

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 8609/2022

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

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DATE

In the matter between:

**BBH BRYANSTON (PTY) LTD**

Applicant

And

**MPUTSU INVESTMENTS HOLDINGS**

Respondent

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**JUDGMENT**

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**MAKUME, J:**

**INTRODUCTION**

- [1] On the 3<sup>rd</sup> August 2022 before Vally J an order was granted placing the Respondent under provisional winding up.

[2] A *rule nisi* was issued calling upon the Respondent and all persons who have a legitimate interest in this matter to put forward their reasons why the Respondent should not be placed under a final winding up order.

[3] This application before me is to consider whether there are sufficient jurisdictional and factual reasons present to place the Respondent under a final winding up.

#### BACKGROUND FACTS

[4] During or about 9<sup>th</sup> March 2020 the Applicant and the Respondent concluded a lease agreement in terms of which the Applicant leased certain business premises situated at and known as 14A Old Kicullen Street, Bryanston to the Respondent.

[5] In terms of the lease agreement the Respondent agreed to pay monthly rental of R25 000.00 (Twenty-Five Thousand Rand).

[6] The Respondent fell into arrears as a result of inconsistent payments. The Applicant's attorneys addressed a letter of demand to the Respondent in terms of Section 345 of The Companies Act. On receipt of the letter of demand the Respondent made a payment of R100 000.00 (One Hundred Thousand Rand) being part payment of the arrears on the 5<sup>th</sup> October 2021.

[7] The Respondent presently owes the Applicant an amount of R623 313.01. It is worth noting that when this application was launched during February 2022 the Respondent owed the Applicant an amount of R265 666.73.

[8] Notwithstanding delivery of the letter to the Respondent in terms of Section 345 of the Companies Act the Respondent has failed to pay to the Applicant

the amount due to it or to secure same or compound the debt to the reasonable satisfaction of the Applicant.

- [9] The Applicant concluded that in the circumstances the Respondent is deemed unable to pay its debts as contemplated in Section 344 (f) and 345 (i)(a) of the Companies Act 61 of 1973 and falls to be wound up. In the final analysis the Applicant contends that the evidence clearly shows that the Respondent is at least commercially insolvent in that it is unable to pay the liquidated amount to the Applicant.
- [10] In its Answering Affidavit opposing the granting of a final order of liquidation the Respondent raises the following defences:

10.1 The first point in *limine* is that the deponent to the Applicant's Founding Affidavit namely Magriet Johana Brits lacks the necessary authority to depose to the application. The Respondent says that the resolution marked FA1 attached to the Founding Affidavit was not authorised by the Directors of the Applicant's company.

10.2 The second point in *limine* raised by the Respondent is that this application is an abuse of the legal process in that it is an application clearly aimed at enforcing a debt. This the Respondent says is clear from a reading of the resolution (Annexure FA1).

10.2.1 Respondent says the debt is disputed. The Respondent further adds that it disputes the debt because the Applicant did not comply with the provisions of Section 345 (1) (a) of the Act because the alleged debt is not due.

10.2.2 The Respondent says that in terms of clause 38 of the lease agreement it is provided that the Respondent has consented to the jurisdiction of the Magistrate Court for action relating to payment of arrear rental. Therefore, according to the Respondent this Court has no jurisdiction.

10.2.3 The Respondent relies on the following decisions in its argument that this application is an abuse of the process:

- a) **Phillips vs Botha 1999 (2) SA 555 SCA page 565**
- b) **Orestisovle (Pty) Ltd v Nofo Investments Holdings 2015 (4) (SA) 449 (WCC).**

THE RESPONDENT FIRST POINT IN *LIMINE*

- [11] The Respondent maintains that the deponent to the Applicant's Founding Affidavit lacks the authority. It is the Respondent's argument that there is no evidence that the deponent Magrieta Johana Britz has been duly authorised by either of the two Directors to the Applicant to sign all documents on behalf of the Applicant necessary for this litigation.
- [12] It is further argued by the Respondent that Ms Britz the deponent has not been duly mandated by resolution of the company to depose to the affidavit. In the result so argues the Respondent the application should be dismissed with costs.
- [13] In their Replying Affidavit the Applicant filed a resolution adoptee by the Director of the Applicant in which the deponent is authorised to take all steps in instituting the liquidation application on behalf of the Applicant against the Respondent. This brings to a close this objection and that point in *limine* falls to be dismissed.
- [14] In any case the law on this issue has been clarified in a number of matters. The SCA in **Ganes and Another vs Telecom Namibia Ltd 2004 (3) SA 615** concluded that in determining the question whether a person has been authorised to institute and prosecute motion proceedings it is irrelevant whether such person was authorised to depose to the Founding Affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised.

