africa Limited and Another*. [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88-89; Hotz and Others v University of Cape Town [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) para 28.

[5] Number 1, *supra*.

[6] *Imobrite (Pty) Ltd v DTL Boerdery* CC [2022] ZASCA 67 (May 2022).

[7] Number 1, *supra*.

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.

(b) …

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

DISCUSSION

[15] According to Scania Finance, the appeal is based on three key grounds, which are as follows:

'(a) There is no bona fide dispute, as the common intention of both parties was always to enter into and conclude the financial lease agreement.
(b) The offer to purchase and tax invoice was executed to Scania SA, a distinct and independent juristic entity to, and
(c) Scania Finance established a prima facie case for provisional winding-up against the respondent.'

***BONA FIDE* DISPUTE**

[16] Scania Finance stated that it knew nothing about the sale agreement, and it is not its case that it received an application for a lease agreement from Scania SA on behalf of Lekgawutsane. It contends that Lekgawutsane signed the lease agreement and is therefore liable.

[17] Lekgawutsane disputes that the common intention of both parties was always to enter into and conclude the lease agreement. It argued that the finance application that it sought was for the purchase of the truck and not to lease. Given that the purchase price was similar to the total lease amount, it would

not have concluded a lease agreement when it had an opportunity to own the truck at the expiry of the period and at the same amount.

[18] It needs to be highlighted that reference to Scania SA in this judgment is inappropriate because it is not a party to this application. Accordingly, how the offer to purchase was converted into a different document cannot be entertained without Scania SA, which has a direct and substantial interest, being part of these proceedings. The concern of this Court is the agreement that was concluded between the parties and that is the lease agreement.

[19] It is unclear from the papers of Lekgawutsane why it signed the financial lease agreement if it was concluding an instalment sale agreement. Also, what actions it took upon finding out that it had signed a lease agreement instead of an instalment sale agreement. Ordinarily, a claim arising from an instalment sale agreement differs from that of a lease agreement due to its natural terms and conditions. An instalment sale agreement would culminate in Lekgawutsane acquiring ownership of the truck, whereas, in the case of the lease agreement, the truck will return to Scania Finance as the owner and lessor.

[20] In paragraph 24 of its judgment, the court *a quo* was satisfied that the claim of Scania Finance was *bona fide* disputed on reasonable grounds as there was a lack of consensus regarding the nature of the transaction when the parties concluded the lease agreement. The existence or non-existence of consensus cannot be attributed to Scania Finance. Scania Finance has always been conscious that the parties were executing a lease agreement. If Lekgawutsane thought it was something else then it has itself to blame. The lease agreement has been properly signed by both parties, and no case of impropriety has been canvassed on behalf of Lekgawutsane.

***PRIMA FACIE* CASE**

[21] It is trite that for a provisional winding-up application, the court needs to be satisfied that an applicant has made out a *prima facie* case. It is not in dispute that:

21.1 Lekgawutsane fell into arrears in terms of the lease agreement;

21.2 Lekgawutsane failed to pay when the demand was made;

21.3 Lekgawutsane remains indebted to Scania Finance and does not dispute its indebtedness.

[22] Having regard to the contents of the preceding paragraph, it is manifest that Lekgawutsane is unable to pay its debts as and when they arise. It is consequently commercially insolvent as intended in the Close Corporation Act. The discretion that the Court a quo had was limited in the sense that it was obliged to exercise it in favour of Scania Finance by granting provisional liquidation. The Court a quo's exercise of the discretion not to grant the provisional liquidation was therefore premised on incorrect principle.

[23] In view of what I have canvassed above, I propose that the appeal be upheld and that the following order be made:

1. The order granted by the court *a quo* is set aside and substituted for the following:

   a. The appeal is upheld with costs.

   b. The provisional winding-up application against the respondent is granted.

c. The respondent is called upon to show cause in the above Honourable court on the date to be arranged by the parties in consultation with the Registrar as to why a final liquidation order should not be granted against the respondent.

[redacted]

N. MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

I agree,

[redacted]

B. MASHILE

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

I agree,

pp C. Oosthuizen-Senekal

C. OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

Appearances:

Counsel for the appellant:	Adv. M.V.R Potgieter SC
Instructed by:	Cilliers Attorneys
Counsel for the respondent:	Adv. D Williams
Instructed by:	Ramarumo Attorneys
Date heard:	17 May 2024
Date of Judgment:	14 August 2024