

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/9865

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[18 FEBRUARY 2022]

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SIGNATURE

In the matter between:

KIC SA (PTY) LTD

APPLICANT

and

EDITH VENTER PROMOTIONS CC

RESPONDENT

J U D G M E N T

MUDAU, J:

[1] This an opposed application for a winding-up order of the respondent. The applicant bases its application on the ground that the respondent is unable to pay its debts in terms of sections 344(f) and 345(1)(c) of the Companies Act 61 of 1973 read with sections 69(1)(c) and 69(2) of the Close Corporations Act 69 of 1984.

[2] The relevant facts are largely undisputed. On or about 14 May 2019 Whirlpool SA (Pty) Ltd made a payment of R800 000 plus vat to Edith Venter Promotions CC, the respondent, an event organiser for an event that failed to

materialise. Whirlpool and the respondent agreed to cancel the sponsorship agreement on the basis that the respondent would retain R50,000 plus VAT and would return R750,000 plus VAT to Whirlpool. Subsequently, Whirlpool's claim was ceded to the applicant during 2019.

- [3] On 20 November 2019 the respondent sent the applicant a letter giving a clear, unconditional and unequivocal undertaking to repay the applicant R750,000.00 (excluding VAT) by, on, or before 31 January 2020. On 28 January 2020 the respondent sent the applicant a letter wherein she apologised that she was unable to meet her financial commitments as she undertook to do "due to the fact that incoming funds that she was expecting and promised have been delayed". The applicant then engaged its attorneys to send a letter calling upon the respondent to effect payment, and stating that it would be prepared to indulge the respondent if the respondent would pay at least 25% (twenty-five percent) of the indebtedness by 31 January 2020 and the remaining 75% by the last day of February 2020.
- [4] On 31 January 2020, the respondent sent a letter to the applicant stating plainly as follows: "I am not able to settle the amount by tomorrow or pay a 25% of the amount due to the fact that I will only be receiving funding the next two weeks or so." Yet again, the applicant, stated that it would indulge the respondent until the end of February 2020, by which date the applicant required payment in full. On 10 March 2020 the applicant's attorney again addressed a letter to the respondent stating that they had received an instruction to institute the present liquidation proceedings. In immediate response, by way of a letter thereto, on the same day, the respondent stated "I have every intention of honouring the agreement and only ask for a little extra time to make sure that funds were secured for payment." Subsequently, the applicant launched its motion on 24 March 2020.
- [5] The applicant filed a supplementary affidavit in which it pointed out that Ms. Edith Maybel Venter ("Ms. Venter"), on the 13 July 2020, signed on behalf of the respondent, a Deed of Settlement. The respondent made payments to the applicant as follows in accordance with the deed of settlement: (a) R400 000,00 on 20 July 2020; (b) R115 625,00 on 31 August 2020; (c) R50 000,00 on 30 September 2020; and (d) R65 625,00 on 12 October 2020. No further payments were received from the respondent in reduction of the debt. As such, the outstanding amount due to the applicant by the respondent is R231 250.00.

- [6] The deed of settlement provided that an initial deposit, in terms of clause 4.1.1 of R400 000,00 (four hundred thousand rands) was to be paid on or before 20 July 2020. Four equal instalments of not less than R115 625,00 was payable on or before the last day of August 2020, September 2020, October 2020 and November 2020, in terms of clause 4.1.2.
- [7] The interests and costs were payable, in terms of clause 4.1.3. by, on, or before 30 December 2020. The costs, in terms of clause 4.1.4 read with clause 2.5.1 of the Deed of Settlement was payable in the amount of R90 364,22 being the costs incurred up until 30 June 2020, and payable by, on, or before 30 December 2020. Any further costs incurred, from 30 June 2020, until date of finalization of this matter ("additional costs"), were to be paid within 14 days of the taxation or agreement of those additional costs, whichever was to be the sooner.
- [8] The deed of settlement made provision that any additional costs incurred by the applicant's attorneys of record in enforcing the applicant's rights in terms of the settlement agreement, from 30 June 2020, until date of final discharge, were recoverable, on demand from the respondent in full on the attorney and own client scale, whether or not action was instituted. The respondent, in terms of clause 2.5.1 of the settlement agreement, agreed to pay a collection commission of 10% per instalment up to a maximum of R2 000,00 (VAT excluded) (per instalment). Interest of 10% per annum was chargeable from 31 January 2020 in terms of clause 2.9 of the Deed of Settlement. In terms of clause 5.1, provision was made for an acceleration of the entire amount due together with interest thereon and costs in case of breach of the terms of the settlement agreement and, further, that the applicant may apply for a final order of liquidation against the respondent.
- [9] In an email dated 27 October 2020 the respondent acknowledged its indebtedness to the applicant and tendered to pay R300 000,00 in full and final settlement. According to the applicant however, no such amount was received from the respondent.
- [10] The respondent only filed the answering affidavit on 15 July 2021 in which the amount claimed was disputed. The respondent claimed that the applicant failed to serve any demand on the respondent by leaving same at the respondent's registered address requiring the respondent to pay any amount due to the applicant. In reply, the applicant took issue that the answering affidavit was filed out of time without the necessary condonation.

