**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, DURBAN**

**Reportable**

Case no.: D5622/2020

In the matter between:

**INVESTEC BANK LIMITED** **APPLICANT**

and

**PERSONIFY INVESTMENTS (PTY) LTD** **RESPONDENT**

Case no.: D5623/2020

In the matter between:

**INVESTEC BANK LIMITED** **APPLICANT**

and

**MISTY BLUE INVESTMENTS (PTY) LTD** **RESPONDENT**

Case no.: D5624/2020

In the matter between:

**INVESTEC BANK LIMITED** **APPLICANT**

and

**HUNTREX 302 (PTY) LTD** **RESPONDENT**

**Coram:** M E Nkosi J

**Heard:** 03 August 2023

**Delivered:** 17 August 2023

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## ORDER

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[1] The respondents are placed under a final winding-up order in the hands of the Master of the High Court, Pietermaritzburg.

[2] The costs of this application shall form part of the costs of the winding-up of the respondents.

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## JUDGMENT

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**M E Nkosi J**

**Introduction**

[1] The applicant applies for the final winding up of Personify Investments (Pty) Ltd, Misty Blue Investments (Pty) Ltd and Huntrex 302 (Pty) Ltd (hereinafter referred to collectively as 'the respondents'. This is pursuant to the judgment that was delivered by Ploos van Amstel J on 29 June 2021, in terms of which the learned Judge dismissed the business rescue application in respect of each one of the

respondents and granted the provisional winding-up orders against all three of them. The application is opposed by the respondents.

**Factual background**

[2] The factual background to the matters is fully set out in the judgment of Ploos van Amstel J, hence I do not propose to restate same in this judgment. It suffices to mention by way of summary that the respondents' application for leave to appeal against the dismissal of their business rescue application by Ploos van Amstel J went all the way up to the Constitutional Court. It was refused by that court on 21 October 2022 on the basis that it bore no reasonable prospects of success. Until then, the proceedings for the winding-up of the respondents had remained suspended in terms of s 131(6) of the Companies Act, 71 of 2008 ('the 2008 Companies Act'). Therefore, with the respondents having exhausted all avenues of appeal in respect of their business rescue application, the suspension of the winding-up proceedings against them has finally been lifted.

[3] The provisional winding-up order granted by Ploos van Amstel J against the respondents had called upon them and all interested parties to show cause, if any, to this court on 24 August 2021 why the provisional order should not be made final. It is common cause that the return date of the winding-up application was postponed several times while the respondents applied to the Supreme Court of Appeal (SCA) and the Constitutional Court, respectively, for leave to appeal against the dismissal of their business rescue application by Ploos van Amstel J. It has taken more than two years for the respondents to exhaust their appeal remedies, and the question for determination by this court is whether the applicant has made out a case for a final winding-up order to be granted against the respondents.

[4] It is trite that where a provisional order was granted, the applicant must satisfy the court that a case has been established for a final winding-up order to be granted.[1] The degree of proof required when an application is made for a final winding-up order is higher than that for the granting of a provisional winding-up order. In the case of a provisional winding-up order a mere *prima facie* case must be established, whereas the court must be satisfied on a balance of probabilities that such a case has been made out by the applicant seeking confirmation of the provisional order before it grants such an order.[2] This is more so where the company which is sought to be liquidated has put up opposition to the granting of a final winding-up order against it. The court can exercise its discretion not to grant a final winding-up order if it can discern from the evidence before it, on a balance of probabilities that the company concerned does not appear to be insolvent.

[5] In the present case, the finding made by Ploos van Amstel J was that the evidence before him established, *prima facie,* that the respondents were unable to pay their debts as and when they became due. Consequently, the learned Judge saw no basis for exercising his discretion against the granting of a provisional liquidation order sought by the applicant. Therefore, what remains for determination by this court at this stage of the proceedings is whether the evidence before this court establishes, on a balance of probabilities, that the respondents are unable to pay their debts as and when they become due. If so, that would mean that the respondents are commercially insolvent, in which case this court will have no basis to exercise its discretion against the granting of the final winding-up order against them.

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[1] Henochberg on the Companies Act, 71 of 2008 Vol 2 Appx 1-94.
[2] *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) at 186.

**Forms of insolvency**

[6] It was argued by Mr *Harpur*, who appeared with Ms *Deodath* on behalf of the respondents, that the respondents are neither actually nor commercially insolvent. The difference between actual and commercial insolvency was explained by the SCA in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*[3] as follows:

'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).'

