HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

14 March 2022
Date Judge M.L. Senyatsi

Case no: 621/2021

In the matter between:

GROVES (PTY) LTD Applicant

and

MTE PUMPS AND MINING SUPPLIES (PTY) LTD Respondent

***Case Summary*: APPLICATION FOR WINDING UP IN TERMS OF SECTION 345(1)(c) READ WITH SECTION 344(f) OF THE COMPANIES ACT 61 OF 1973**

JUDGMENT

SENYATSI J

A. INTRODUCTION

[1] This is an opposed application for winding up of Respondent in terms of section 345(1)(c) read with section 344(f) of the Companies Act 61 of 1973 ("the old Companies Act").

B. BACKGROUND

[2] Applicant is Groves (Pty) Ltd, a private company with its principal place of business situated at 24 De Kock Street, Vulcania, Brakpan Gauteng.

[3] Respondent is MTE Pump and Mine Supplies (Pty) Ltd, a private company with its registered and principal place of business situated at 55 Watt Road, New Era Springs, Gauteng.

[4] Applicant conducts business in the supply of chrome and steel foundry and cast parts. Respondent uses such products to manufacture water pumps primarily for the mining sector.

[5] Respondent ordered various parts from Applicant totaling R1 208 941.40 as at September 2019- and defaulted on payment. The parties reached a settlement agreement during September 2019 and Respondent agreed to pay of the amount by way of monthly installments of R40 000 and reduced the historical debt to R829 892.27.

[6] Respondent placed new orders which were paid in cash or strictly on 30 days payment terms. The amount of new orders that was not paid is R148 031.68 according to Applicant. In total the historical and new balance is R972 923.95.

[7] Respondent opposes Application on the following grounds;

(a) Applicant fails to make out a case justifying the relief it seeks;

(b) The indebtedness as alleged to be due is disputed since Respondent has made payment in excess of R2 million since September 2019.

(c) The application as launched is an abuse and that it is the intention of Applicant to pressure Respondent to withdraw a pending application between the parties.

(d) Applicant is currently in possession of assets of Respondent which are valued in excess of R2 146 866.00 far more than the amount which Applicant alleges Respondent owes, which assets Applicant alleges it holds as security for the indebtedness.

C. ISSUES FOR DETERMINATION

[8] The issue for determination is whether Applicant has made out a case for winding up in terms of section 345(1)(c) read with section 344 (f) of the old Companies Act.

D. LEGAL PRINCIPLES

[9] The inability of a company to pay its debts when they fall due is regulated by the deeming provision in terms of section 345 (1) which provides as follows:

*"**When a company deemed unable to pay its debts**-*

(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts."

The onus is on Applicant, as creditor, to prove that Respondent is unable to pay its debts.

[10] It is trite that the unpaid creditor has a right to wind up the defaulting company which is unable to pay its debts.

[11] I was referred by counsel for Applicant to two cases, namely, *Standard Bank of South Africa Ltd v R-Bay Logistics CC*[1] and *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*[2].

[12] Counsel for the Respondent referred to ten respective cases, namely, *Rosenbach and Co (Pty) Ltd v Singer's Bazaars (Pty) Ltd*[3], *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*[4], *In Re: HC Collision Ltd*[5], *Barclays Bank Ltd v Riverside Dried Fruit Co. (Pty) Ltd*[6], *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[7], *Western*

[1] 2013 (2) SA 295 at 300-301 para [2] (KZD)
[2] 1993 (4) SA 346 a 440 F
[3] 1962 (4) SA 593 (D) at 597
[4] 1993 (4) SA 436 (C) at 440F-441A
[5] (1906) 23 SC 721
[6] 1949 (1) SA 937 (C)
[7] 1956 (2) SA 346 (T) at 347 -348

Insurance Co. v Coldwell's Trustee[8]*, Argus Printing and Publishing Co Ltd v Anastassiades*[9]*, Chandlers Ltd v Dealsville Hotel (Pty) Ltd*[10]. These are all cases dealing with the deemed inability to pay debts.

