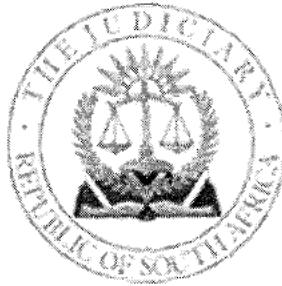


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024 / 004680

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

30 January 2025

DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED

Applicant

and

TALA LIGHT WEIGHT CONSTRUCTION (PTY) LTD
(REGISTRATION NUMBER: 2016/472029/07)

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 January 2025.

JUDGMENT

MUDAU, J:

- [1] This is an application for the final winding up of the Respondent on the basis that it is unable to pay its debts in terms of section 345(1) of the Companies Act 61 of 1973 read with Item 9 of Schedule 5 of the Companies Act 71 of 2008. The respondent was not represented when this matter was argued with the attorneys of record having withdrawn.

Background Facts

- [2] The Respondent, Tala Light Weight Construction (Pty) Limited (Tala Light), conducted a current banking account with the Applicant, Nedbank Limited. Nedbank is a commercial bank established and registered in accordance with the Banks Act 94 of 1990 (as amended); and a credit provider, registered in accordance with the National Credit Act 34 of 2005. The Respondent is one of a group of associated entities who conducted their banking facilities with the Applicant. The Respondent operated an account with Nedbank and was afforded overdraft facilities on the account from time to time. In this matter, the overdraft facility on the account was to the tune of R7 000 000.00 (Seven Million Rand).
- [3] It is common cause that the overdraft facility was a demand facility. The terms of the facility agreement were that the Applicant would be entitled to charge a penalty interest rate in the event of the overdraft facilities being exceeded. The maximum penalty rate would be equal to the ruling rate of the South African Reserve Bank repurchase rate ("the repo rate plus 14%"). Clause 4.2 of the standard terms and conditions state that, where an event of default occurs, and should the Respondent not remedy the matter within the period provided, if any stipulated by the Applicant, at such time the Applicant will, in respect of all entities that comprise the Respondent without diminution of any other right it may have, be entitled, at its sole discretion, to cancel the Respondent's facilities and all existing agreements immediately, or suspend the availability of any of the Respondent's Facilities, or claim immediate payment of all amounts owing to the Applicant.
- [4] It was a material term of the facility agreement that a certificate signed by any Manager of the Applicant, whose appointment and authority need not be proved, would, for any purposes, be *prima facie* proof of the amount due and payable by

Respondent. After the acceptance of the offer of facilities by the Respondent on 18 October 2022, the Respondent from time to time drew down on the overdraft and became indebted to the Applicant in respect of the overdraft. Although the Applicant complied with the terms and conditions of the facility agreement, the Respondent, from at least 27 May 2023, ceased servicing the facility, thus triggering the acceleration clause. The full balance due owing and payable on the account as evidenced by the certificate of balance is in the sum of R7 694 358.28 together with interest calculated at prime lending rate applicable from time to time then at 11.75%, plus 10.50%, thus 22.25% per annum, compounded daily and capitalised monthly from 1 December 2023 to date of final payment.

- [5] Consequently, on 31 October 2023, the Applicant's attorney of record addressed a letter of demand to the Respondent in terms of section 345(1)(a)(i) of the Companies Act (1973) in terms whereof payment of the (then) combined arrears, in the sum of R7 429 512.26, was demanded. Notwithstanding the Applicant's demand, the Respondent failed to effect payment of the amount due.
- [6] According to the Respondent, the Respondent is part of the XBS Group of companies, with the group having banked with the Applicant for more than 10 (ten) years. During the beginning of June 2023, the shareholders of the majority of the companies within the XBS Group elected to liquidate a company named Loubser Bulk Services (Pty) Ltd, in which it had shareholding. The decision was taken after the majority shareholder of Loubser Bulk Services (Pty) Ltd, Mr Loubser, suddenly passed away.
- [7] The group allegedly uncovered improprieties by the late Mr Loubser, which contributed to the decision to close Loubser Bulk Services (Pty) Ltd, through liquidation. The Applicant did not approve of the decision to close Loubser Bulk Services (Pty) Ltd and elected to send a letter on 28 June 2023 to all the companies within the XBS Group, notifying the companies of their intention to close all the bank accounts within 10 (ten) business days. The subsequent closure of bank accounts and facilities caused and created enormous difficulties for the companies of XBS Group, and caused substantial reputational and financial loss for the companies in the group.

