

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) **NOT REPORTABLE**
(2) **NOT OF INTEREST TO OTHER
JUDGES**

CASE NO: 2023-020892

DATE: 26TH MARCH 2024

In the matter between:

BIDVEST BANK LIMITED

Applicant

And

EQ EMPORIUM (PTY) LIMITED

Respondent

Neutral Citation: *Bidvest Bank v EQ Emporium (2023-020892)* [2024]
ZAGPJHC ---- (26 March 2024)

Coram: Adams J

Heard: 4 March 2024

Delivered: 26 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 26 March 2024.

Summary: Winding-up application – commercial insolvency ground for winding-up order – debt owing, due and payable by the time s 345 notice

dispatched – the *exceptio de non adimpleti contractus* principle not available to the respondent as a defence – total advances should be repaid – if not, company deemed unable to pay its debts and is therefore commercially insolvent – provisional winding-up order granted.

ORDER

- (1) The respondent be and is hereby placed under provisional winding-up in the hands of the Master of the High Court of South Africa.
- (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 **Monday, 10 June 2024**, at **10:00 am** or so soon thereafter as the matter may be heard.
- (3) A copy of this order shall be served by the Sheriff of this Court on the respondent at its registered office.
- (4) A copy of this order shall be published forthwith once in the Government Gazette.
- (5) A copy of this order shall be forthwith forwarded to each known creditor by electronically receipted telefax transmission or by electronically receipted email.
- (6) A copy of this provisional winding-up order must be served on: -
 - (a) Every trade union or trade union representative who represents any and/or all of the employees of the respondent;
 - (b) The employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's business premises and/or principal place of business, or if there is no access to the premises or to the principal place of business by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises

- or the place of business from which the respondent conducted any business at the time of the presentation of the application;
- (c) The South African Revenue Service; and
 - (d) The respondent.
- (7) The costs of this application shall be costs in the winding-up of the respondent.

JUDGMENT

Adams J:

[1]. The applicant (Bidvest Bank) applies for the winding-up of the respondent (EQ Emporium) in terms of sections 344(f) and (h) and section 345(1)¹ of the Companies Act² ('the Companies Act'). The winding up of the respondent is sought on the basis that it is unable to pay its debts and that it is just and equitable that the respondent be wound up.

[2]. Underpinning the application is EQ Emporium's indebtedness to Bidvest Bank pursuant to and in terms of an agreement concluded between the parties in terms of which the bank would afford trade facilities to EQ Emporium. This meant that EQ Emporium would present certain trade bills to the bank, which trade bills were essentially invoices from EQ Emporium's suppliers and which it requested the bank to make payment to the suppliers on its behalf. Bidvest Bank would make payment to the suppliers on behalf of EQ Emporium, which would then become liable to repay to the bank such advances in terms of the

¹ '345When company deemed unable to pay its debts

- (1) A company or body corporate shall be deemed to be unable to pay its debts if –
 - (a) a creditor, to whom the company is indebted in a sum not less than one hundred rand then due –
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
-¹.

² Companies Act, Act 61 of 1973.

maturity dates reflected on the bank's invoices to EQ Emporium. Repayment was normally due within a period of 120 days from the date of on which payment was made by Bidvest Bank. Such due dates were however reflected on the invoices.

[3]. EQ Emporium is indebted to Bidvest Bank in the amount of R7 947 898.57. It is the case of the bank that, despite delivery to EQ Emporium of a notice in terms of s 345(1)(a)(i) of the Companies Act, demanding payment of the debt, the latter has failed to settle such indebtedness to the bank. This means, so the case on behalf of Bidvest Bank continues, that EQ Emporium is therefore deemed to be commercially insolvent since it has neglected to pay, secure or compound the sum demanded.

[4]. EQ Emporium contends that Bidvest Bank refused to make payment of certain trade bills as requested by it. Therefore, so the contention on behalf of EQ Emporium goes, its obligation to make repayment of other trade bills, which the bank had paid on its behalf, was suspended until the bank complied with its 'reciprocal' obligations to make payment of such unpaid trade bills. EQ Emporium's case accordingly appears to rely on the application of the *exceptio de non adimpleti contractus* principle.

