

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2024-050928

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

And

LLR PROPERTYS (PTY) LTD

Respondent

JUDGMENT

MOTHA J

- 1) Before this court are two applications. First, the Standard Bank of South Africa (the applicant) seeks an order for the final winding-up of LLR Property (Pty) Ltd (the respondent), in terms of section 344(f) as read with section 345 of the Companies Act 61 of 1973 ("the Act"); and read with Item 9 of Schedule 5 of the Companies Act 71 of 2008, based on that the respondent is deemed to be, and is in fact, unable to pay its debts, *id est*, commercially insolvent. Second, the respondent brings a counterapplication to declare that the applicant's termination of the loan agreement concluded with the respondent on 12 July 2019 was unlawful and should be set aside.

- 2) Importantly, the respondent does not contest that on 30 December 2023 its arrears totalled R2 704 608,00, and that its outstanding balance was R15 855 546.49.

The background.

- 3) On 12 July 2019, the applicant, The Standard Bank of South Africa Limited, concluded a Commercial Property Finance Loan Facility (loan) with the respondent, LLR Property (Pty) Ltd. Shortly thereafter, on 22 August 2019, the loan agreement was amended, with the aggregate maximum capital amount that could be advanced under the loan set at R16 500 000.00.
- 4) This loan facility was granted to raise finance against the security of Portion 25 (of 15) of ERF [...] P[...] Z[], Portions 3 and 5 of ERF 1[...] F[...] and ERF 1[...] T[...] J[...].
- 5) The funds were to be utilized to settle the existing medium-term loan against the security of Portion 25 (of 15) of ERF [...] P[...] Z[]; settle the Mortgage bond held by First National Bank over Portions 3 and 5 of ERF 1[...] F[]; and part-fund the purchase of shares in the second respondent.
- 6) According to clause 9.1.1, the loan facility was to be repaid in monthly instalments of R196,236.00 (One Hundred and Ninety-Six Thousand Two Hundred and Thirty-Six Rand), covering both the capital and interest.
- 7) Clause 17.1.1 stipulates that a default occurs if, *inter alia*, at any time, the respondent fails to pay any sum due by it in terms of the facility letter or otherwise to the applicant or Standard Bank Group Limited or any other subsidiary or associated company of Standard Bank Group Limited on the due date. A default also occurs, under clause 17.1.2, if the approved loan limit is exceeded.
- 8) Having failed to effect payment of the instalments due in terms of the loan agreement, the respondent fell into arrears. As already mentioned above, on 30

December 2023, the respondent was in arrears in the amount of R2,704,608.00, and the outstanding balance amounted to R15,855,546.49, together with interest at the rate of 11.4% per annum.

- 9) Pursuant to the breach, the applicant dispatched a letter of demand, by way of registered post and email, for the payment of arrears, on 10 January 2024. In a nutshell, the letter afforded the respondent ten (10) business days within which to pay the arrears.
- 10) Additionally, it recorded that in the event of the respondent's failure to settle all arrears and remedy the breach, the applicant elected to:
 - Enforce the respondent's indebtedness in terms of the agreement;
 - Cancel the agreement without any further notice to the respondent; and
 - Proceed with legal action for payment of the outstanding balances, which included a foreclosure on the property and claim subsequent shortfall damages, if any.
- 11) The respondent failed to make the requisite payments to settle the arrears. Two months later, on 13 March 2024, the notice of cancellation was dispatched by email and registered post, electing to cancel the agreements and to institute legal action for the recovery of all outstanding amounts.
- 12) On 19 March 2024, the section 345 letter was sent, with the application issued on 19 May 2024. Essentially, the letter demanded payment of R13 961 580.69 and recorded that if the respondent failed to timeously pay the amount within a period of three (3) weeks (21 calendar days) from receipt of the notice, alternatively fail to secure or compound to the reasonable satisfaction of the applicant, within the stipulated period, it will be deemed that respondent is unable to pay its debts; legal action would be proceeded with to have the respondent liquidated.

The law

- 13) Distinguishing between factual insolvency and commercial insolvency is an important starting point. Examining these two forms of insolvency, the court in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*¹ held:

“For decades our law has recognised two forms of insolvency: factual insolvency (where a company’s liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, *Johnson v Hirotec (Pty) Ltd*; *Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)*; *Rosenbach & Co (Pty) Ltd v Singh’s Bazaars (Pty) Ltd*.

