



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
03/11/2025	
Date	Signature

CASE NO.: 094136/23

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA
LIMITED

APPLICANT

and

MACAMA (PTY) LIMITED

RESPONDENT

JUDGEMENT

MOLOPA-SETHOSA J

[1] The applicant launched an application for the final, alternatively provisional winding up of the respondent.

[2] The applicant, in its capacity as a creditor of the respondent, seeks the respondent's liquidation based upon. So it alleges, the respondent's deemed or actual inability to pay its debt [section 344(f), read with section 345(1)(a) and (c) of the Companies Act, 61 1973 ("The Act")]; or on the basis that it is just and equitable that the company should be wound up [section 344(h)].

[3] The applicant contends that the present application is based on the respondent's indebtedness towards the applicant for payment of the outstanding balance due and payable on the respondent's medium term loan account held with the applicant under account number 012754554.

[4] On 3 March 2021 and at Heidelberg, the applicant, represented by an authorised employee or official, and the respondent, at all relevant times represented by one Deon Sybrandt Van Niekerk ("Van Niekerk"), concluded a written medium term loan agreement("MTL"), a copy of which is annexed to the founding affidavit as annexure "JVW5"

[5] The material and express, alternatively implied, alternatively tacit terms of the agreement which are relevant to the present application, include, inter alia the following:

[5.1] The principal debt in the amount of R13 000 000.00 is repayable by the respondent to the applicant over an agreed term of 120 months by way of annual instalments of R1 300 000.00, the first repayment being due after the respondent's first draw down on the loan, and yearly thereafter until the loan is fully repaid, together with interest, costs and charges.

[5.2] Interest on the loan is calculated at a variable rate to the prime interest rate by a margin of 2% above the prime interest rate and is therefore subject to change. The prime interest rate on date of the conclusion of the agreement is 7%per annum. If the respondent's debit balance on the account exceeds the credit limit/the reduced credit limit, the interest rate will be 2,5% above the interest rate referred to above, calculated from the date on which the respondent exceeds such credit limit, to the date on which the debit balance is equal to or lower than such credit limit. The interest is to be capitalised monthly and repayable with a capital repayment of R1,000,000.00 at the end of the first year after the date of the agreement, and thereafter interest will be debited to the respondent's current account on the 25th day of each month.

[5.3] The medium term loan agreement will take the place of an earlier medium term loan agreement dated 4 September 2020.

[5.4] The purpose of the loan was to finance the purchase of property.

[6] Pursuant to the respondent's acceptance of the terms of the agreement on 3 March 2021, the applicant granted credit facilities to the respondent on the aforesaid medium term loan account.

[7] The applicant contends that the respondent defaulted in terms of its repayment obligations towards the applicant in terms of the MTL agreement.

[8] Pursuant to the respondent's alleged default the applicant addressed a letter of demand, dated 22 September 2022 to the respondent (and also to DVN Boerdery) by email. In terms of the letter the respondent was, inter alia, notified of its alleged default in not making payment to the applicant of the minimum capital repayment amount of R1 3000 000.00 which was due on 6 August 2022. Further, that the respondent has also failed to make payment of the amount of R1 000 000.00 payable as capitalised interest one year from the date of the agreement, i.e. on 3 March 2022.. The respondent was required to make payment to the applicant of the amount of R2 300 000.00 within a period of 10 business days from the date on which the letter/notice was brought to the attention of the respondent, failing which the full amount owing to the applicant in terms of the medium term loan agreement would become due and payable. On 20 October 2022 the applicant's attorney also forwarded the letter of demand by email to the respondent.

[9] The applicant contends that due to the respondent's alleged default, the full outstanding balance on the respondent's medium term loan account under the agreement has become due and payable by the respondent to the applicant.

[10] The applicant alleges that the respondent is unable to repay to the applicant the full balance owing in terms of a medium-term loan in the sum of R15 024 334 45, together with interest, which balance, it is alleged, is due and payable following an acceleration of the payment date because of the alleged default by the respondent in the payment of the contractually agreed annual instalments.

[11] The respondent opposes the grant of an order for its liquidation on the basis that it is indeed factually and commercially solvent, and that it has the necessary liquidity to pay its debts as they fall due.

[12] Further, the respondent disputes the applicant's purported calling up of the medium-term loan and acceleration of the payment dates. The respondent contends that the parties entered into a payment deferment arrangement, and following a payment of R6,5 million by the respondent to the applicant on or about 30 August 2023, the respondent is well-ahead in its performance of its obligations under the medium-term loan. The respondent thus denies its alleged inability to pay its debts,

[13] The respondent avers that it was reliant upon its lessee, DVN Boerdery, to pay its agreed rent or to make advances of loan capital for the respondent to meet its annual payment obligations to the applicant under the MTL agreement of R2,3 million.