[5]. In addition, it is the contention of EQ Emporium that, as a result of Bidvest Bank's breach of the contractual arrangement between them, it has suffered damages, which it claims from the bank, and which exceeds by far the R8 million claimed by the bank and which grounds the liquidation application. In short, the case of EQ Emporium in its opposition to the liquidation is that it *bona fide* disputes its indebtedness to the bank on reasonable grounds – the so called *Badenhorst* principle.

[6]. The question to be considered in this liquidation application is therefore whether EQ Emporium's disputing of its indebtedness to Bidvest Bank is *bona fide* and on reasonable grounds. In that regard, it is a trite principle of the law relating to winding-up proceedings that such proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the company on reasonable

grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt³.

[7]. As I have already indicated, Bidvest Bank, in essence, contends that EQ Emporium is commercially insolvent and is unable to pay its debts. In *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*⁴, Berman J held as follows in that regard:

'The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 3440 of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597E-F.

"If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts".'

[8]. *In casu*, it is therefore necessary to establish whether EQ Emporium *bona fide* disputes its indebtedness to Bidvest Bank on reasonable grounds. That, in turn, requires an assessment of the sustainability from a legal point of view of EQ Emporium's contention that the bank breached the agreement in refusing to make payment of trade bills presented to it by EQ Emporium for settlement. This assessment would, in my view, also take care of the 'defence'

³ The 'Badenhorst rule' after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347 – 348 and authorities there cited; *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 529-530; *Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd* 1976 (1) SA 189 (W) at 191; *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) at 269; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (AD) at 980; *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (W) at 48; *Robson v Wax Works (Pty) Ltd* 2001 (3) SA 1117; *SMM Holdings (Pvt) Ltd v Southern Asbestos Sales (Pty) Ltd* 120051 4 All SA 584 (W) at 591-592.

⁴ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440.

based on a counterclaim for damages. The point is that, if the defence against the indebtedness is bad in law, the counterclaim also falls flat.

[9]. Before dealing with the sustainability of the defence raised by EQ Emporium, I need to address a preliminary point relied upon by it and that relates to the service of the section 345(1)(a)(i) statutory demand, which, according to EQ Emporium, was not served on it. I intend giving short thrift to this issue as it clearly lacks merit.

[10]. According to the sheriff's return of service relating to the s 345 notice, same was served at the registered address of EQ Emporium on 25 November 2022 at 12:33 by service on one 'Mr Brynalon'. As correctly pointed out by Mr Kairinos SC, who appeared on behalf of Bidvest Bank, the deponent to EQ Emporium's answering affidavit, dated 15 June 2023, is Brynalynd Roland Tuckett, its sole director, who also happens to reside at the registered address at which the notice was served by the sheriff. It is, as submitted by Mr Kairinos, way too much of a coincidence that the name of the person mentioned in the sheriff's return so closely resembles the name of the director of EQ Emporium. The point is that, in these circumstances, it is highly unlikely, nay nigh impossible, that the said notice was not served as per the sheriff's return at the registered address of the respondent. The version by EQ Emporium on this aspect of the matter – its denial that the notice was ever served on it – can and therefore should be rejected on the papers as being far-fetched and untenable.

[11]. That point on behalf of EQ Emporium therefore falls to be rejected out of hand. Moreover, the *prima facie* nature of the sheriff's return of service as indicating that he indeed served the statutory notice of demand at the registered address of EQ Emporium and did so by serving it on the deponent, being the sole director of the respondent, means that I have to accept as a fact, as I do, that the notice was duly served as required by the said section. That, as I indicated, is the end of that preliminary point. The point is that the Companies Act requires no more than that the statutory notice of demand be 'left' at the registered address of the company – it need not be served personally on a person at such address.

[12]. That bring me back to EQ Emporium's indebtedness to Bidvest Bank and to whether its disputing same is *bona fide* and on reasonable grounds.