That a company’s commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company’s assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(1) thereof.”²

- 14) The court continued and stated:

“This conclusion is significant in determining what is meant by a ‘solvent company’. The retention by the legislature in the context of a winding-up

¹ (936/2012) [2013] ZASCA 173; [2014] 1 All SA 507 (SCA); 2014 (2) SA 518 (SCA) (28 November 2013)

² Supra paras 16 and 17.

of a solvent company in the new Act, of the deeming provisions as to when a company is unable to pay its debts as contained in s 345 of the old Act, is a clear indication of what is meant by an insolvent company in the new Act. It can only mean a company that is commercially insolvent. It therefore follows that a solvent company must be the converse, namely a company that is commercially solvent.

Consequently, in order for a solvent company to be wound-up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the old Act, as is provided for in subitem 9(i) of schedule 5 of the new Act.

The confusion which has arisen as to when a company may be wound-up in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense.

Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See *Johnson v Hirotec (Pty) Ltd*, it follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act"³.

³ Supra paras 21 to 24.

- 15) Dealing with the abuse of winding-up proceedings, the court in *Imobrite (Pty) Ltd v DTL Boerdery CC*⁴ held:

“It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debts. Thus, winding-up proceedings ought not to be resorted 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.

A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company’s liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights.”⁵

- 16) Still on this point, the court in *Afgri Operations Ltd v Hamba Fleet Pty Ltd*⁶ stated:

“It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. This is known as the so-called ‘Badenhorst rule’. Where, however, the respondent’s indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.”⁷

- 17) Section 344(f) of the old Act provides that a company may be wound up by the court if ‘the company is unable to pay its debts as described in section 345’. The relevant portions of s 345 of the old Act read as follows:

⁴ (1007/2020) [2022] ZASCA 67 (13 May 2022)

⁵ Supra paras 14 and 15.

⁶ ZASCA 24 (24 March 2017)

⁷ Supra par 6.

(1) A company... shall be deemed to be unable to pay its debts if-

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum of money of not less than one hundred rand then due -

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; ...

and the company... has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor...or

(b)...

(c)It is proved to the satisfaction of the Court that the company is unable to pay its debts.'

Issues for determination

18) The respondent raised several defences to contest the winding-up application. Upon a careful examination of the respondent's case, three defences stand out as issues for the court's consideration, namely:

- The abuse of court process;
- The unlawful termination of the agreement, which is tied to the counterclaim; and
- The invitation to engage, the nub of the respondent's case, as confirmed by its counsel.

Submissions

By counsel for the respondent

Abuse of court process

- 19) The respondent submitted that this application was an abuse of process because it had enough security. In its answering affidavit, the respondent maintained that: "It held real security of more than what was the true amount outstanding (according to it R13 million);" and concluded that it "had more than sufficient assets to settle its true outstanding amount."⁸
- 20) Furthermore, the respondent's counsel submitted that "Standard Bank holds security in the sum of R24 125 000,00, all of which is secured by the continuing covering mortgage bonds..."⁹

Unlawful termination of the loan agreement.

- 21) At the core of this defence is that the applicant, in its letter of demand, afforded the respondent 10 days within which to settle the arrears before cancelling. By so doing, the applicant prescribed, unilaterally and unlawfully, the time within which it would take action against the respondent, argued counsel.
- 22) Counsel contended that clause 18 of the loan agreement addressed the consequences of a default. Under clause 18.1.6, failure to pay entitled the applicant to terminate the loan agreement "forthwith" on written notice. Therefore, mentioning ten days from the date of the delivery of the letter, rather than "forthwith," was in direct conflict with clause 18.1.6.
- 23) During the interaction with the court, counsel insisted that the loan agreement did not prescribe a period of ten days to settle arrears or to remedy a breach of the loan agreement. He concluded that this unlawful conduct, which amounted to self-help, did not constitute a legal basis for terminating the loan agreement or accelerating the payment of the outstanding balance.

The invitation to a discussion

⁸ Answering affidavit subparas 2.17.4 and 2.17.5.

⁹ Heads of argument subpara 2.2.8

- 24) Counsel for the respondent contended that, in terms of paragraph 4 of section 345 letter, the respondent was afforded two options. To quote him verbatim, he said:

“So, there are two issues that are raised, one, if you do not pay within three weeks, you will be deemed to be insolvent. But you have an alternative to engage with us, to come to an arrangement, which is reasonable to the satisfaction to our client. If that happens, because it is an alternative, then we cannot bring a liquidation application.”

