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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

Case Number: 5801/2023

In the matter between:

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

25.06.2026 ________________________

SIZABANTU PIPING SYSTEMS (PTY) LTD	**APPLICANT**
NEDBANK LTD	**INTERVENING PARTY**

And

MANTELANE CONSTRUCTION CC	**RESPONDENT**

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an application for the final winding-up of the respondent on the basis that it has failed to discharge a debt due and owing to the applicant. Nedbank Limited (the intervening party), a creditor of the respondent and the intervening party in these proceedings, brought an application to intervene, which application was granted. The intervening party supports the relief sought by the applicant on the basis of its own claim against the respondent.

BACKGROUND

[2] The respondent was awarded a tender by the Ehlanzeni District Municipality ("the municipality") during 2021 for the construction of a pipeline. Pursuant to the execution of that tender, the respondent procured goods and services from the applicant.

[3] The applicant alleges that the respondent is indebted to it in the amount of R6 903 267.07 in respect of goods supplied and services rendered pursuant to the aforesaid tender. Following the respondent's failure to settle the outstanding amount, the applicant caused a letter of demand to be served by the sheriff at 1[…], Zone […], S[…], being the respondent's registered address.

[4] Despite demand having been made, the respondent failed to discharge the debt or make satisfactory arrangements for payment. Consequently, the applicant launched these windingup proceedings on the basis that the respondent is unable to pay its debts as contemplated in the applicable provisions of the Companies Act.

THE APPLICANT'S VERSION AND SUBMISSIONS

[5] The respondent signed an acknowledgment of debt but has failed to honour that acknowledgment of debt. The applicant submitted that the signed acknowledgement of debt in the amount of R6 903 267.07 constitutes conclusive proof of the respondent's indebtedness to the applicant. The applicant further contended that, notwithstanding

demand, the respondent has failed to settle the outstanding amount. In this regard, a letter of demand was served by the sheriff at the respondent's registered address on 6 September 2023, demanding payment of the aforesaid amount. Despite such demand, the respondent failed to make payment.

THE INTERVENING PARTY'S VERSION AND SUBMISSIONS

[6] The intervening party obtained judgment against the respondent in the amount of R2 035 225.87 on 6 September 2024. Despite judgment having been granted, the respondent has failed to satisfy the judgment debt. The intervening party accordingly contends that the respondent's failure to meet its obligations to creditors constitutes further evidence of its inability to pay its debts and supports the granting of a final winding-up order.

THE RESPONDENT'S VERSION AND SUBMISSIONS

[7] The respondent submitted that the applicant has failed to establish that the respondent is indebted to it in the amount claimed. It contends that the alleged indebtedness is bona fide disputed on reasonable grounds, thereby rendering winding-up proceedings inappropriate for the determination of such dispute. The respondent further averred that the applicant breached the agreement between the parties, in that the applicant was aware that payment to the applicant was contingent upon the respondent receiving payment from the municipality.

[8] The respondent further contends that it remains in a sound financial position and is therefore solvent. It submits that, in terms of the agreement between the parties, payment to the applicant would only become due once the municipality had paid the respondent for the work performed. Accordingly, the respondent maintains that, should the alleged indebtedness ultimately be established, payment will be made to the applicant upon receipt of payment from the municipality. The respondent further asserts that it has no other overdue creditors, which, according to it, demonstrates that it is not unable to pay its debts.

LEGAL FRAMEWORK

[9] It is trite that the power of a court to grant a winding-up order is discretionary and that such discretion must be exercised judicially upon a consideration of all the relevant facts and circumstances. It is equally well-established that winding-up proceedings are not designed to enforce payment of a debt that is disputed on bona fide and reasonable grounds. In such circumstances, a winding-up application constitutes an abuse of process and should not be employed as a substitute for ordinary action proceedings. The principle was articulated in Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T), where the Court held that a winding-up order should not be granted where the indebtedness relied upon is genuinely and reasonably disputed.

[10] However, where the indebtedness is admitted or where the alleged dispute is not bona fide or reasonable, the court may, subject to its discretion, which is narrow and limited, grant a winding up order if the requirements of section 344 and 345 of the Company's Act have been satisfied.

[11] The relevant parts of section 344 and 345 reads as follows:

Section 344 "A company may be wound up by the Court if-

…

(f) the company is unable to pay its debts as described in section 345;

Section 345 (1) A company or body corporate 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 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; or

(ii) ...

and the company or body corporate 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."

ANALYSIS

[12] The guiding principle in such matters is that generally an unpaid creditor has a right *ex debito justitiae* to a winding up order against a company that has failed to discharge the debt owed to it. See Afri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at paragraph 12. The discretion of the court to grant or refuse a winding up order where the applicant has established that the respondent has failed to pay the debt is narrow.

