Republic of South Africa

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

REPORTABLE

Case Number: 17435/2013

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

VECTO TRADE 68 (PTY) LTD Respondent

JUDGMENT DELIVERED ON 04 MARCH 2014

ZONDI, J:

[1] This is an application for the provisional winding-up of the respondent on the grounds that it is unable to pay its debts within the meaning of s 345 (1) (a) or is deemed to be unable to pay its debts in terms of subpara (c) as read with s 344 (f) of the Companies Act 61 of 1973 ("the Act") alternatively that the winding-up of the respondent is just and equitable as contemplated in s 344 (h) of the Act.

[2] In terms of Schedule 5, item 9 (1) of the Companies Act 71 of 2008 (the New Companies Act) the Companies Act of 1973 (the Old Companies Act) continues to apply with respect to the winding-up and liquidation of companies.

[3] The winding-up of the respondent is sought on the basis that the respondent is indebted to the applicant in the amount of R8 453 401.94 plus interest on the said amount at the rate of 7% per annum from 13 September 2013 to the date of payment. It is alleged that such amount is due and payable. The applicant has filed a certificate of indebtedness to prove the amount outstanding.

[4] It is common cause that on or about 20 March 2008 the parties entered into a written loan agreement (first loan agreement) in terms of which the applicant lent and advanced R12 million to the respondent. When the respondent struggled to repay the loan in accordance with the terms of the first loan agreement the parties concluded a further loan agreement (the second loan agreement) on or about 20 June 2009. The respondent was obliged to repay the loan and interest on it in equal monthly instalments and in the event of the respondent's default the applicant would be entitled to withdraw the first loan agreement and claim immediate repayment of the full outstanding balance, or terminate the first loan agreement without affecting any of its rights. The loan was secured by *inter alia,* the registration of a covering bond in favour of the applicant over erf 25070 and erf 25071 belonging to the respondent. It is also not disputed that in breach of the agreement the respondent has on numerous occasions failed to make payment to the applicant on the relevant due dates. The respondent's failure to pay the debt in accordance with the terms of the loan prompted the applicant to cause to be served on the respondent a statutory demand in terms of s 345(1) on 1 August 2013 which, it is common cause, the respondent failed to comply with. It is clear from the papers that the respondent does not have liquid assets available with which to meet the applicant's claim and it is for this reason that it decided to sell one of its properties so as to raise the necessary funds.

[5] The applicant launched this application for the winding-up of the respondent, contending that the respondent is unable to repay its debts or that it is just and equitable that the respondent be wound up.

[6] The respondent opposes the application and has filed an answering affidavit deposed to by Mr Hauptfleisch, who describes himself as a shareholder and the creditor of the respondent. He says he is also a director of Daybreak Properties 68 (Pty) Ltd which is another creditor of the respondent. Essentially the purpose of his affidavit is to show that the other creditors of the respondent do not support the liquidation of the respondent as in their view the liquidation will cause them prejudice. He avers that "*in the event of the properties being sold on the open market and in the ordinary course as opposed to being sold upon the winding-up*" the respondent's properties will fetch a proper market related price and all the creditors will be paid out of the proceeds. He further contends that "*in addition to the usual expenses of a sale of property the respondent's estate will be saddled with commissions and charges from the liquidators as well as the auctioneers appointed…*" which he argues will affect the amount remaining for distribution among the creditors.

[7] As I have already pointed out above the respondent has been attempting to sell the properties since July 2013 and it received offers which never materialised because they were either too low or the prospective purchasers were unable to raise sufficient funds for the purchase price. What is, however, clear from the respondent's answering affidavit is that it has not given up in its attempt to find a purchaser for one of its properties. It remains hopeful that it will be able to do so before the end of March 2014. It is for this reason that the respondent urges the Court to exercise its discretion against the applicant and refuse the liquidation application. Moreover the respondent

denies that it is factually insolvent. It avers that the value of its assets exceeds the value of its liabilities. An attempt is made in the respondent's heads of argument to demonstrate the respondent's factual solvency. Using management accounts for November 2013 as a basis of its calculation the respondent alleges that its total assets amount to R16 262 808.21 and its liabilities to R15 337 715.01.

[8] The debate at the hearing of this application was not about whether or not the existence or validity of the debt was disputed. This much was conceded by Mr Grobbelaar who appeared for the respondent. He admitted that the amount claimed by the applicant is due and payable but the respondent is unable to pay it at this stage as it does not have liquid assets or readily realisable assets available with which to meet the debt. He pointed out that the respondent can only do so if it realises one of its properties. There was no doubt in my mind that the respondent is commercially insolvent in the sense that it is unable to pay its debts as and when they become due and that its commercial insolvency is a ground that will just its an order for its liquidation. (*ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440 F – I). Notwithstanding this the court may in the appropriate circumstances in the exercise of its discretion refuse to grant provisional winding-up order. (*Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597).

[9] The debate therefore was about whether or not the respondent had placed before the court sufficient grounds upon which to exercise its discretion against the applicant and refuse the provisional liquidation order. In this regard Mr Grobbelaar submitted that the winding-up application should be refused on the grounds that the respondent is factually solvent; the other creditors of the respondent do not support the liquidation of the respondent and finally, that the applicant is a secured creditor. He

submitted that these factors provide a sufficient basis for this court to exercise its discretion against the applicant.