- 25) During his submission, counsel reiterated that this was the nub of the respondent's case. On 10 April 2024, a meeting took place between the respondent, represented by Lesley Lufuno Ramatshila-Mugkri, and the applicant's Donald Shigadhla, he argued.

- 26) At the meeting, counsel continued, it was agreed that the outstanding balance on the loan transaction would be refinanced on the following conditions:

“I (Ramatshila-Mugkri) would settle an outstanding amount of R 80 000, 00 which was due on my cheque account. This was done on 11 April 2024.

The outstanding arrears, then in the amount of R 606 501, 45 would be settled. This was done on 11 April 2024 and the arrears were cleared on that date.

RM Incorporated would be used as the entity to enter into the refinancing transaction and that I would provide the applicant with RM Incorporated's documents which the applicant requested, such as its financial statements, This was done on 16 April 2024.”

- 27) Once all these conditions were fulfilled, counsel maintained that there was no need for the winding-up application.

- 28) The court suggested to him that, if, as is common cause, the respondent was in arrears of R2.7 million in January 2024, the applicant was well within its rights to cancel and bring liquidation proceedings. Counsel retorted that despite this, the court could not ignore the events of 10 April 2024.
- 29) When asked why the engagement focused on the arrears instead of the total amount owed, he stated that the balance was going to be refinanced.
- 30) To paraphrase his submission, counsel averred that Mr. Ramatshila-Mugkri, on behalf of the respondent, must have indicated that he could not pay R13 million within 21 days but would instead bring in an entity, RM Incorporated, which would enter into an agreement with the applicant to take over the balance of the debt.
- 31) However, it is worth noting that the balance was never refinanced, nor was the debt taken over by RM Incorporated. According to counsel, this was because the applicant reneged.
- 32) Referring to the answering affidavit, counsel asserted that the respondent's Mr. Ramatshila-Mugkri met with the applicant's Donald Shigadhla and Vivian, on 15 July 2024. During this meeting, Vivian informed the respondent that liquidation proceedings had been instituted due to the respondent's failure to comply with the aforementioned conditions.
- 33) According to the respondent, this was incorrect as all the conditions for refinancing the transaction had been complied with. The fact that Vivian might not have been aware that refinancing conditions had been complied with was a consequence of miscommunication within the applicant's administration, so the argument continued.
- 34) Since the letter of demand foreshadowed foreclosure proceedings, counsel insisted that the applicant was precluded from bringing liquidation proceedings.

By counsel for the applicant

- 35) The applicant's counsel submitted that the respondent could not find refuge in the fact that the bank held ample security, and contended that that argument was legally hollow, as commercial insolvency was based on a company's liquidity, not on its collateral. To this end, he referred to the case of *FirstRand Bank Limited v Tshabalala*,¹⁰ where the court said:

“The fact that there is security for the applicant in the form of the property and that PEM's assets exceed its liabilities is no defence to the winding-up application...It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should hold that the company is unable to pay its debts within the meaning of s345(1)(c) as read with s344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.”¹¹

- 36) The second line of reasoning was that the arrears had been reduced from R 2.7 million to about R 600 000.00. He argued that the events are determined at a snapshot in time and referred to the threshold as set out in the Act, being a creditor to whom a company is indebted in the sum of not less than R100.00.
- 37) Examining the argument that by suggesting foreclosure proceedings in paragraph 4, the applicant was, *ipso facto*, precluded from embarking on liquidation proceedings, counsel referred to clause 18.1 of the agreement, which reads: “The Bank may, without prejudice to any other rights it may have hereunder or in law, at any time after the happening of an event of default, by written notice to the Borrower:..”
- 38) The kernel of the applicant's submission is that its rights are not restricted to the foreclosure proceedings mentioned in the letter of demand. Additionally, the phrase on demand in clause 18.1.4 and the word forthwith in clause 18.1.6 are not in conflict with the letter of demand, particularly paragraph 6, which states that it will cancel without further notice. Therefore, the Bank's cancellation was

¹⁰ 2021/46586 ; 2021/46585) [2023] ZAGPJHC 674 (9 June 2023).

¹¹ Supra para 27.

valid. Pursuant to the cancellation of the loan agreement, the Bank had various legal remedies at its disposal, he concluded.