[13] The respondent disputes the debt to the applicant and contends that if the indebtedness is established, the debt is not due and payable. The acknowledgement of debt signed by the respondent filed by the respondent as an annexure to its answering affidavit contradicts the respondent's contention. In addition to acknowledging being indebted to the applicant in the sum of R6 903 267.07, there is a clause in the acknowledgement of debt that provides as follows:

"2.4 In the event of:

2.4.1 any one instalment required in terms hereof not being paid upon due date; or

2.4.2 the buyer being in breach of any other provisions hereof (all of which are deemed to be material); or

2.4.3 the buyer committing any act of insolvency; the full outstanding balance, together with interest thereon and costs, shall immediately become due and payable and …"

[14] The respondent acknowledges that it is experiencing financial difficulties but contends that it will be in a position to discharge the indebtedness at some unspecified future date once the municipality pays its invoice. This assertion serves only to confirm its inability to pay its debts as they become due. Furthermore, the respondent failed to make payment in accordance with the acknowledgement of debt, with the result that the full outstanding balance became due and payable in terms of clause 2.4 thereof. In my view, the denial by the respondent of its

indebtedness does not raise a real, genuine or bona fide dispute of fact. (see Plascon Evans Limited v Van Riebeck Paints (Pty) Ltd 1984(3) SA 623)

[15] Regarding the respondent's assertion that it is financially stable as evidenced by its financial statements and its assets which are valued in excess of R6 000 000.00, the test is not whether the respondent's assets exceed its liabilities, but whether the respondent is able to meet its current obligations in the ordinary course of business. A company may be factually solvent yet commercially insolvent if it is unable to pay debts when they fall due. The guiding principle in such matters, as enunciated in Afri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at paragraph 12, is that generally an unpaid creditor has a right to *ex debito justitiae* to a winding up order against a company that has failed to discharge the debt owed to it. The discretion of the court to grant or refuse a winding up order where the applicant has established that the respondent has failed to pay the debt is narrow.

[16] The respondent has admitted its indebtedness to the applicant and has acknowledged experiencing financial difficulties. It has further failed to comply with the terms of the acknowledgement of debt and has not discharged the amount demanded despite the statutory demand having been served at its registered address. Although the respondent contends that its assets exceed its liabilities, it has not demonstrated an ability to satisfy the debt due to the applicant or the judgment debt owed to the intervening creditor.

[17] The respondent further asserts that it has a counterclaim against the applicant for breaching their agreement by failing to deliver all the items required by the respondent. The respondent's reliance on an alleged counterclaim arising from a purported breach of agreement by the applicant does not avail it. No particulars of the alleged agreement, the alleged breach, or the quantum of the alleged counterclaim were furnished. The allegation is therefore bald, unsubstantiated and insufficient to establish a bona fide and reasonable dispute of the indebtedness contemplated in Badenhorst v Northern Construction Enterprises (Pty) Ltd.

[18] Additionally, despite the respondent's assertion that it has no overdue creditors, the judgment obtained by the intervening party on the 6th September 2024 remains unpaid. The respondent has accordingly failed to rebut the statutory presumption created by section 345(1)(a) of the Companies Act. The evidence demonstrates that the respondent has

neglected to pay a debt that is due and payable and has failed to satisfy another substantial indebtedness owed to the intervening party. These facts constitute compelling evidence of commercial insolvency.

COUNTER APPLICATION

[19] The respondent brought a conditional counter application seeking to be placed under business rescue in terms of section 131 of the Act only if I found that the debt is due and payable. The applicant resists this application on the following grounds: the respondent has no *locus standi* to bring this application and that the application is an abuse of court process.

[20] Section 129 empowers the board of a company to voluntarily place a company under business rescue by board resolution if there are reasonable grounds to believe that the company is financially distressed and that there is a reasonable prospect of rescuing the company. However, section 129(2)(a) expressly provides that such a resolution may not be adopted once liquidation proceedings have already been initiated by or against the company. In this matter, liquidation proceedings had already been instituted prior to the respondent's business rescue application. Consequently, the respondent could not validly invoke section 129.

[21] Section 131 provides that where liquidation proceedings have already commenced, business rescue may only be initiated through an application brought by an affected person. Section 128(1)(a) defines an affected person as a shareholder, creditor, registered trade union representing employees, or employees (or their representatives) where no trade union exists. The respondent is not an affected person as contemplated in section 128 and can therefore not rely on section 131.

[22] The respondent's conditional application approach is inconsistent with the statutory framework. Section 131(6) clearly provides that once a proper business rescue application is made, liquidation proceedings are suspended until the court adjudicates the application. The suspension operates immediately upon the lodging of a valid section 131 application.

[23] The respondent's proposed procedure effectively invites this Court to first adjudicate a substantial portion of the liquidation application, namely whether the debt is due and payable and only thereafter consider business rescue application. This defeats the very purpose of section 131(6), which is to suspend liquidation proceedings pending determination of the rescue application. In the circumstances I find that the respondent's conditional counter application is not sanctioned by the act.

[24] It has been established that (a) the applicant and the intervening party are creditors of the respondent for an amount exceeding R100.00; (b) the applicant sent through the statutory demand to the registered address; (c) the respondent has failed to pay or make an arrangement to pay the amount; and (d) the respondent has complied with the statutory requirements in section 346.The applicant and the intervening party having satisfied the requirements for a winding up order, it is for the respondent to establish circumstances that warrants the exercise of the court's discretion against the granting of the order.

[25] The respondent contends that it employs approximately 150 employees who will be left destitute should the winding up order be granted. It further asserts that the respondent has projects to the value of R49 000 000.00 and is therefore solvent. The respondent did not provide any evidence demonstrating available liquidity or proof of its ability to satisfy its obligation to creditors. The assertion regarding the project value alone is insufficient.

CONCLUSION

[26] Having regard to all the circumstances, I am satisfied that the applicant and the intervening party have established the requirements for a final winding-up order. I am further satisfied that there are no circumstances justifying the exercise of the Court's discretion against granting such order.

In the result I make the following order:

1. The respondent's counter application is dismissed with costs.

2 The respondent is placed under final winding-up in the hands of the Master of the High Court.

3. The costs of the application, including the costs occasioned by the intervention application shall be costs in the winding up.

P D KEKANA
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 APRIL 2026

DATE OF JUDGMENT: 25 JUNE 2026

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