REPORTABLE JUDGMENT

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 2819/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICAL LIMITED	**Applicant**
and	
324 CHURCH STREET INVESTMENTS 1 CC	**First Respondent**

Counsel for the Plaintiff	:	Adv. R Howie Adv. M Adhikari
Instructing Attorneys	:	Bowman Gilfillan
Counsel for Defendant	:	Mr K Titus (Attorney)
Instructing Attorneys	:	
Date of Hearing	:	29 October 2012
Date of Judgement	:	4 December 2012

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No:15230/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA	Applicant
versus	
324 CHURCH STREET INVESTMENTS 1 CC	Respondent

JUDGMENT: 4 DECEMBER 2012

Mansingh, AJ

[1] This is an application for the provisional liquidation of the respondent.

[2] The application does not fall to be decided essentially on the respondent's version. **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 620 (A) 643H-I**. Instead, applicant is only required to make out a *prima facie* case. **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) 978D-979C**.

THE APPLICANT'S CLAIM:

[3] The applicant's claim is:

3.1. In February 2008, the parties concluded a written finance loan agreement in terms of which the applicant lent R7 million to the respondent, ("the agreement") to assist in financing its acquisition of Erf 95980, Cape Town-19 Hope Street, Cape Town, ("the property").

3.2. Its terms included a non-variation clause.

3.3. The agreement expired on 30 November 2011.

3.4. All amounts owing there under are due and payable.

3.5. The respondent has failed to make payment since 5 March 2012.

3.6. As at 12 July 2012, the respondent owed the applicant R6 154 076.34.

THE RESPONDENT'S DEFENCES:

[4] The Respondent's defences are:

4.1. That the applicant "promised" to advance development funding to it. This leg fails. The loan agreement contains a non-variation clause. No written amendment in this respect was effected to the agreement. Further, respondent failed to allege when, where and between whom it was so agreed and whether such person had the requisite authority. This defence is not borne out by the terms of the agreement, not the objective facts.

4.2. Plea for time and Valuation of R8 300 00,00:Respondent seeks to rely on a valuation dated 10 January 2012, in which the property is valued at R8 300 000, 00. Francis Edward Gormley, ("Gormley"), placed the valuation of the properties owned by Green Willows Properties 153 (Pty) Ltd in the matter Standard Bank Ltd v Green Willows Properties 153 (Pty) Ltd, the related matter, between R60 and R70 million in the sequestration application by Irish Bank

Resolution Corporation Ltd for Gormley's sequestration (case no. 6747/2012). He then alleged in the Green Willows matter that they are actually worth R113 500, 00. This valuation of R113 500, 00 was rejected in the Green Willows matter and the parties are referred to that judgment. Given Gormley's own view of the decreased value of the Green Willows properties, the same view is attributable to the respondent's property which is situated on the same street and in the same precinct as the Green Willows properties. Further, the property was valued by Ms Natalie Ginsberg during June 2011 at R3 800 000,00, a value which she reviewed and confirmed on 6 July 2012. The fair value is between R3 251 050, 00 (2010 valuation) and R3 800 000, 00 (2011 valuation confirmed in 2012.) Given the fair value and respondent has been unable to find a purchaser for 17 months, even if given time to find purchaser, respondent would not be able to use the net proceeds of the sale to even pay the applicant's claim.

It is trite that a creditor who cannot obtain payment of his debt is entitled to a winding-up order, and is not bound to give time to the debtor. **Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597G**. Where a respondent does not have assets that can be readily sold in a reasonable time to pay a large debt without closure of the business, then the respondent is commercially insolvent and should be wound up. **Irvin & Johnson**

Ltd v Oelofse Fisheries Ltd 1954 (1) SA 231 (E) at 238B and 239A.

4.3. Respondent claims it can not be deemed unable to pay its debts: It is common cause that in March 2012, the applicant delivered a statutory demand to the respondent in terms of s69(1)(a) of the Close Corporations act 69 of 1984 ("the Act"). Respondent fails to pay applicant's claim or to compound it to the satisfaction of the applicant.

