

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 8655/2023

(1) REPORTABLE: YES/NO

(2) OF INTREST TO THE JUDGES: YES/NO

(3) REVISED.

In the matter between:

ABSA BANK LIMITED

APPLICANT

And

PP MARE BOERDERY (PTY) LTD

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The applicant has brought an application for compulsory winding up of the respondent on the basis that the respondent is unable to pay its debts, and also that it just and equitable that the respondent be wound-up. According to the applicant, at the time it launched this application the respondent was indebted to it in the amount of R12 406 737.14 plus interest at the prime rate capitalized monthly from 2nd August 2023. The applicant submit that this amount represents the balance of an amount owed by Strehla on account number 3044078305. The applicant had lent and advanced Strehla on a term loan agreement during February 2016.

[2] In terms of the loan agreement, Strehla had to repay the applicant in instalments of R1 514 000.00 every six months. Strehla paid its first instalment on 30th June 2016 and last instalment was supposed to be paid on 30th December 2025. Strehla had failed to pay its instalments punctually, and as at the launching of the application was in arrears with the payment of instalments and interest accumulated which amounted to R5 212 764.00. The applicant had demanded payment of the full balance from Strehla, but it has failed to make payment and remains indebted to the applicant.

[3] The respondent had signed a deed of surety binding itself as surety and co-principal debtor in favour of the applicant for the repayment on demand of any sum of money that may be owed by Strehla to the applicant for whatever cause arising. The applicant hold security for the repayment of the outstanding amount by the respondent by way of four mortgage bonds registered over the immovable property of the respondent. The first covering bond provides security to the applicant for an amount of R400 0000.00 plus interest and additional amount of R80 000.00. The second bond provides security for R6 000 000.00 together with interest plus additional amount of R1 200 000.00. The third covering bond provides security for R6 000 000.00 together with interest plus additional amount of R1 200 000.00. The fourth covering bond provides security for R11 000 000.00 together with interest plus additional amount of R2 200 000.00.

[4] Strehla is the trading entity whilst the respondent holds the properties from which the trading occurs. The applicant had made attempts to recover the arrears and balance on the account owed from Strehla and respondent over time, but was not successful. Strehla was able to bring its account up to date on 31st May 2017, but thereafter again fell into arrears. Since 2017 Strehla was unable to bring its account up to date. During March 2019 Strehla was in arrears in the amount of R2 600 000.00 and the applicant issued a letter of demand. On 5th December 2019 the applicant instructed its attorneys of record to pursue a collection of the debt. Its attorneys sent a letter of demand to the respondent via the sheriff of court. The applicant started making sporadic payments of R100 0000.00 per month. The last payment was made during August 2023. That made the applicant to come to its

conclusion that the respondent was not in a position to repay the debt owed to it by its surety.

[5] Despite the sporadic payments that the respondent was making, the balance of the debt remains owing and outstanding. According to the applicant, the respondent as a surety is obliged to pay it the outstanding amount, but has failed to do so despite a formal letter of demand at its registered address. As the full balance was not paid, this led to the applicant issuing a further notice in terms of section 345 of the Companies Act (old Act) which was served at the respondent's registered address on 11th June 2022. Despite demand the debt remains unpaid, and the applicant came to the conclusion that the respondent is unable to pay its debts as is contemplated in section 345 of the old Act, and that it would be just and equitable to wind up the respondent.

[6] The respondent is opposing the applicant's application. In its answering affidavit the respondent has raised a point *in limine* of non-joinder of Strehla. However, the respondent had abandoned that point *in limine* when the matter was argued before me in court. On the merits, the respondent disputed that it was insolvent, and submitted that it will not be just and equitable to wind it up. The respondent admitted having signed a suretyship agreement, but submitted that the applicant should firstly recover the outstanding amount from Strehla. That the applicant had novated the new agreement by several other agreements which is not pleaded in the application, and believe that the amount is incorrect. The respondent further submitted that the applicant is holding security over four farms with an estimated value of over R30 million, but had failed to take steps to recover the monies from the principal debtor.

[7] The respondent had conceded that it is aware that Strehla paid the applicant all its arrears during 2017. The respondent denied that Strehla immediately fell in arrears with its repayment when the instalment payable by the end of June 2017 fell due to be paid. The respondent submitted that the applicant is attempting to dress the respondent up as the main debtor, and attribute the conduct of the main debtor to that of the respondent. The respondent conceded that during March 2019 the

applicant had directed a letter of demand to Strehla which was in arrears in an amount of almost R2 600 000.00.

[8] The respondent conceded that it had received a formal letter of demand dated 11th July 2022 from the applicant's attorneys. The respondent submitted that Strehla was making regular payments in the amount of R100 000.00 in reduction of the debt, and that these payments should be subtracted from the principal debt. The respondent denied that it was unable to pay its debt, and further denied that it had received the section 345 notice in terms of the old Act. The respondent submitted that it is unaware that it had an obligation to provide the applicant with its financial statements.

[9] In its replying affidavit, the applicant has stated that the current arrears on the agreement amounted to R5 145 368.38, and that the respondent as a surety, remains liable for the failure of the principal debtor to make payment in terms of the agreement. The applicant had also deposed a supplementary affidavit in which it explains that after filing its replying affidavit during December 2023, it received an updated calculation of the respondent's account. On the updated calculation it shows that on 15th April 2024 the respondent had made three substantial payments in the amounts of R1 000 000.00, R804 050 and R3 000 000.00. These payments had reduced the arrears to R1 991 947.53 even though it did not eliminate the whole arrears. Thereafter the respondent had made eight ad hoc payments in the amount of R100 000.00 between the period 30th April 2024 to December 2024. As at December 2024 the outstanding balance owed to the applicant in respect of the account amounted to R8 369 982.92 plus interest, whilst the arrears amounted to R4 732 607.73. Despite these payments, the applicant is still seeking that the relief set out in its notice of motion to be granted.