- [11] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds (See *Badenhorst v Northern Construction Enterprises (Pty) Ltd*¹ and *Kalil v Decotex (Pty) Ltd & Another*).² This is known as the so-called “Badenhorst Rule”. Where, however, the respondent’s indebtedness has, *prima facie*, been established, the onus is on it to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds (see for example *Kalil*;³ *Meyer, NO v Bree Holdings (Pty) Ltd*;⁴ *Badenhorst*;⁵ *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd*; *Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd*;⁶ *Kyle and Others v Maritz & Pieterse Inc*).⁷
- [12] 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 (*Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd*,⁸ to which reference was made, with approval, in *Sammel & Others v President Brand Gold Mining Company Ltd*).⁹ *Ex debito justitiae* means “as a right arising out of the justice of the matter”.
- [13] A correct statement of the law is, once the applicant has demonstrated that the respondent was *prima facie* indebted to it, it was for the respondent to establish that it disputed that indebtedness on *bona fide* and reasonable grounds. 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 in special or unusual circumstances only (See for example *Service Trade Supplies*;¹⁰ and *FirstRand Bank Ltd v Evans*).¹¹
- [14] The respondent in this case made no allegation that it was either factually or commercially solvent. Most significantly, as previously mentioned, the underlying debt, giving rise to the application for the winding-up of the respondent, was not in dispute. Indeed, it was admitted by the respondent in the settlement agreement which it neglected or failed to honour. It has therefore failed to discharge the onus of demonstrating that its indebtedness

¹ 1956 (2) SA 346 (T) at 347-348.

² 1988 (1) SA 943 (A) at 980D.

³ *Id* at 980C.

⁴ 1972 (3) SA 353 (T) at 354-355.

⁵ Fn 1 above at 348B.

⁶ 1979 (1) SA 265 (W) at 269B.

⁷ [2002] 3 All SA 223 (T) at 226.

⁸ 1962 (3) SA 424 (T) at 428B-D.

⁹ 1969 (3) SA 629 (A) at 662F.

¹⁰ Fn 8 above at 428B.

¹¹ 2011 (4) SA 597 (KZD) at para 28.

to the applicant has indeed been disputed on *bona fide* and reasonable grounds. The applicant demonstrated satisfactorily that the respondent is *prima facie* indebted to it.

[15] From a joint practice note filed of record, the respondent continued to trade. This is amplified by an affidavit deposed to by a candidate attorney, Rall, of the applicant who attached a WinDeed Spider Report on the Respondent dated 24 January 2022. In the circumstances, it may indeed be in the interest of a *concursum creditorum* to grant a provisional winding-up order to be served on creditors and published accordingly. Upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law, I am satisfied that the applicant has made a *prima facie* case, at the very least, for the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt. I find the issues raised by the respondent in opposing the claim of the applicant insufficient to constitute a *bona fide* dispute on reasonable grounds.

[16] The following order is made:

1. The respondent is hereby placed under provisional winding-up;
2. All persons who have a legitimate interest, are called upon to put forward their reasons why this Court should not order the final winding up of the respondent on 11 April 2022 at 10h00 or as soon thereafter as the matter may be heard;
3. A copy of this order be served on the respondent at its registered office;
4. A copy of this order be published forthwith once in the Government Gazette and any local daily English newspaper;
5. A copy of this order be forwarded to each known creditor by prepaid registered post or by e-mail;
6. A copy of this order be forwarded to each of the established employees of the respondent by prepaid registered post or by e-mail;
7. A copy of this order be served on the employees' trade union, if any, at the respondent's registered office;

8. A copy of this order must be served on the South African Revenue Services;
9. A copy of this order must be served on the Master;
10. The parties to enroll the matter for 11 April 2022; and
11. Costs of the application are to be costs in the winding-up of the respondent.

T P MUDAU
[Judge of the High Court]

Date of Hearing: 25 January 2022
Date of Judgment: 18 February 2022

APPEARANCES

For the Plaintiff: Adv. C Louis
Instructed by: ORELOWITZ INCORPORATED

For the Defendant: Adv. Sias B. Nel
Instructed by: WYNAND DU PLESSIS ATTORNEYS