Respondent's security is insufficient based on Gormley's confession on the diminished value and the independent valuation conducted. Further, respondent failed to secure the whole debt within the 21 day period. Accordingly, the respondent is deemed unable to pay its debts.

4.4. Respondent has suplus income- not withstanding the fact that respondent's financial statements record a net cash flow deficit in 2010 and 2011, the respondent alleges it has surplus income to cover its operational and property costs in full. This is rejected on two basis. First, it does not have requisite cash on hand to pay the applicant's claim. The balance sheet for 2011, reflects an operational loss of R595 636,00 with no cash or cash equivalents on hand. Second, respondent failed to disclose on its papers why its representations in the financial statements are wrong, nor is there any evidence to support its allegation that it has the surplus income it claims to have.

4.5. Contingent and Prospective Liabilities: in terms of s69(2) of the Act, such liabilities must be taken into account when determining whether a close corporation is unable to pay its debts.

4.6. Creditor supremacy:

Respondent's relied on the case of **ABSA Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another [2012] ZAGPJHC 144**, Sutherland J pointed out that, "*where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order*". At para [31], Sutherland J held, "*In plain terms, it seems now to be incorrect to speak of an 'entitlement' to a winding up order simply because the applicant is an unpaid creditor. The rights of creditors no longer have pride of place and been levelled with those of shareholder's, employees, and with the public interest too...The norm that infuses the law about the governance of companies after the advent of the Companies Act, 2008, means that the age of creditor supremacy is over.*"

Respondent implored the court to exercise its discretion under s 347 of the Companies Act, read with the Companies Act, 2008, "*to make any interim order or any other order it may deem just...*" rather than to allow applicant to insist "*on a manner of execution that is disproportionate and manifestly unfair to the respondent, given the fact that the sale in execution of the immovable property by the respondent will achieve the applicant's stated objective of simply wishing to get the monies owed to it by the respondent, but will be considerably cheaper, more expedient and equitable. (than a liquidation)*"

The argument that creditors no longer have pride of place is of no assistance to the respondent because not only is the phrase broad and undefined, but nowhere is it recorded that it impinges on a creditor's statutory right to apply for the winding-up of a company, nor does the respondent qualify as a shareholder, employee or member of the public.

Further, respondent relied on **Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC),** Mokgoro J held, "*it must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other* *available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."* Respondent submitted that judicial oversight in execution of debt is required to determine whether a creditor has the right to deny a debtor the right to insist on *"more proportionate means to attain the same end."*

This is a red herring. The **Jafta** case is distinguishable on the facts. Further, respondent's contention that a sale by the respondents will yield more and cost less than the *"costly and time consuming machinery of liquidation"* were unsubstantiated. The proportionality test is not applicable to this matter. The applicant can obtain no relief other than a provisional liquidation order.

THE LAW:

[5] In the recent unreported judgment of **Scania Finance Southern Africa (Pty) Ltd / Thomie-Gee Road Carriers CC, case no. 958/2012 Free State High Court,** Snellenburg AJ after a consideration of the recent authorities held that in terms of s 9 of Schedule 5 of Companies Act 71 of 2008, a creditor may approach a court for the liquidation of a company or close corporation on the ground of its inability to pay its debts in terms of s 344(f). He held further that s 345 (and s 69 of the Close Corporations Act) is still a deeming provision. Such an

applicant need not prove that the respondent company is insolvent in order to rely on Chapter XIV of the previous Act.