## THE SECOND POINT IN LIMINE

- [15] The second point in *limine* is that this application is an abuse of the process. The Respondent says the Applicant is using liquidation proceedings to enforce a disputed debt further that the debt is not due.
- [16] The Respondent is being disingenuous in this regard firstly when the first letter of demand was sent to the Respondent the Respondent promptly made a payment of R100 000.00 being in reduction of the amount claimed. The Respondent did not raise any dispute nor that the amount was not due and payable. The Respondent has not raised a genuine and reasonable dispute and its attempt to raise these spurious points in *limine* is not *bona fide*. The intention is to delay finality.
- [17] The Respondent's reliance on the decision in **Phillips v Botha 1999(2) SA 555 SCA** is yet another attempt to derail the real issue before this Court. The dispute in Phillips (*supra*) was about the *locus standi* of a Private Prosecution in a criminal sitting. The question in that matter was whether the Private Prosecution was either instituted for some collateral and improper purpose such as extortion of money rather than with the object of having criminal justice done to the offender.
- [18] This is not the case in this matter the application follows on the failure to respond to the Section 345 letter of demand.

## THE THIRD POINT IN LIMINE LACK OF JURISDICTION OF THIS COURT

- [19] The Respondent says that this Court has no jurisdiction because of the provisions of clause 31 of the lease agreement in which the parties consented to the jurisdiction of the Magistrate Court for actions relating to payment of arrear rental. Clause 31 did not oust the jurisdiction of the High Court. In the result this point in *limine* is similarly dismissed. It is one of the delaying tactics devised by the Respondent.

HAS THE RESPONDENT SUCCEEDED IN PROVING THAT IT IS ABLE TO PAY ITS DEBTS?

- [20] It is trite law that in an application for the winding up of a company on the ground that it is unable to pay its debts as intended in Section 344 (F) read with Section 345 of the Companies Act 61 of 1973 the factual insolvency of the Company is not irrelevant in deciding whether the company should be so wound up (See: **Johnson v Hipotech 2000 (4) SA 930**).
- [21] In terms of the 1973 Companies Act a company is deemed to be unable to pay its debts if a creditor of that company serves a letter of demand for payment which is due and for a period of over three weeks such company fails or neglects to make a payment.
- [22] In the present matter the last time that the Respondent made payment of rental was when it made payment of the sum of R100 000.00 on receipt of the first letter of demand. It thereafter made no payment and has failed to do so after receipt of the second letter of demand.
- [23] In the result this Court is satisfied that the Respondent is unable to pay its debts. As at the 1<sup>st</sup> October 2022 the Respondent is in arrears in the amount of R623 323.01. The Applicant has satisfied all the jurisdictional requirements for the winding up of the Respondent.
- [24] The SCA in **Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 ALL SA 185** summarised the position as follows:

“The degree of proof required when an application is made for a final order is higher than for the grant of a provisional order. In the former case a mere prima facie case need be established wherein the Court before it will grant a final order 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.”

[25] On the evidence before this Court I am satisfied that there is such a balance in favour of the Applicant. In the final analysis the application to finally wind up the Respondent is upheld and I accordingly make the following order:

ORDER

1. The provisional winding up order granted on the 3<sup>rd</sup> August 2022 is hereby confirmed.
2. The Respondent is placed under final Liquidation in the hands of the Master of the above Honourable Court.
3. The costs of this application shall be costs in the administration of winding up of the Respondent's estate.

Dated at Johannesburg on this    day of February 2023

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**M A MAKUME  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

**Appearances:**

DATE OF HEARING        :        18<sup>TH</sup> JANUARY 2023  
DATE OF JUDGMENT     :        FEBRUARY 2023

FOR APPLICANT         :        ADV SEKGOTHADI KABELO  
INSTRUCTED BY         :        MESSRS KWA ATTORNEYS

FOR RESPONDENT        :        ADV AC DIAMOND  
INSTRUCTED BY         :        MESSRS PHOSA LOOTS INC

FOR PLAINTIFF         :        ADV HAVALA (FOR IDC)

INSTRUCTED BY : MESSRS DLAMINI ATTORNEYS