Analysis

- 39) In my view, the respondent is grasping at straws, and its defences are devoid of substance. To begin with, the defence that the respondent has sufficient security flies in the face of the established legal position that factual solvency, in itself, is not a bar to an application for the liquidation of a company in terms of the old Act on the ground that it is commercially insolvent. Consequently, it is of no moment that the STD Bank held security in the sum of R24 125 000.00.
- 40) Commercial insolvency is assessed objectively, namely: “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.”¹²
- 41) The test remains whether a company has readily realisable assets to meet its liabilities as they fall due, and “These will include not only cash on hand, but receipts that it can expect to receive in the ordinary course; overdraft or other banking facilities that can be used to make payment of debts when they fall due; or assets, such as shares, bonds or book debts, that can be realised quickly so as to generate cash with which to pay debts.”¹³.
- 42) The second line of defence was that the applicant did not cancel the loan forthwith but gave the respondent 10 days to purge the arrears. To me, this argument amounts to fiddling while Rome burns. In paragraph 6 of the selfsame letter, the applicant states that failure to settle the arrears would result in cancellation of the agreement without further notice to the respondent.

¹² Murray and Others NNO v African Global Holdings (Pty) Ltd and Others (306/2019) [2019] ZASCA 152; [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 (SCA) (22 November 2019) para 28.

¹³ Supra paras 29 and 28

- 43) The agreement records that payment must be required on demand, which is not defined. By any stretch of the imagination, it cannot be said that affording the respondent time to purge its default amounts to failure to comply with clause 18.1.6. Be that as it may, the loan agreement was cancelled forthwith on 13 March 2024. The fact that the word forthwith was not mentioned is immaterial.
- 44) The submission that the applicant was precluded from bringing winding up proceedings is without merit. Clause 18.1 categorically states that, without prejudice to any other rights it may have hereunder or in law, on default, the Bank may cancel the agreement.
- 45) Finally, it is a misreading of the section 345 letter to conclude that there is an alternative which involves negotiations to paying R13 961 580.69 within 21 calendar days. The alternative mentioned in the letter involves the securing or compounding of the debt to **the satisfaction of the applicant**. (my emphasis). To manufacture some misunderstanding within the applicant's administration implausible. When the parties met in July, Vivian expressed dissatisfaction with the respondent's inability to fulfil its commitment. Therefore, the debt was never secured or compounded to the satisfaction of the applicant.
- 46) When interpreting a legal text, it should not lead to absurdity. The trite principles of interpretation are elucidated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁴ where the court held:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context

¹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (Endumeni).

in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”¹⁵

- 47) In *Cool Ideas 1186 CC v Hubbard and Another*,¹⁶ the court held that the purposive approach involves the interpretation of the legal text, such as statutes or contracts, in a manner that gives effect to the underlying purpose or intention behind the text. It emphasised that the words of statutes should be understood in their ordinary grammatical meaning, except where it would lead to absurdity
- 48) With these legal precepts in mind, I am of the view that the respondent’s interpretations of the word “forthwith” in the loan agreement and the phrase “to the satisfaction of the client” do not give effect to the underlying purpose or intention behind the texts.
- 49) When all is said and done, it is telling that the respondent suggested another entity to assume its debt. This is an unequivocal concession that the respondent could not honour its obligation to the applicant.
- 50) For all the reasons tabulated above, the respondent’s counterclaim does not pass muster and stands to be rejected. It is common cause that the respondent does not dispute being indebted to the applicant. Further, it is common cause that the jurisdictional factors have been complied with. Having found that the cancellation of the loan agreement was lawful, I am persuaded that the respondent was commercially insolvent. In exercising my discretion, I am of the view that it is just and equitable to place the respondent under final liquidation.

Costs

- 51) It is trite that the costs follow the results, and there is no reason to stray from that well-trodden path. In the result, I make the following order.

¹⁵ Supra para 18.

¹⁶ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

ORDER

1. The Respondent is placed under final liquidation;
2. The costs of the application are to be costs in the liquidation;
3. The Respondent's counterclaim is dismissed with costs on scale B.

MP MOTHA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARANCES:

Date of Hearing: 08 October 2025
Date of Judgment: 04 December 2025

For Applicant: Adv JC Viljoen
Instructed by Stupel & Berman Incorporated

For Respondents: Adv Tsatsawane SC
Instructed by: Ramatshila-Mugeri Attorneys Incorporated