[13] For decades our law has recognized two forms of insolvency; firstly factual insolvency (where a company's liabilities exceed its assets and commercial insolvency ; secondly, 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.[11]

[14] It is also trite that a company's commercial insolvency is a ground that will justify an order for its liquidation and this principle has served us through the passage of time. The reasons are not hard to find, the valuation of assets, other than cash, is elastic and often subjective. The liquidity of assets is often more viscous than the defaulting debtors would have a court believe in the majority of cases, creditors do not have knowledge of the assets of a company that owes them money and must not 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.[12] This has been the approach of our courts when faced with the liquidation application of a defaulting company.

[15] 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 liquidation of the liquidation of companies[13]: one of the purposes of the new Companies Act 71 of 2008 Section 7(1) thereof.

[16] Our law is also settled on the principle 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

[8] 1918 AD 262 at 271
[9] 1954 (1) SA 72 (W)
[10] 1954 (4) SA 78 (O) at 749 -750
[11] See Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd ZASCA 173 (28 November 2013) para
[12] See Firstrand Bank Ltd v Lodhi 5 Properties Investment CC 2013 (3) SA 212 (GNP) para 34.
[13] See Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd, above para [17]

a company is unable to pay its debts.[14] The court, when faced with the application for winding up, should exercise discretion to consider all facts before it.

ANALYSIS OF EVIDENCE AND

E. REASONS FOR JUDGMENT

[17] The bone of contention by Respondent is the allocation of payments made. Respondent avers that the R1 208 941.00 was, as stated by Applicant, to be repaid in monthly installments of R40 000.00. The settlement agreement was in terms of an oral agreement and there was no agreement on acceleration of the balance. The R40 000.00 repayment on historical debt was from October 2019. The new orders placed would be settled within 30 days as already stated.

[18] Respondent contends that it has paid over R2 million between 2 October 2020 and 3 March 2021. In fact, the analysis of its answering affidavit reveals fifty-four payments well in the region of R2 million. This has not been controverted by Respondent. Respondent does not indicate whether those payments related to the new orders or not.

[19] As at the issue of the notice of motion on 8 January 2021, and during that month, payments amounting to R282 149.45 were made.

[20] The dispute has been from Respondent's side, the allocation of payments to historical as well as current debt which is payable within 30 days. This contention was raised by Respondent prior to the issue of motion proceedings and during the exchange of pleadings.

[21] In reply to Respondent's contention, Applicant states that there was an attempt to settle the debt and this stopped in March 2021. Applicant also refers to an email made prior to the agreement to repay the historical debt as well as dealing with the conditions of payment of new orders. It does not offer any comment on the fifty-four payments made up to the date of issue of the motion proceedings to liquidate.

[14] See Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA)

[22] Having regard to the fact that if winding up order is granted it will be effective from 8 January 2021 and furthermore regard being had to the payments made during the month of January 2021 and prior to that month, I am not persuaded that Respondent was unable to pay its debts when they fell due within the meaning of section 345(1)(c) of the old Act. I am fortified on this view that the total payments of R2 million have not been properly answered by Applicant and the issue of allocation of the payment remains, in my view, unresolved as contended and disputed by Respondent.

[23] Furthermore, Applicant has failed to deal with the assets that it holds in its possession as security for the debt. These assets in my view, could be sold once a judgment is granted for the recovery of the disputed debt if proven at trial in the normal course were summons for the recovery of the alleged debt to be issued. I therefore exercise my discretion in favour of Respondent.

[24] Having regard to the litigation between the parties under case number 21655/2019 founded on *rei vendicatio* for the recovery of the assets the Applicant has in its possession, it will not be just and equitable to wind up Respondent, especially given the dispute in that case and the disputed debt in this case.

[25] It follows therefore that the application for winding up must fail.

ORDER

[26] The following order is made:

(a) The application for winding up is dismissed with costs.

_____

M.L. SENYATSI
JUDGE OF THE HIGH COURT

Heard:	16 August 2021
Judgment:	14 March 2022
Counsel for Applicant:	Advocate R.F. De Villiers
Instructed by:	Deneys Zeederberg Attorney, Pretoria c/o Faber and Allin Inc Johannesburg
Counsel for Respondent:	Advocate J Hershensohn

Instructed by:	Jaco Roos Attorneys Inc, Pretoria c/o MI Lindwa Attorneys Johannesburg