- [8] It is the Applicant's case that the Respondent was unable to pay its debts even before it received notice that its facilities with the Applicant. At the time that it received the notice of the closure of its facilities, the Respondent clearly did not have liquid assets that were readily realisable. Nedbank also pointed out in reply that what the Respondent failed to mention, was that XBS Quantum is indebted to the Applicant for more than R50 million. The deponent to the Respondent's answering affidavit, Arnold Steynberg and two other entities within the group LBS Holdings (Pty) Limited and XBS Group (Pty) Limited bound themselves as surety and co-principal debtors with XBS Quantum in favour of the Applicant for the debts of XBS Quantum. According to Nedbank, the voluntary liquidation of XBS Quantum and the institution of proceedings against the above-named sureties is a material adverse change considering the value of its securities and the ability of the Respondent and its associated entities to comply with their obligations to the Applicant.
- [9] In essence however, the Respondent's case is two-fold. First, the Respondent contends that it is factually solvent in that its assets allegedly exceed its liabilities. Second, the Respondent suggests it cannot pay the Applicant because the Applicant closed its facilities. In the unaudited management financial statement attached to the answering affidavit, there is a substantial reduction in the Respondent's assets from 2023 to 2024; R74 229 389 to R27 171 598 in income. A capital write-off of more than R50 million is recorded but does not show what was written off. There is nothing reflected in the accounts themselves to this value that could have been written off. Admittedly, the Respondent has no cash on hand at all to pay its creditors. The net profit before tax is the same as the net profit after tax. The net profit after taxation is recorded as R3 312 233 as at February 2024, well below the amount demanded in terms of the facility agreement. Total liabilities are recorded at R7 023 325, well above the net profit during the same period.
- [10] To determine commercial insolvency requires an examination of the financial position of the company at present and in the immediate future, to determine

whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.¹

[11] The correct legal position was set out in *Murray No and Others v African Global Holdings (Pty) Ltd and Others*:

“A company is unable to pay its debts when it is unable to meet current demands on it, or its day-to-day liabilities in the ordinary course of business, in other words, when it is ‘commercially insolvent’. The test is therefore not whether the company's liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant.”²

[12] Differently put, it is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading.³ Essentially, can the company meet current demands on it and remain buoyant?⁴

[13] The facts of this matter clearly demonstrate that the Respondent has no liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be able to carry on normal trading. I accordingly hold that Tala Light has not discharged the onus of showing that its assets, fairly valued, exceed its liabilities, fairly valued. It is an entity in serious financial distress.

[14] There is a reasonable prospect, which is not too remote, that some, not negligible, pecuniary benefit will be obtained by creditors.⁵ In addition, it could well be to the advantage of the creditors if an enquiry were conducted into the Respondent's financial affairs where there is a prospect of undisclosed assets

¹ See *Koekemoer v Taylor and Steyn NNO and Another* 1981 (1) SA 267 (W) at 271B – D.

² [2019] ZASCA 152; 2020 (2) SA 93 (SCA) at para 28. The SCA quoting from *LAWSA* Vol 4(3), (2 ed, 2014) at para 74.

³ See *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597B – F.

⁴ See *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440F – H.

⁵ See *Epstein v Epstein* 1987 (4) SA 606 (C) at 609B-E.

being brought to light. It follows that it is just and equitable that the Respondent be liquidated. Nedbank is entitled to a final winding-up order on the basis that the Respondent is commercially insolvent.

[15] Order

1. That the Respondent be placed under final liquidation in the hands of the Master; and
2. That the costs of this application be costs in the administration of the Respondent's estate.


MUDAU J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

Counsel for the Applicant:

Adv. Sekgothadi Kabelo

Instructed by:

KWA Attorneys

Counsel for the Respondent:

No appearance

Instructed by:

Bennecke Thom Inc. (since withdrawn)

Date of Hearing:

28 January 2025

Date of Judgment:

30 January 2025