[10] As to the submission that the respondent's liquidation is not supported by the other creditors of the respondent, it is clear that the views of the creditors should be taken into account by the Court in exercising its discretion. See s 345 (2) and *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd* (*United Dress Fabrics (Pty) Ltd and Another Intervening* (1978 (1) SA 70 (D) at 74 B – C; *Porterstraat 69 Eiendomme v PA Venter Worcester* 2000 (4) SA 598 (C) at 613 H – I). According to Henochsberg on the Companies Act, Vol 1 at 750 (1) for the wishes of the creditors to be taken into account they "*must be proved by sufficient evidence which should indicate the factual basis upon which the creditors have reached their conclusions and demonstrate that such are reasonable…*". In my view it cannot be said that the views of the creditors as represented by Mr Hauptfleisch are reasonable in the light of the respondent's financial position which clearly demonstrates that the respondent is commercially insolvent. It is not their contention that should the liquidation of the respondent be postponed or refused, the respondent will be able to successfully trade out of its current situation. Their assertion is that in the event of the properties being sold on the open market and in the ordinary course as opposed to being sold upon the winding-up they will fetch a proper market related price which will benefit the respondent's creditors. I reject this assertion. I do not understand why a liquidator will be less successful in realising a proper market value for the immovable properties. Provided a sale of the properties is effected at market related prices, whether by private treaty or at an execution sale, I can see no reason why a liquidator would not be equally successful in obtaining the best price for the properties.

[11] With regard to the respondent's contention that the winding-up order should be refused on the ground that it is factually solvent, it is correct that factual solvency of a company is a ground which may justify refusal of its liquidation in particular if it can be shown that it has liquid assets or readily realisable assets available out of which the company is in fact able to pay its debts. (*Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd supra* at 597 D – E).

[12] To demonstrate its factual solvency the respondent referred to, and relied on, its management accounts for November 2013 as well as the valuation placed on its two properties by SC Stopforth of De Vaudriel Eiendomme in terms of which one property was valued at R9 million and the other R8 million. It would seem a comparative sales analysis method was used to arrive at the two figures. In the respondent's heads of argument a different formula is, however, used to determine the value of the assets of the respondent. In my view the evidence regarding the value of the assets of the respondent is unreliable to establish its factual insolvency. It is not clear if the person who prepared the two valuations is indeed qualified to do so. We are not told of what his qualifications are or whether he is a registered valuator. In any event it is instructive to note that in its management accounts the respondent has listed "*sundry debtors*" as forming part of its current assets. It is not certain whether the respondent will be able to collect these debts because if it was, it would not be struggling to pay its creditors.

[13] I am mindful of the fact that as the applicant is unable to obtain payment of its debt it is entitled as between it and the respondent, *ex debito justitiae,* to a winding-up order as it has brought its case within s 345 (1) (c) read with section 344 (f). It is not bound to give the respondent time. That commercial insolvency justifies the liquidation

of a company is the long established and well-settled practice in our Courts. Factual solvency in itself is therefore not a bar to an application to wind-up a company in terms of the Act on the ground that it is commercially insolvent. In this regard the remarks of Willis JA in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* (936/12) [2013] ZASCA 173 (28 November 2013) para 17 are apposite:

> *"[17] 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."*

I fully agree with these remarks.

[14] Even if I were to accept that the respondent is factually solvent in the sense that its assets exceed liabilities and that should it be given an opportunity to sell one of its assets it will be able to pay the applicant, I do not believe that after satisfying the applicant's claim it will be in a position to carry on normal trading. The respondent is a property owning company and the two relevant properties represent a substantial

amount of its assets. It generates its income by renting out these two properties. According to the respondent the total value of its assets amount to R16 262 808.21. This figure includes R14 111 679.64 being the combined value of the two properties. The amount of the debt owing to the applicant is R8 453 401.94 excluding the interest. It is clear from this analysis that the respondent will be unable to meet the applicant's claim by selling one of its properties. It may have to sell both of its properties in order to be able to pay the applicant and once this is done the respondent will be unable thereafter to carry on trading as a property owning company. The sale of its two properties will therefore destroy the whole basis of its existence.

[14] In the result I make an order in the following terms:

"*1. respondent is placed under provisional winding-up in the hands of the Master of the Honourable Court;*

2. a Rule Nisi is issued calling upon all persons interested to show cause, if any, to the above Honourable Court, on Tuesday, 8 April 2014, at 10h00 why the following order should not be granted:

2.1 that respondent be placed under final winding-up; and

2.2 that the costs of this application be costs in the winding-up.

3. service of this order shall be effected:

3.1 by the Sheriff:

3.1.1 on respondent at its registered office:

3.1.2 on respondent's employees and all registered trade unions *representing respondent's employees, if any;*

3.1.3 on the South African Revenue Services.

3.2 by one publication in each of the Cape Times and Die Burger newspapers".

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D H ZONDI
JUDGE OF THE HIGH COURT