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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no: **4221/2024**

In the matter between:

NEDBANK LIMITED

Applicant

And

DC TRUSTEES

Respondent

REASONS: DELIVERED THIS 28TH DAY OF OCTOBER 2024

MTHIMUNYE, AJ

[1] This is an opposed application for the final winding-up of the respondent, DC Trustees (Pty) Ltd, on the grounds that the respondent is commercially insolvent and unable to pay its debts. The winding-up is sought in terms of section 344(f) read with section 345(1)(a) of The Companies Act 61 of 1973.

Issues to be determined:

[2] Issues in dispute:

1. Whether the applicant's non-compliance with Rule 41A is a valid defence for dismissing the liquidation application;
2. Whether the applicant's claims are disputed on *bona fide* and reasonable grounds; and
3. Whether the respondent is commercially insolvent.

[3] The parties entered into loan agreements between August 2018 and August 2019, in terms of which the applicant advanced various loans to the respondent against the security of mortgage bonds being registered over the respondent's immovable property.

[4] On 22 April 2024, DC Trustees was placed under provisional liquidation by the Master of the High Court of South Africa. A *rule nisi* was issued, calling upon the respondent and all interested persons to provide reasons, if any, on 20 June 2024, as to why a final liquidation order should not be granted.

[5] On 20 June 2024, the matter was postponed to the semi-urgent roll for hearing on 19 August 2024, and the *rule nisi* was extended to 19 August 2024.

[6] . The respondent raised a point in limine of non-compliance with Rule 41A of the Uniform Rules of Court in their answering affidavit and sought the dismissal of the application.

Non-compliance with Rule 41A

[7] Rule 41A provides thus:

“(2)

(a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation."

[8] It is common cause that when the application was served on the respondent on 11 March 2024, it was not accompanied by the notice as contemplated in Rule 41A(2)(a). Similarly, the respondent's notice to oppose the application and the subsequent answering affidavit were served without the notice in terms of Rule 41A(2)(b).

[9] The applicant submitted that the respondent's preliminary point is misplaced, as the mediation process contemplated in Rule 41A is, entirely voluntary and a court is not empowered to direct the parties to mediate a dispute. Consequently, a party's election not to negate during the mediation process does not impact on the validity of an application which has been instituted. In addition, there is no sanction for non-compliance with Rule 41A. Furthermore, the applicant submitted that the respondent has not contended that it has been prejudiced by the applicant's alleged non-compliance, nor has the respondent indicated, in its answering affidavit that it wishes to mediate the dispute. Further, the applicant submitted that the dispute is not amenable to mediation.

[10] The respondent contends that the applicant's failure to adhere to Rule 41A is an irregular action, and the applicant has not even attempted to comply with the Rule at a later stage. The respondent submitted that the applicant's assertion that no prejudice has been caused by the applicant's failure to file a notice in terms of Rule 41A, is patently incorrect. The respondent submits that it has been severely

prejudiced by the applicant's failure to afford the respondent an opportunity to mediate the matter.

[11] I do not agree with the respondent's contentions that a failure to comply with the provision of Rule 41A (2) warrants an order that the matter be dismissed. The object of Rule 41A is to afford litigants an opportunity to resolve their disputes through a process of mediation as an alternative to litigation. It is a voluntary process, and as a result parties cannot be compelled to submit their dispute to mediation.

[12] It appears that the respondent has lost sight of the fact that in terms of the rule, the respondent is also obliged to deliver such a notice, regardless of the applicant's failure to comply with the rule. Neither party complied with Rule 41 A and the respondent's hands are not clean in order to complain about the applicant's non-compliance.

[13] The second point in limine raised by the respondent in its answering affidavit is that the applicant has received payment from the insurance cover with Nedgroup Insurance Company Limited. Consequently, the respondent submits, there are no amounts owing to the applicant as all outstanding amounts have been settled by the trade credit insurance cover.

