IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4889/2021

In the matter between:

KARIEN CATHERINE MARIA MARX Applicant

and

COALITION TRADING 561 CC Respondent

and

NEDBANK LIMITED Intervening Creditor

JUDGMENT BY: SNELLENBURG, AJ

HEARD: 14 APRIL 2022

REASONS DELIVERED: 26 APRIL 2022

---

[1] After hearing arguments in this matter the rule nisi, issued on 11 November 2021, was confirmed on the extended return date and placed the respondent under final liquidation with an order that the costs of the application are to be costs in the administration of the liquidation of the respondent. I also ordered that the intervening creditors costs, over and above the order as to costs granted by Mathebula J on 24 February 2022, are to be costs in the administration of the liquidation of the respondent on the scale as between attorney and client which order shall include all orders as to costs that have stood over.

[2] These are the reasons for my order.

[3] The respondent was provisionally liquidated on 11 November 2021. A rule nisi was simultaneously issued, calling upon all interested parties to advance reasons why a final order of liquidation should not be granted on the return date.

[4] On 12 January 2022 the respondent gave notice of its intention[1] to oppose the application and appointed Messrs Noge Attorneys[2] as its attorneys of record. On the same day the respondent served its answering affidavit.

[5] On 11 February 2022, Nedbank Limited issued an application seeking leave to intervene in the main liquidation application. The application was not opposed, and Nedbank was admitted as intervening creditor on 24 February 2022.

---

[1] The notice was dated 11 January 2021.

[2] Messrs Modise & Modise Attorneys, Bloemfontein was appointed as the respondent's correspondent attorney.

[6] The respondent did not file any heads of argument nor was there any appearance on its behalf on the extended return date, regardless of it being aware that the application would serve for adjudication.

[7] After the matter was called and during an adjournment that was granted to the applicant to liaise with the respondent's attorneys, the respondent's attorneys sent a notice of withdrawal as attorneys of record to the applicant's attorneys which was handed up when the proceedings resumed. The respondent was aware, as stated, that the application served for adjudication. In light thereof I heard arguments on behalf of the respondent and intervening creditor and made the orders referred to above.

[8] The respondent is indebted to the applicant for payment of the amount of R2 495 329.73. The applicant's claim against the respondent stems from the sale by the applicant of a business as running concern known as Pop Snax to the respondent on 9 September 2019. The parties' respective rights and obligations are governed by a written agreement which is subject to a non-variation clause.

[9] In terms of the agreement of sale the respondent would purchase the business for the amount of R 3 500 000.00 which was payable as follows: a deposit in the amount of R 750 000.00 and thereafter the balance of the purchase price would be payable by means of 10 monthly installments of R 247 500.00, the first instalment to be paid before or on 9 October 2019 and thereafter before or on the 9th of every month until the full amount has been paid.

[10] The respondent paid the deposit and a further amount of R403 487.91 in reduction of the purchase price but thereafter failed to make any further payments. In addition, the respondent acquired goods on the applicant's accounts from suppliers. The applicant was constrained to pay the suppliers. To this end for example the one supplier had already obtained a judgment against the applicant for the indebtedness incurred by the respondent. The respondent also failed to reimburse the applicant for stock and raw materials which were sold to it by the applicant and which the respondent utilised and sold. The respondent failed to pay the applicant for the stock and raw materials.

[11] On 3 August 2021 the applicant caused the Sheriff to serve a statutory demand in terms of section 69 of the Close Corporations Act 69 of 1984 [the Act] on the respondent. The applicant also caused the Sheriff to serve the aforesaid demand on the respondent's auditors. The Sheriff recorded in the return of service that he unsuccessfully attempted to contact the respondent's sole member telephonically on 3 occasions. The respondent did not make payment or secure or compound for the amount owed to the applicant's satisfaction, nor did it dispute the claim after service of the demand.

[12] Section 69[3] of the Act provides for circumstances under which a close corporation is deemed unable to pay its debts. Section 69, in relevant parts provides:

"(1) …. a corporation shall be deemed to be unable to pay its debts, if-

[3] Section 66 of the Act provides that the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act 71 of 2008 ["new Companies Act"], read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in that Part or in any other provision of the Act.

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ……; or

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation."

It is settled that section 69 of the Act must be read with sections 344 and 345 of the Companies Act 61 of 1973 ["old Companies Act"].

[13] The debt claimed by the applicant by means of statutory demand was due and payable.

[14] In terms of the 'Badenhorst rule' winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds.[4] "Where, however, the respondent's indebtedness has, prima facie, been established, the onus [evidential burden] is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds."[5]

---

[4] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348 and Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) ([1987] ZASCA 156) at 980D. Also see Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) par 6.

[5] Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, supra, par 6.

[15] In **Afgri Operations Ltd v Hamba Fleet (Pty) Ltd supra**[6], Willis JA on behalf of a unanimous bench reaffirmed the specific principle that, "generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt"[7] and that in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a very narrow one that is rarely exercised and then in special or unusual circumstances only.[8]

[16] In opposed sequestration applications the applicant may rely on all the papers before Court, including those of an intervening creditor. Likewise, the intervening creditor may rely on factual allegations made by the unsuccessful, tardy or withdrawing applicant.[9] No reasons are apparent why these principles would not apply equally to liquidation proceedings and they are in fact so applied in practice. After all, the Court takes a practical view in such matters.