[14] The respondent contends that as a result of an outbreak of foot-and-mouth disease countrywide during 2021 and a government-imposed quarantine, it was impossible for DVN Boerdery to take its cattle to auction and raise the necessary cash-flow to pay its rental obligations to the respondent. That this, in turn, left the respondent in the unpleasant position that it was unable to meet its payment obligations to the applicant on 3 March 2022 for payment of R1 million in respect of interest and on 6 August 2022 for payment of R1,3 million in respect of capital repayment.

[15] With this predicament in mind, the respondent entered into negotiations with representatives of the applicant in June 2022, viz. one

Jaco Dennis, and Ms Jacqueline van Wyk (“Van Wyk”), the deponent to the applicant's founding affidavit herein; with a view to restructure the aforesaid payment obligations under the MTL agreement that fell due in March and August 2022 respectively.

[16] On 8 June 2022, and at the said meeting between Van Niekerk, representing the respondent and the aforesaid representatives of the applicant, it was, inter alia, agreed that:

[16.1] The proposed restructure of the MTL agreement in the respondent's name and an overdraft facility in DVN Boerdery's name would be suspended and that the current facilities (in terms of the MTL agreement and the overdraft facility agreement) would remain unchanged until 30 November 2022, at which time re-assessment would take place.

[16.2] Interest on the MTL agreement would be capitalised for the following 5 months.

[16.3] Interest and capital on the MTL agreement would be paid by 30 November 2022. The respondent would be expected to pay by end November 2022, 12 months' interest and the remaining months since inception of the loan would be capitalised and re-spread over the remaining term of the loan.

[16.4] At the end of November 2022, the parties would consider agreeing that the respondent would service the monthly interest.

[16.5] Proceeds from the sale of the subdivided portion of the farm Driefontein would be utilised to buy a new adjacent farm and not to reduce the term facility.

[16.6] The sale would not affect the applicant's security position, but the applicant would have an unsecured portion due to the increase in the term facility due to the capitalisation of the interest. This would be covered by the registration of a first continuing mortgage bond over the new farm property in favour of the applicant.

[16.7] No further increase or new facilities would be considered by the applicant for the following 5-month period.

[16.8] When other farms belonging to the DVN Group were sold, a capital reduction of R3 million would need to be made to reduce the MTL exposure in line with the previous conditions of the MTL agreement.

[17] Shortly after the meeting, Van Niekerk, on behalf of the respondent, offered to pay the applicant the sum of R3 million from the sale proceeds of the proposed sale of the subdivided portion of the farm Driefontein towards the respondent's indebtedness on the medium term loan. This proposal was apparently accepted the aforesaid representative

of the applicant on 9 June 2022. This is not disputed by Van Wyk.

[18] The agreements referred to above were recorded in writing by Van Wyk on behalf of the applicant on 9 June 2022. On 14 June 2022 Van Niekerk made a written offer on behalf of the respondent to pay the full R6,5 million sale proceeds from the sale of a subdivided portion of the farm Driefontein to the applicant in lieu of the instalment due at the end of November 2022, and his previous offer to make payment of an additional R3 million. This was accepted by Van Wyk on behalf of the applicant in writing on the same date.

[19] The respondent contends, correctly so, that the applicant's conduct amounted to a waiver of the respondent's 2022 payment obligations. In furtherance of the abovementioned agreement, the respondent, upon conclusion of the sale of the subdivided portion of the farm Driefontein, caused a written guarantee to be issued by Nedbank in favour of the applicant on 29 November 2022 for the payment of the sum of R6.5 million upon registration of transfer of the property (which was R3.5 million more than the respondent's undertaking).

[20] The respondent avers that due to a technical error, this guarantee was later substituted on 21 June 2023 by a similar guarantee and the proceeds of R6.5 million was paid to the applicant on or about 30 August 2023. Van Wyk on behalf of the applicant admits that the applicant indeed received the amount of R6.5 million from the respondent. She does not explain more under which circumstances was the said amount paid to the applicant by the respondent. She further admits that there was a meeting on 8 June 2022, as alleged by Van Niekerk on behalf of the

respondent; she however, does not elaborate on what the meeting was all about. She simply does not take the court into her confidence.

[21] It follows from the above deferment of the payment dates of the instalments of R1 million and R1,3 million initially to 30 November 2022, and thereafter the acceptance by the applicant of a payment guarantee of R6,5 million on 29 November 2022 in lieu thereof, that the applicant's demands for payment on 22 September 2022, and on 20 October 2022 and 7 November 2022 (service of the letters of demand), were all premature.