[14] The applicant in response submitted in their answering affidavit that the respondent's contentions in respect of the trade credit insurance lack any factual, legal or logical basis. The applicant further submitted that there is no such policy in place in respect of the accounts in question and that no amounts have been paid to the applicant from any insurer.

[15] The respondent failed to succinctly and unambiguously deal with this dispute of fact in his papers. He presents vague allegations without providing any documentation substantiating his allegations that the policy exists, or that such monies were paid out to the applicant by the insurer.

[16] The applicant on the other hand has disputed the averment made by the respondent and dealt with the allegations succinctly and clearly in the replying affidavit.

[17] I am therefor inclined to agree with the applicant that the allegations made by the respondent is unsubstantiated, far-fetched and untenable and falls to be dismissed.

[18] I now turn to deal whether applicant's claims are disputed on *bona fide* and reasonable grounds:

[19] The court must consider a critical concept of our law when responding to this inquiry. The **Badenhorst** principle is the first. In terms of this principle, winding-up proceedings are not to be employed to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds. (*See Robson v Wax Works (Pty) Ltd and others [2001] 3 All SA 546 (C)*)

[20] However, in cases where the respondent's indebtedness has, *prima facie*, been established, the onus is on the respondent to show that the indebtedness is indeed on *bona fide* and reasonable grounds. (*See Desert Star Trading 145 (Pty) Ltd and another v No 11 Flamboyant Edleen CC and another [2011] 2 All SA 471 (SCA)*).

[21] The second important concept is the **Plascon-Evans** Rule. The test here is different than the one applied in the **Badenhorst** principle, as in **Plascon-Evans**, the affidavits must demonstrate a *prima facie* case in favour of the applicant.

[22] The concept of winding-up companies based on commercial insolvency (a state of inability to pay debts as they fall due) is recognised. The Supreme Court of Appeal in *Murray NO and others v African Global Holdings (Pty) Ltd and others [2020] 1 All SA 64 (SCA)*. It confirmed that in respect of a company which has assets and seeks to oppose its winding-up, the test applied is whether were those assets to be sold, the company would thereafter be able to continue normal trading. In the event that the company is unable to resume normal trading following the sale, it should be placed in winding-up.

[23] The respondent acknowledges at page 269 at paragraph 11.1 of his answering affidavit that he entered into eight (8) separate loan agreements with the applicant between the period of August 2018 and August 2019. The respondent on the other hand, denies that loans advanced by the applicant were against the security of mortgage bonds registered against the respondent's immovable property.

[24] It is important to note that the applicant has attached copies of the covering mortgage bonds to their founding papers to prove that the loans advanced by them to the respondent were indeed against security of mortgage bonds that were registered against the respondent's immovable property. The respondent on the other hand does no more and places no evidence before the court to gainsay the allegations made by the applicant. The respondent's allegations therefore amounts to a bare denial.

[25] Further, the respondent denies the quantum of the debt. In his answering affidavit at paragraph 14.2, he avers that any outstanding amount that was payable to the applicant by him was settled by trade credit insurance.

[26] In amplification of his denial the respondent refers to his third point *in limine* by alleging in their answering papers, that the applicant blocked his access to account 1[...], by reflecting the account on the money-app as R0-00 outstanding. The respondent avers that the applicant did this in order to create an arrear amount. This resulted in preventing payment of any of the outstanding accounts being paid by the debit order.

[27] Respondent avers further that even after the applicant issued demand for payments, he continued to make payments. Further that the last payment he made was during January 2024, which was accepted by the applicant.

[29] In my opinion, the respondent's assertion is implausible. He refers to the account 1[...] as being blocked by the applicant, but does not dispute that it is only one of the eight accounts that are in arrears. According to his own admission the last payment he made to the applicant was during January 2024. He does not

address the fact that the applicant averred in their founding affidavit at page 9 at paragraph 15, which is that from 14 February 2024, to date, the cumulative arrears of the loans advanced to him by the applicant amounted to R393 539,26 while the total outstanding balance amounted to R5 637 141, 86 together with further interest thereon.