[17] On the respondent's own version it materially breached the agreement by failing to make the requirement payments. Its grounds for disputing its indebtedness to the applicant is neither bona fide nor do they appear to be genuine. The respondent does not go so far as to rely on a counterclaim, although it appears to contend that the applicant would have made it impossible to trade after it breached the

---

[6] Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, supra, par 12.

[7] The Court did remark that different considerations may apply where business rescue proceedings are being considered in terms of part A of chapter 6 of the Companies Act 71 of 2008. Such considerations are not relevant to these proceedings.

[8] Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, supra, par 12 and legal precedent referred to in footnote 16 of the judgment.

[9] Uys and Another v Du Plessis (Ferreira Intervening) 2001 (3) SA 250 (C); Fullard v Fullard (supra at 372A); and Nathan & Co v Sheonandan 1963 (1) SA 179 (N).

agreement by taking possession of certain equipment with regards whereto the applicant reserved its ownership. It also appears, in the vaguest of terms, to rely on the fact that the applicant is enforcing a penalty against it by exercising the right to repossess the equipment of which it reserved ownership whilst claiming the full outstanding purchase price.

[18] In **Afgri Operations Ltd v Hamba Fleet (Pty) Ltd supra** the Court emphasised that mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. The counterclaim must also be shown to be genuine.

> "The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not."[10]

The discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one.[11]

[19] None of the grounds raised by the respondent, insofar as they can be discerned, satisfied the 'Badenhorst rule'. The test for a final order of liquidation differs from that which applies to a provisional order[12]. I am satisfied that no genuine bona fide dispute exists that would justify dismissal of the application.

[20] The respondent admits being in breach.

---

[10] Par 7.

[11] Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, supra par 13.

[12] Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC).

[21] Insofar as the respondent's affidavit is capable of being understood to rely on the fact that the applicant is imposing a penalty, the respondent was constrained to lucidly deal with this issue in order to establish that the liability is bona fide disputed. The respondent failed to do so.[13] Suffice it to say that the respondent's reference to the penalty lacks particularity and is referred to in the vaguest of terms.

[22] The respondent has not rebutted the statutory presumption that it is not able to pay its debts. Although the respondent conducts several businesses, it failed to advance any evidence regarding its financial position. It appears to no longer be conducting the business it purchased from the applicant whilst still using some of the assets that formed part of the business, the ownership of those assets which were reserved by the plaintiff.

[23] The intervening creditor's affidavit also establishes that the respondent is indeed commercially insolvent.[14] "That a company's commercial insolvency is a ground that will justify an order for its

---

[13] The onus of proving the actual prejudice suffered by the creditor, for purposes of reducing a penalty, rests on the debtor. See Steinberg v Lazard 2006 (5) SA 42 (SCA). In order to rely on this ground to dispute the liability, the respondent is not required to produce evidence or even to show that it will be successful in an action, but the basis for the reliance on the penalty and the effect on the disputed liability must at least be set out with sufficient clarity so that the Court can determine whether a genuine dispute of fact would exist when the court must determine whether a final liquidation order must be granted. In casu the reliance on a penalty, even if accepted for sake of argument that it would cover the balance of the purchase price, does not constitute a defence to the full amount claimed by the applicant.

[14] Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA).

liquidation has been a reality of law which has served us well through the passage of time."[15]

[24] In **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd supra,** the Supreme Court of Appeal authoritatively held that the deeming provisions concerning the inability to pay its debts, contained in s 345 of the old Companies Act may be used to establish the insolvency of a company. The Court held that a commercially insolvent company may be wound up in accordance with chapter 14 of the old Companies Act, as is provided for in subitem 9(1) of schedule 5 of the new Companies Act and that factual solvency in itself is not a bar to an application to wind up a company in terms of the old Companies Act on the ground that it is commercially insolvent. It will however always be a factor in deciding whether a company is unable to pay its debts.

[25] Even if the respondent was factually solvent, the same would not be a bar to the liquidation of the respondent on the basis that it is commercially insolvent.

[26] In the circumstances the applicant has made a proper case for confirmation of the rule nisi and an order for final liquidation of the respondent.

[27] The intervention by Nedbank was justified in the circumstances.

[28] In the premises the following **ORDER** was made:

---

[15] Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd, supra, par 17.

1. The rule nisi, issued on 11 November 2021, is confirmed and the respondent be and is herewith placed under final liquidation.

2. The costs of the application, including any reserved costs, are to be costs in the administration of the liquidation of the respondent.

3. The intervening creditor's costs, over and above the order as to costs granted by Mathebula J on 24 February 2022, are to be costs in the administration of the liquidation of the respondent on the scale as between attorney and client which order shall include all orders as to costs that have stood over.

_____

SNELLENBURG, AJ

On behalf of the applicant	**:**	**Adv G.S. Janse van Rensburg**
Instructed by	**:**	**Ettienne Visser Inc Bloemfontein**

On behalf of the Intervening Creditor	**:**	**Adv S. Tsangarakis**
Instructed by	**:**	**Rossouws Attorneys Bloemfontein**

On behalf of the respondent: **No appearance.**