

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA**

Case No.: 2796/2021

Date Heard: 5 May 2022

Date Delivered: 26 July

2020

In the matter between:

**SA SECURITIES SOLUTIONS AND
TECHNOLOGIES (PTY) LTD**

Applicant

and

MODULAR COMMUNICATIONS SA (PTY) LTD

Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] The applicant seeks the provisional winding-up of the respondent on the grounds that it is unable to pay its debts as contemplated in section 344 and 345 of the Companies Act, 61 of 1973, alternatively, that it would be just and equitable for the respondent to be placed under provisional winding-up.

[2] The applicant contends that it has a liquidated claim against the respondent in the sum of R1 466 211.13 and that it thus has the requisite legal standing to pursue this application. I shall deal, below, with the grounds on which the applicant makes this contention.

[3] The respondent, in essence, opposes the application on the basis that winding-up proceedings are not appropriate to enforce payment of the respondent's alleged indebtedness to the applicant in circumstances where such indebtedness is *bona fide* disputed by the respondent on grounds which it alleges to be reasonable. Here again I shall canvass more fully below the grounds on which the respondent founds its opposition.

The applicant's principal contentions

[4] In December 2014 separate written agreements were concluded between the applicant and the three shareholders of the respondent in terms of which the applicant purchased from the shareholders various percentages of their shareholding in the respondent, resulting, so it is alleged, in the applicant acquiring, in aggregate, 60% of the shareholding in the respondent (collectively, "the first agreement"). One such agreement was attached to the founding affidavit.

[5] In terms of a written agreement concluded in February 2017 the respondent purchased from the applicant the shareholding it had allegedly

acquired in the respondent, in terms of the first agreement, for a purchase consideration of R3 000 000.00 (“the second agreement”).

[6] The second agreement provided that the purchase consideration for the shares would be paid in two phases, namely:

6.1. the first phase - for 30 ordinary shares the sum of R1 450 000.00 would be redeemed from the applicant’s loan account on 28 February 2017; and

6.2. the second phase - the balance of 30 ordinary shares for the sum of R1 550 000.00, payable no later than nine months from the date of signature of the second agreement.

[7] The second agreement was signed on 28 February 2017. Contemporaneously the sum referred to in paragraph 6.1, above was redeemed from the loan account.

[8] The applicant states that the sum referred to in paragraph 6.2, above was reduced, by setting off an indebtedness of the applicant to the respondent, to the sum of R1 466 211.13, i.e. the applicant’s alleged liquidated claim against the respondent. It is not in dispute that this sum has not been paid to the applicant.

[9] According to the applicant the respondent's failure to pay the balance of the purchase consideration can be ascribed to its inability to pay its debts, which inability can be gleaned from the following:

9.1. the respondent, after negotiations regarding its alleged indebtedness to the applicant, attempted to compromise such indebtedness in email correspondence dated 6 December 2019. The applicant argues that this correspondence is clearly indicative of an inability by the respondent to pay its debts as and when they fall due. Significantly in this letter the respondent did not, in terms, acknowledge being indebted to the applicant in the sum claimed by the applicant;

9.2. on 2 July 2021 a letter of demand as envisaged in section 345 of the Companies Act, 1973 was delivered to the respondent and this demand remains unsatisfied. Thus, so it is contended, the respondent is deemed to be unable to pay its debts.

[10] The applicant also says that it would be just and equitable for the respondent to be placed under provisional winding-up, as:

10.1. in terms of the second agreement ownership in the shares sold remained vested in the applicant until the full purchase consideration had been paid;

- 10.2. despite the applicant thus still being a majority shareholder in the respondent, the business of the respondent was continuing to be run to the detriment of the applicant;
- 10.3. the respondent, through its directors had resisted all attempts to convene a shareholders' meeting or allow the applicant any involvement in the running of the respondent;
- 10.4. the respondent, in a letter dated 29 June 2021, "inexplicably" disputed that the applicant was, in fact, the majority shareholder in the respondent and would thus resist any attempt to arrange a shareholders' meeting.

The respondent's grounds of opposition

[11] The respondent's main contention is that the suspensive condition in clause 3 of the first agreement regarding the submission of a memorandum of incorporation in an agreed form to CIPC did not occur. No demand was ever made of the respondent to fulfil this condition and it was never fulfilled. Thus, the suspended provisions, which included the sale and purchase provision in clause 4 of the agreement and clause 5 relating to the amount of the purchase consideration in terms of its payment did not come into effect. The effective date of the agreement (defined in the second agreement as being the third business day after the fulfilment of the suspensive condition in clause 3) was accordingly never reached.