[7] Within the context of the explanation set out in the preceding paragraph, the court went on to state that:

'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 exercise 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(l) thereof.'[4]

[8] In fact, the SCA in *Boschpoort* confirmed what was held by our courts in previous cases involving the determination as to when a company may be regarded

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[3] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) at 523 para 16.
[4] *Boschpoort* at 523 para 17.

as *"insolvent"* in our law. For instance, in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*[5] the position was summarised as follows by the court:

'The concept of commercial insolvency as a ground for winding-up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it 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? 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 s 345(1)(*c*) as read with s 344(*f*) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

**The respondents' opposition of the final winding-up order**

[9] In essence, the respondent's opposition of the final winding-up order being granted against them is based primarily on five grounds. They are premised on their contentions that, firstly, there are disputes of fact raised in the application which must be determined on the respondents' version by applying the *Plascon-Evans* test;[6] secondly, there is a difference of opinion among the creditors on the need for liquidation of the respondents; thirdly, the respondents' assets exceed their liabilities; fourthly, there is evidence that the respondents could be saved by transactions of which particulars were furnished,[7] and, lastly; the outbreak of Covid-19, coupled with the national lockdown on 26 March 2020, was a temporary supervening impossibility which prevented the respondents from performing in

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[5] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 at 440F-H.
[6] *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[7] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) paras 14-17.

terms of the settlement agreement they concluded with the applicant on 5 February 2020.

[10] Starting with the alleged disputes of fact, it was argued by Mr *Harpur* that the first dispute of fact relates to the respondents' contention that their indebtedness to the applicant was not due, having regard to the onset of temporary supervening impossibility of performance caused by the global Covid-19 pandemic. This, so he argued, resulted in the declaration of a national disaster and a national lockdown by the government of the Republic of South Africa, which rendered it impossible for the respondents to discharge their obligations towards the applicant. In fact, the same argument had been raised before Ploos van Amstel J, who held that the respondents were not excused by the national lockdown or the pandemic from paying their debts, particularly, as their inability to pay seemed to him to be a subjective impossibility, as opposed to an absolute or objective impossibility of performance.[8] He added that it was held in *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours*[9] that when a debtor is in *mora* any subsequent supervening impossibility does not relieve him from his duty to perform.

[11] This, not being an appeal against nor a review of the judgment of Ploos van Amstel J, I do not think it is competent or even proper for me to gainsay the findings of law made by Ploos van Amstel J, and I do not propose to do so. In fact, the same applies to the respondents' allegation that the applicant had discouraged potential purchasers from purchasing certain immovable properties belonging to Misty Blue and Personify. With due respect to Mr *Harpur*, that issue was also raised before Ploos van Amstel J, and his finding was that the new information of the alleged sales

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[8] *Unibank Savings and Loans (formerly Community Bank) v Absa Bank* 2000 (4) SA 191 (W) at 198.
[9] *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 805F-I.

hardly changed the picture, and added very little to the prospect of rescuing the respondents from final liquidation. For what it is worth, based on the information before me, I am in full agreement with the finding of Ploos van Amstel J in that regard.

**Has the case for the granting of a final winding-up order been established?**

[12] It was contended by the deponent to the respondents' answering affidavit (dated 24 August 2021) in opposition of the granting of the final winding-up order against them that no reliance may be placed on the provisional winding-up order granted by Ploos van Amstel J because the learned Judge was misdirected by the applicant in concluding that the acceptance of further evidence from the respondents would amount to the abuse of the court process. The further evidence concerned comprised, *inter alia,* several sale agreements in respect of certain immovable properties belonging to Misty Blue and Personify, which are commonly known as The Square (R75 million); the Central Park land (R15 million); Auberge and 104 Kenneth Kaunda Road (R15 million); Urban Park, Ground Floor (R10 million), and; Urban Park Mezzanine, ground floor to 4th floor (R60 million). It was alleged that the respondents would have received a total sum of R175 million from the sale of those properties, which they would have paid over to the applicant. That would have left a balance of not more than R25 million owing to the applicant, which would be secured by the respondents' Waterfront apartments valued at R122 million as per the sworn valuation, as well as the respondent's 55 Central Park units valued at approximately R40 million.

[13] In any event, it would seem that the sale agreements concerned are now all defunct, with none of the payments promised to the applicant having materialised.

The view expressed by Ploos van Amstel J was that there are oddities with some of the agreements, and he explained in his judgment why he held that view. For instance, the agreement for the sale of a number of floors in Urban Park was conditional on the applicant consenting to the sale, or the winding-up application being dismissed, or the seller being placed under business rescue and the agreement being accepted by the practitioner. Ploos van Amstel J opined that he could not understand why the agreement was conditional on the liquidation application being dismissed, and commented that this suggested some manipulation on the part of the respondents.