[30] The respondent's denial that he is commercially insolvent and unable to pay its debts as they became due, is unsubstantiated, in that the respondent does not place any evidence before this court to gainsay the allegations by the applicant. Instead, it is the applicant who in solidifying their claim attaches certificates of balances of the outstanding loans. Nowhere in his papers does the respondent dispute these as being inaccurate reflections of certificates of balance on the outstanding balances owed the loans. By issuing trivial denials, the respondent seeks to convince this court that his allegations are accurate.

[31] The respondent's bare denial is considered against his admission that eight loans were advanced to him by the applicant, that there is evidence that the applicant advanced loans to him was against the security of mortgage bonds registered against the immovable properties owned by the respondent. Furthermore, the respondent's failure to address the fact that all eight loan accounts are in arrears, the payments he had made up to January 2024, and the amounts owed as reflected in the statement of accounts, which expressly records the debt being owed in the amount of R5 637 141, 86, together with interest.

[32] The certificates of balance is *prima facie* proof of the respondent's indebtedness and the respondent has placed nothing before the court to rebut the *prima facie* case made out by the applicant.

[33] In addition to failing to present a bona fide and rational defence in accordance with the Badenhorst principle, the respondent also fails to present a genuine dispute of fact in accordance with the Plascon-Evans rule. The respondent fails to adequately address the applicant's allegations, and he fails to provide a specific explanation for why he is not in arrears. The respondent's defences are unfounded and untenable, and they should be rejected.

[34] Turning then to the allegations regarding commercial and factual solvency. The test for commercial solvency is whether the respondent possesses the necessary funds to satisfy the applicant's debt in the amount of R5 637 141,86, or not.

[35] It is sufficient for the court to determine that the necessary case under section 344(f) of the Companies Act 61 of 1971 has been established when there is evidence that the respondent's company is commercially insolvent, meaning that it is unable to pay its debts when they are due.

[36] The respondent's obligation to pay the applicant a substantial debt is undeniable in this application. It is evident that the respondent lacks the necessary funds to satisfy the applicant's debt. Consequently, the respondent is insolvent, and no further action is necessary, in addition to the deeming provision resulting from the section 345 statutory notice.

[37] Although the respondent has submitted valuation certificates for the immovable properties that were mortgaged to the applicant in an effort to substantiate the claim that it is solvent, the documentation has actually established the contrary.

[38] The financials show that the value of the immovable properties already mortgaged to the applicant amounts to R5 903 000,00 according to the respondent's averments at page 272 paragraph 17.3 of his answering affidavit. This amount referred to by the respondent is not cash flow and does not assist the respondent as the total outstanding balance due to the applicant amounts to R5 637 141,86. Were the value of the respondent's immovable property to be set-off against the applicant's outstanding balance, the respondent would effectively only have R265 858 at his disposal, bearing in mind that at the time of the application the costs and further interest rates had not yet been included in the total outstanding balance due.

[39] The respondent, in its own best case “expected” position is unable to meet the demands of the debt. The full accelerated debt is due, and the respondent definitely does not have R5 637 141,86 together with the interest thereon to pay the debt owed to the applicant.

[40] The respondent has to date not paid his debt to the applicant and his submission at page 272 paragraph 17.4 of his answering affidavit can only be seen as a concession that the debt is owed and that he does not have the funds to satisfy the debt and further that he requires the immovable properties held as security by the applicant to satisfy the debt owed.

[41] The respondent has set out no basis and certainly no satisfactory facts why this court in exercising its discretion should not grant an order for its final winding-up.

Conclusion

[42] In the circumstances, I am satisfied that the applicant has succeeded in making out a case for the final liquidation of the respondent on the basis that the respondent is unable to pay its debts.

Costs

[43] In the exercise of my discretion on costs, I considered an appropriate order to be that each party to pay their own costs, even in spite of the applicant’s success in the section 344(f) application.

Order

[44] In the result, the following order was made:

That the rule nisi granted on 22 April 2024 is made absolute and the Respondent is placed under Final Liquidation.

MTHIMUNYE, AJ