[10] The applicant is seeking a final winding up order, alternatively a provisional winding up order against the respondent in accordance with sections 344(f) and 344(h) of the old Act. It is trite that when a final winding up order is sought, the onus rest on the applicant to show on a balance of probabilities that the debt is not bona fide disputed on reasonable grounds. For provisional winding up order, the applicant only need to establish a *prima facie* case that the respondent is insolvent. It is settled

law that our law recognizes two forms of insolvency, and that is factual insolvency, that is where a company's liabilities exceeds its assets, and commercial insolvency, that is a state of illiquidity where the company is unable to pay its debts even though its assets may exceed its liabilities. (See *Ex parte De Villiers & Another NNO: In Re Carbon Developments*¹).

[11] In *Kalil v Decotex (Pty) Ltd and Another*² Corbett JA said:

"...that an application for liquidation should not be resorted to in order to enforce a claim which is bon fide disputed by the company. 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".

[12] The basis upon which this application is being brought against the respondent, is that the respondent had bound itself as a surety and co-principal debtor for Strehla. At the time when the application was launched the debt amounted to R12 406 737.14, the actual arrears of the instalments which Strehla has failed to pay punctually amounted to R5 212 764.00. The applicant had filed its replying affidavit to the respondent's answering affidavit on 10th January 2024. Between the period 10th January 2024 and 30th December 2024 the respondent had made substantial payments which reduced its debt to R8 369 982.92 and the arrears to R4 732 607.73. The applicant is still insisting on its application on the basis that a debt of more than R100.00 is still outstanding.

[13] The application against the respondent is the one that falls under commercial insolvency. The applicant must therefore show the respondent's inability to pay its debts in the sense of being unable to meet its demands. The respondent disputed that it is indebted to the applicant in the amount claimed, and the basis of its dispute is that the applicant has not provided a detailed statement on how the amount has been calculated. In relation to the arrear amount, the respondent's denial is on the basis that it is not aware of the amount Strehla is in arrears with. The respondent

¹ 1993 (1) SA 493 (A) at 502C-D

² 1988 (1) SA 943 (A) at 980B-D

submit that the applicant is holding security over four properties which is roughly estimated in excess of R30 million, and that the applicant has not taken any steps to recover the monies from the principal debtor.

[14] The respondent is not disputing that it is indebted to the applicant, that the debt is more R100.00 and has been outstanding for more than three weeks after a demand has been made by the applicant, and has not made arrangements to the reasonable satisfaction of the applicant of how it was going to clear the arrears and bring its account up to date. The respondent's basis for disputing the applicant's debt is that it was not provided with a detailed statement. Surprisingly, after the applicant's has filed its replying affidavit, the respondent had made substantial payments without insisting on a detailed statement before making any payment. The applicant has failed to attach its financial statements to its opposing papers to enable the applicant and the court to assess its financial position and its liquidity. Even though the respondent had made substantial payments after the applicant had filed its replying affidavit, without financial statements it will be difficult for this court to make a determination whether the respondent's financial position is improving or deteriorating to enable this court to exercise its discretion not to wind up the respondent. The court must be able to determine whether these payments by the respondent were not just dispositions of its property with the sole purpose of merely postponing the inevitable.

[16] The respondent had further submitted that the applicant is holding security over four properties which had a rough estimation value of over R30 000 000.00, and that the applicant had failed to take any steps to recall the bonds and recover the monies from the principal debtor. In *Imobrite (Pty) Ltd v DTL Boerdery CC*³ Molemela JA said:

"The impression that I got from the whole tenor of the high court's judgment is that it accepted that there was no dispute regarding the respondent's indebtedness but made much of the fact that the appellant held securities in the full amount of the principal debt, which prompted it to exercise the residual discretion not to grant the winding up order. I am also of the of the view that the high court's wrong interpretation of the concept 'secured debt' in section

³ [2022] ZASCA 67 (13 May 2022) at para 23

69(1)(a) fettered its exercise of the residual discretion whether or not to grant a winding up order; the result is that it exercised its discretion on the basis of a wrong principle”.

[17] The affidavits as they stand shows that the respondent is not seriously disputing its indebtedness to the applicant. The respondent is having a debt against the applicant which is more R100.00 and has been outstanding for more than three weeks after the applicant had made a demand. In my view, the applicant had discharged its onus on a balance of probabilities that the respondent is not bona fide disputing its indebtedness to it on reasonable grounds. The applicant has established a prima facie case for granting a winding up order, and therefore it will be appropriate to grant a provisional order.

[18] In the result the following order is made:

18.1 The respondent PP Maree Boerdery (Pty) Ltd is placed under a provisional order of winding up in the hands of the Master of the High Court Polokwane.

18.2 A *rule nisi* is issued calling upon the respondent and all interested parties to show cause if any on 19th June 2025 as to why the aforesaid provisional order should not be confirmed and made final.

18.3 The provisional order is to be served on the respondent and published once in the Government Gazette and in a local newspaper.

18.4 The costs of the application will be costs in the liquidation of the respondent.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

Counsel for the applicant: Adv HP Wessels

Instructed by: Tim du Toit and Co Inc

Counsel for the respondent: Adv R Morgan

Instructed by: Roach Attorneys

Date heard: 5th March 2025
Electronically circulated on: 25th March 2025

POLOKWANE HIGH COURT