[22] The respondent submitted that the MTL agreement was not validly terminated, but remains of full force and effect (subject to the June 2022 agreements). The respondent contends that as a result of the payment of R6,5 million made on 30 August 2023 the result is that the 2022 and 2023 instalments have been paid in full and that the respondent has paid at least the sum of R1,9 million in advance towards its payment obligations for 2024, That there is accordingly no debt currently due and payable to the applicant in the light of the fact that the respondent has made payment in advance of its obligations under the MTL agreement and there is presently no amount due and payable to the applicant under the MTL agreement, the Court can therefore not be satisfied that the respondent is unable to pay its debts as envisaged in section 345(1)(c) of the Companies Act.

[23] The applicant admits that indeed the applicant did receive a payment of R6,5 million from the proceeds of a guarantee, but that the remaining balance on the respondent's medium term loan account remains due and payable to the applicant. The applicant denies that the respondent

has paid in advance towards its payment obligations for 2024, as alleged, or at all. The applicant does not elaborate on this, nor does the applicant elaborate on the terms of the agreement of 08 June 2022. Van Wyk admits the meeting but doesn't say what meeting was all about.

[24] It is important to note that, pertaining to the applicant's aforesaid letter of 22 September 2022, when the respondent was put on terms, Van Wyk states that *"documentation and information required by the applicant were important (and reasonably required) to enable the applicant to assess the current circumstances of the business of the respondent and the risk in determining whether to extend the repayment date.* However, in the aforesaid email of 09 June 2022 from Van Wyk, already it is recorded, amongst others, under 'Way forward', that *"...interest and capital on the medium term loan account to be paid by 30 November when the position will be re-assessed with the possibility to start servicing the monthly interest and the need for an overdraft requirement. The term loan will be in place for 19 months by end November 2022 and interest(sic). The bank's requirement is that 12 month's interest is paid together with the capital and the remaining 9 months interest can be capitalised and re-spread the over the remaining term. of the loan"* (sic). [My underlining]

[25] This clearly confirms Van Niekerk's assertion, on behalf of the respondent, that there was agreement at the meeting of 08 June 2022 to defer payment obligations to the end of November 2022. The demand by the applicant in September and October 2022 was thus premature in light of the fact that the applicant had specifically agreed to defer the respondent's two payment obligations to 30 November 2022. The

applicant does not dispute the fact that the parties had the said discussion but meritlessly denies the correctness thereof. The applicant further admits that it sent the relevant email of 09 June 2022 to the respondent, wherein the agreement is set out, the applicant however contends that the email relied on by the respondent has been taken out of context. It is quite clear from the emails that the applicant specifically agreed to defer the payment dates of the instalments of R1,000,000.00 and R1 300 000.00 to 30 November 2022.

[26] As already stated, Van Wyk, on behalf of the applicant, does not dispute that on 14 June 2022 the applicant agreed to accept payment of R6,500,000.00 towards the MTL obligations as soon as transfer of the property sold by the applicant took place. In terms of these negotiations, R6,500,000.00 is said to have been paid to the applicant in terms of the MTL agreement on 30 August 2023, and as stated above, this is not disputed by the applicant.

[27] The applicant was not entitled to deliver the demands dated September 2022 and October 2022 to the respondent as the payment was not yet due. On the facts, it cannot be said that the respondent is unable to pay its debts, whether actual or deemed, and further it cannot be said that considerations of justice and equity require that the respondent company should be wound up.

[28] In the light of the fact that the respondent has made payment of its obligations under the MTL agreement, there is presently no amount due

and payable to the applicant under the MTL agreement, this court cannot find that the respondent is unable to pay its debts as envisaged in section 345(1)(c) of the Companies Act.

[29] Seeing the difficulty, the applicant has with the deferment of the payment obligations, the applicant then raises, for the first time in its replying affidavit, the point that the applicant requested further documentation which formed an integral part of the subsequent agreement and that the respondent's failure to submit same constitutes a further breach of the agreement.

[30] As already stated above, from a reading of the email of the applicant, the requested documentation was not a pre-requisite for the deferment of payment. In my considered view, this cannot be accepted as a ground for the liquidation of the respondent in circumstances where the applicant for the first time refers to a breach of clause 15.2 of Part A of the MTL agreement in the replying affidavit. It is trite that the applicant must make out its case in the founding affidavit. This is the case that the respondent is called upon to answer.

[31] *In Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B. the court put the position as follows:

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the

allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny”.