[6] In **Scania Finance para [12] & [13]**, supra the court disagreed with the finding in **HBT Construction & Plant Hire CC v Uniplant Hire CC 2012 (5) SA 197 (FB)**. The court held that it was incorrect to require a creditor to prove insolvency before being able to rely on Chapter XIV of the previous Companies Act. The court held that ss 3449(f) and 345 of the previous Act still applies to companies and if a company is to be wound up due to an inability to pay its debts, ss 344 (f) and 345 can still be used. The court held further that what the legislature has in effect brought about, by the repeal of s 68 and the amendment of s 66 of the Close Corporations Act is that the grounds of winding-up 'insolvent' close corporations by order of court are now the same as the grounds for winding-up of 'insolvent' companies and if the application for winding-up is made on the basis of s344(f) the applicant may rely on the deeming provisions of s 345 of the old Act. Regarding close corporations, the same ground will be used, to wit, s 344(f) read with s 69 of the Close Corporations Act.

[7] The court held that the onus of proving solvency rested on the respondent and the respondent would have to satisfy the requirements of s 4(1) of the 2008 Act, i.e. the debtor would have to satisfy the solvency test. See also, **Body Corporate for Fish Eagle v Group Twelve Investments 2003 (5) SA 414 (WLD) at 428(J).**

[8] The solvency test in section 4(1) of the 2008 Act requires *inter alia* that:

8.1. that the assets of the company, fairly valued, equal or exceed the liabilities of the company as fairly valued; and

8.2. that the company will be able to pay its debts as when they become due in the ordinary course of business. (**Scania Finance** *supra* at para [14])

[9] In **Scania Finance**, *supra* at para [19] and [20] the court referred with approval to two unreported judgments, **First Rand Bank Ltd v Lodhi Properties Investmments CC and Others** (case no. 38326/2011, NGHC) and **First Rand Bank Ltd v Bunker Hills Investments 499 CC** (case no. 32130/2011, SGHC) in which the courts held that the legislature did not in the 2008 Act intend to do away with a liquidation on the grounds of commercial insolvency.

[10] Respondent referred to the case of **ABSA Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd & Another [2012] ZAGPJHC 144.** This case merely deals with the Court's discretion. The Court did not find that the proof of factual insolvency is a pre-requisite which has to be satisfied before a creditor can apply for the winding-up of the company on the basis that it is unable to pay its debts. Furthermore, this case dealt with business rescue as an alternative to liquidation.

THE RESPONDENT'S INABILITY TO PAY ITS DEBTS:

[11] The respondent does not trade and therefore has no source of income. Except for owing immovable property, the respondent does not have any readily liquid or realizable assets available to settle its indebtedness. The amount owing is substantial and nothing has been put forward indicating any hope of possible payment.

[12] The mere selling of its assets to meet its debts is indicative of financial difficulty and an acknowledgement that liquidation must ensue. **Metso ND Engineering (Edms) Bpk v Specsolprojects CC [2006] JOL 17452 (T) at para 19**.

JUST AND EQUITABLE:

[13] Furthermore, it is just and equitable that the respondent be liquidated. **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W); Cuninghame v First Ready Developments 249 2010 (5) 325 (SCA) at para [14]** and **Scania Finance para [23].**

[14] Green Willows and the respondent are related properties and a second bond over Green Willows properties was a prerequisite for the applicant to conclude the finance loan agreement with respondent.

[15] On its own version, the only way respondent can settle the applicant's claim is if it can sell the property. This would inevitably lead to closure of the respondent's business.

[16] In the circumstances, the applicant has established a *prima facie* case for the liquidation of the respondent.

THE ORDER:

1. The respondent is placed under provisional liquidation.
2. A rule *nisi* is issued calling upon all persons interested to show cause, if any, to this Court on Tuesday, 22 January 2012 at 10h00 or so soon thereafter as the matter may be heard:
   - 2.1. why the respondent should not be placed under final liquidation; and
   - 2.2. why the costs of this application should not be costs in the liquidation.
3. Service of this Order shall be effected:
   - 3.1. by Sheriff at the registered office of the respondent;
   - 3.2. by one publication in each of the Cape Times and Die Burger newspapers; and
   - 3.3. on the South African Revenue Service.

URD Mansingh

URD MANSINGH, AJ