[12] Obviously, if the first agreement remained inchoate as result of the non-fulfilment of the suspensive condition, this would mean that the applicant never acquired ownership of shares in the respondent, which, in turn, would have a bearing on the validity of the second agreement. The applicant, for instance, would not have been in a position to warrant its ownership of the shares which were the subject matter of the second agreement as it did in terms of that agreement. The respondent says that its case in this regard is enhanced by the fact that no share certificates were ever delivered to the applicant.

[13] The respondent contends further that the applicant was substantially indebted to it in respect of what the respondent described as trade debts and that this indebtedness was the genesis of the second agreement, which envisaged a set-off arrangement in respect of the applicant's indebtedness to the respondent when calculating the purchase consideration for the shares in terms of the second agreement.

[14] Thus, says the respondent if the applicant had instituted action against it for the recovery of the alleged indebtedness relating to the non-payment of the purchase consideration for the shares the respondent would have had a clear defence against such a claim.

[15] Furthermore, so argues the respondent, the applicant's claim against it has been extinguished by prescription. Payment of the balance of the purchase consideration in respect of the shares, on the applicant's version, was due

in November 2017 and the respondent at no stage acknowledged liability in any amount to the applicant.

[16] It is against this background that the respondent argues that the existence of any indebtedness by it to the applicant is *bona fide* disputed on reasonable grounds and that winding-up proceedings are not appropriate to determine the disputes between the parties.

Legal principles

[17] There is a wealth of authority to the effect that winding-up proceedings ought not to be resorted to and by means thereof to try to enforce payment of a debt the existence of which is in good faith disputed by the company on reasonable grounds.

[18] The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt - the so-called "Badenhorst rule", following the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348.

[19] The legal position which will inform my decision in this matter, with reference to a long line of authority, is appositely stated in the following

terms in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (AD) at 980 B-C:

“As in the present case, the disputes which arise on the affidavits may relate to the *locus standi* of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not a show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.”

Application of legal principles

[20] On the papers before me the following disputes are apparent:

- 20.1. the existence or non-existence of any indebtedness by the respondent to the applicant;
- 20.2. if there is indeed an indebtedness by the respondent to the applicant, the extent of such indebtedness;

- 20.3. whether or not the suspensive condition in clause 3 of the first agreement was fulfilled or whether fulfilment thereof could be and was waived by the applicant and/or the parties to the various agreements providing for the sale of shares in the respondent to the applicant;
- 20.4. whether, in fact, the applicant ever became a shareholder in the respondent, which will be dependent on a determination of the issues referred to in the preceding sub-paragraph;
- 20.5. the *locus standi* of the applicant which, in turn, is dependent on the existence of an indebtedness by the respondent to the applicant and/or the applicant being a shareholder in the respondent;
- 20.6. the validity of the second agreement, which will be determined by resolution of the disputes referred to in the preceding sub-paragraphs;
- 20.7. the possibility that the debt on which the applicant relies has been extinguished by prescription.

[21] In my view the present proceedings are not the appropriate proceedings for resolving the abovementioned disputes. The onus on the respondent is merely to show that the alleged indebtedness is disputed on *bona fide* and reasonable grounds. I am satisfied that it has met this onus.

[22] I accept that the principal ground of dispute, namely the fulfilment, or not, of the suspensive condition in the first agreement, was not canvassed in correspondence preceding this application and, in fact, was only raised and covered in detail in the respondent's opposing affidavit. It was only alluded to in the letter from the respondent's attorneys of 29 June 2021 in which it was recorded that the respondent disputed that the applicant was the majority shareholder in the respondent. The fact that this ground of dispute was raised at a late stage, no doubt on the basis of legal advice received, does not mean that the respondent, in raising it, was not acting in good faith or that the debt relied on by the applicant was not being disputed on reasonable grounds.

[23] Thus, on the strength of the authorities referred to I must refuse to grant an order of provisional winding-up in respect of the respondent.

Costs

[24] The first agreement was given effect to in part. So too was the second agreement partially implemented.

[25] Although I have found that the principal ground of opposition revolving around the fulfilment of the suspensive condition in the first agreement was

raised by the respondent in good faith and constituted a reasonable ground of dispute it was nevertheless only fully raised in the respondent's opposing affidavit. The applicant, in bringing the application for the provisional winding-up of the respondent, was oblivious to this ground of opposition until it was raised in the opposing affidavit.

[26] Given that this is not a case where the applicant pursued winding-up proceedings in the face of a dispute of which it was aware all along, I consider that this is an appropriate case where each party should be ordered to pay its own costs of the application.

Order

[27] I thus make the following order:

- 1. The application is dismissed.*
- 2. Each party is ordered to pay its own costs of the application.*

O H RONAASEN
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:

Adv R Bhima

Instructed by:

Pagel Schulenburg Inc

c/o Greyvensteins

Incorporate

For Defendant:

Adv JG Richards

Instructed by:

Kaplan Blumberg Attorneys

Date Heard:

05 May 2022

Date Delivered:

26 July 2022