The applicant can also not rely on an alleged breach of clause 4.1.2 for claiming the full outstanding amount on the basis that it has become aware of a material deterioration in the respondent’s financial position. The applicant does not substantiate this allegation. Then in its replying affidavit it states that *“the documentation and information required by the applicant were important (and reasonably required) to enable the applicant to assess the current circumstances of the business of the respondent and the risk in determining whether to the extend the repayment date.”*

[32] The respondent is correct is correct in stating that the applicant cannot wear both hats; either it is fully aware of a material deterioration in the respondent’s financial position, or it reasonably requires the requested information to ascertain the financial position of the respondent. If it is then accepted that the applicant could not reasonably have been aware of any material deterioration in the respondent’s financial position, then this cannot be a cause for breach, as set out in the founding affidavit, by which the applicant should respectfully stand or fall. Even if it were aware as alleged, it needs to establish this sufficiently so in order to establish a ground of breach.

[33] It is trite that liquidation proceedings are inappropriate for resolving a dispute as to the existence of a debt, see *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347-348.

The respondent has illustrated that the applicant was not entitled to claim acceleration of the debt in the specific circumstances; the amount claimed by the applicant is thus not yet due or owing.

[34] In ***Imobrite (Pty) Ltd v DTL Boerdery CC*** 2022 JDR 1554 (SCA) at par 14 the Supreme Court of Appeal summarized the principles to be applied in cases where a debt is disputed as follows:

"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes about the existence or non-existence of a debt. Thus, winding-up proceedings should not be resorted to to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused".

In ***Wackrill v Sandton International Removals (Pty) Ltd and others*** 1984 (1) SA 282 (W) at 293C-E it was held as follows:

"In the case of sequestration proceedings the principle is clearly established that the court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a concursus creditorum and a distribution of the respondent's assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the court. See Berman v Brimacombe 1925 TPD 548; Amod v Khan 1947 (1) SA 150 (N) at 152 and on appeal in 1947 (2) SA 432 (N) at 439; and Millward v Glaser 1950 (3) SA 547 (W) at 551. In my view, there is no reason for not adopting the same rule in the case of proceedings for a winding-up order, if only for the reason that a mala fide

application made with an ulterior and improper motive is an abuse of the process of the court. See Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1980 (3) SA 253 (W) at 257H."

[35] The applicant has not on its own disclosed the fact that the parties had entered into payment negotiations and a subsequent agreement as set out by the respondent. This creates serious doubt as to the bona fides of the applicant in applying for the liquidation of the respondent as opposed to proceeding by way of action. This is relevant to the question on whether the applicant is entitled to claim an acceleration of the amount under the MTL agreement in the manner it did. As stated above the applicant has not cancelled the agreement.

[36] In so far as the inability to pay its debts is concerned, i.e. Section 344(f) read with section 345 of the Act, the applicant relies on a demand in terms of section 345 of the Act which was not satisfied by the respondent. The deeming provision has the effect of creating a rebuttable presumption that the company in question is unable to pay its debts, see *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) at 418 C-F. The conclusion of law that a respondent is deemed unable to pay its debts following on its receipt of section 345(1)(a) letter is one which may be attacked by the respondent, See *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (CPD) referred to in *Dineam Trade (Pty) Ltd v Sumali Investments 101 (Pty) Ltd* 2024 JDR 0064 (GJ) at 29. In order for section 345(1) to operate, the debt has to be due and payable. The debt must not be disputed by the respondent bona fide and on reasonable grounds, see *Kalil Decotex* 1988 (1) SA 943 (A)

[37] The evidence of the respondent is that it is factually solvent in that its assets exceed its liabilities by at least R19,000,000.00; open market value @ R40,000,000.00. The respondent avers that the rental income which the respondent derives from renting out the properties it owns amounts to R2,394,000.00 (R798,000.00 in respect of Owanta (Pty) Ltd; plus R1,596,000.00 in respect of DVN Boerdery which far exceeds the amounts payable to the applicant on each instalment as and when it falls due. These averments stand undisputed by the applicant.

In *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA) at para 31 the Court held as follows in determining commercial solvency:

“It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, 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 — in other words, can the company meet current demands on it and remain buoyant?'

Determining 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."

[38] The respondent has therefore satisfactorily rebutted the position of having been deemed unable to pay its debts. From the facts, the respondent is both commercially and factually solvent and has shown that it is in a position to pay the annual instalments due in terms of the agreement as and when they fall due in the normal course of the agreement.

[39] In so far as Just and equitable – Section 344(h) is concerned, much was, rightly so, not made on this ground. In any event on the facts before this court, it would not be just and equitable that the respondent be wound up.

[40] Regard being had to all the facts in this matter, the submissions made on behalf of both parties, it cannot be said that the applicant has made out a case for the order sought.

In the result the following order is made

1. The application for the winding up of the respondent is dismissed with costs, such costs to include the costs of the respondent's counsel on scale B.



L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

For the Applicant : Adv Y Coertzen

Instructed by : Newtons Inc

For the Respondent : Adv L Pretorius

Instructed by : Nolte Inc