[14] It was argued by Mr *Stokes*, who appeared with Mr *Van Rooyen* on behalf of the applicant, that the respondents have not put forward any facts from which the rational conclusion can be drawn that they (the respondents) are proposing a reasonable pragmatic programme of payment which would result in their creditors being paid in full.[10] Therefore, so he argued, the final liquidation of the respondents cannot reasonably be avoided based on a sufficient body of fact and rationality. In response, it was strenuously argued by Mr *Harpur* that the respondents are neither actually nor commercially insolvent as evidenced by Misty Blue's financial statements for the year ended 28 February 2017. According to such statements, Misty Blue's asset values are in excess of its liabilities. He submitted that all the respondents were likewise actually solvent, and added that no countervailing evidence had been adduced by the applicant.

[15] In my view, the problem with the argument advanced by Mr *Harpur* is two-fold. Firstly, it must be borne in mind that the valuation of a company's assets is of

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[10] *ABSA Bank Limited v Newcity Group (Pty) Ltd and Another* [2013] 3 ALL SA 146 (GSJ) para 33.

no consequence for the purposes of determining its solvency.[11] If a company is unable to pay its debts, or to meet its day-to-day liabilities in the ordinary course of business, it is commercially insolvent. This is irrespective of the value of its assets being in excess of its liabilities. Secondly, even if factual insolvency was the only form of insolvency recognised by our law, which is not the Hecase, Misty Blue's financial statements for the year ending 28 February 2017 would not have been of any assistance to the respondent's opposition of the granting of the final winding-up order against them, particularly, as such statements do not reflect the current value of Misty Blue's assets, or those of any other respondent company.

[16] More than two years have already elapsed since the provisional winding-up order was granted against the respondents. Most of that period was spent by the respondents pursuing an appeal against the dismissal of their rescue application up to the level of the Constitutional Court, without success, precisely because of their apparent inability to pay their debts, not only to the applicant, but also to a myriad of their other creditors. Admittedly, the respondents' business rescue application is not the subject of these proceedings, but the main contributor to its demise appears to have been the respondents' proposal to dispose of a substantial portion of their assets, which would have left them in a worse position to continue trading in the ordinary course of business.

[17] What is particularly concerning about the respondents' inability to pay their debts is the interest that is continuously accruing on the accumulative amount of their debts. According to the applicant's evidence, the total amount of the accumulated interest to date is estimated at an astronomical figure of between R1

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[11] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436.

million and R2 million. This in respect of the respondents' indebtedness to the applicant alone. Furthermore, it is apparent from the evidence before me that the respondents' financial distress preceded even the national lockdown caused by the Covid-19 pandemic.

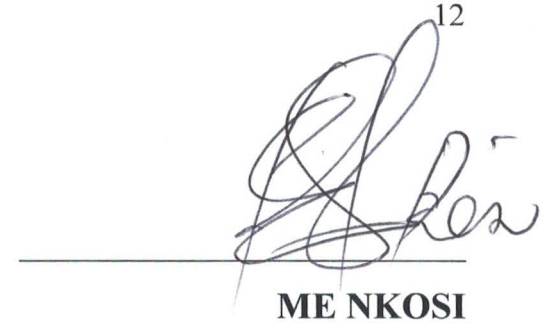
[18] In my view, the fact that the respondents remain under financial distress more than a year after the national lockdown was lifted is indicative of a bleak picture of their prospects of financial recovery. That was probably the conclusion that was reached by both the SCA and the Constitutional Court, respectively, when they dismissed the respondents' application for leave to appeal against Ploos van Amstel J's refusal to grant their business rescue application. It would seem that against that background, I have no doubt that not granting the final winding-up order against the respondents will be an unnecessary delay of the inevitable. It will only serve to get the respondents even deeper into debt and reduce the value of their remaining assets even further, which is not in the interest of either the respondents or the general body of their creditors.

[19] Therefore, based on the evidence before me, I make the following order:

**Order**

[1] The respondents are placed under a final winding-up order in the hands of the Master of the High Court, Pietermaritzburg.

[2] The costs of this application shall form part of the costs of the winding-up of the respondents.



**ME NKOSI**

**JUDGE**

Appearances

| | |
|---|---|
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| | |
| Date of Hearing: | 03 August 2023 |
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| Date of Judgment: | 17 August 2023 |