[13]. In its answering affidavit, EQ Emporium admits that as and at 30 August 2022, trade bills amounting in total to R7 947 898.57 had been paid on its behalf by the bank in respect of trade bills dated from 22 March 2022 to 30 August 2022. In terms of the agreement between the parties and the terms and conditions of the credit facilities afforded to EQ Emporium, the due dates for repayment of these amounts paid on behalf of the said company ranged from 19 July 2022 to 23 November 2022.

[14]. By 30 August 2022, tax invoices to the tune of about R2.064 million had become overdue and payable by EQ Emporium to Bidvest Bank. It was at that stage that the bank decided that it would not continue paying trade bills as and when presented to it for payment by the company. Its obligation to pay future trade bills, so Bidvest Bank contends, was conditional upon EQ Emporium having made payment timeously of invoices for previous trade bills paid by the bank on EQ Emporium's behalf.

[15]. EQ Emporium's defence, as already indicated, is that it was excused from making payment pending performance by Bidvest Bank of its reciprocal obligations in terms of the trade finance facility and/or a compromise agreement subsequently reached regarding payment of arrear amounts. I revert to the compromise agreement shortly. Bidvest Bank is alleged to have breached the terms of the trade finance facility by not making payment of trade bills presented by EQ Emporium during June 2022. The first difficulty with this so-called defence is that it is factually incorrect. During June 2022 five trade bills were presented to Bidvest Bank by EQ Emporium for payment to their suppliers. These payments were, by admission by EQ Emporium in its answering affidavit, in fact paid by the bank on behalf of EQ Emporium. It is therefore difficult to understand the case on behalf of EQ Emporium, which is clearly devoid of a factual basis. That, in my view, spells the end of the defence on behalf of EQ Emporium – there is no defence whatsoever let alone a *bona fide* one.

[16]. Moreover, and as indicated *supra*, by the end of August 2022, payment of invoices from Bidvest Bank to EQ Emporium, amounting in total to over R2 million, was already overdue and payable. This then means that it was in fact EQ Emporium, and not the bank, which was in default of its obligations to perform pursuant to and in terms of the credit facility. By all accounts, EQ Emporium's admitted indebtedness to the bank is not disputed *bona fide* on reasonable grounds.

[17]. EQ Emporium also disputes liability for its indebtedness to Bidvest Bank on the basis of a compromise agreement concluded between the parties on or about 11 August 2022, in terms of which the bank agreed to reinstate the facility on condition that the EQ Emporium was to make weekly payments in settlement of the overdue amounts. The first payment was due on 24 August 2022 and thereafter subsequent payments at regular seven day intervals, until the whole arrear amounts had been brought up to date. It does not appear to be in dispute that, but for payment of the first two instalments, EQ Emporium failed to effect payment of the subsequent instalments and it cannot therefore place any reliance on the compromise agreement.

[18]. A company is conclusively deemed unable to pay its debts when it fails to positively respond to a demand in terms of section 345 of the Companies Act. The phrase 'unable to pay its debts' connotes insolvency in the commercial sense, namely an inability to meet its day-to-day liabilities, even though the company's assets may exceed its liabilities.

[19]. *In casu*, an amount of about R8 million is presently – and has been since November 2022 – owing, due and payable by EQ Emporium to Bidvest Bank. It is not able to pay this amount, which makes it commercially insolvent in that it is 'unable to pay its debts'. What is more is that EQ Emporium, which failed to comply with the s 345 demand from the bank, is conclusively deemed to be unable to pay its debts.

[20]. There is one more issue which I need to address and that relates the alleged non-compliance by Bidvest Bank with the provisions of s 346(4A) of the Companies Act, which provides as follows: -

'(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –

- (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
- (ii) to the employees themselves –
 - (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or
 - (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;
- (iii)'.

[21]. Mr Saint, who appeared on behalf of EQ Emporium, takes issue on behalf of it with the fact that the winding-up application, although addressed to the 'Possible Employees of EQ Emporium (Pty) Limited)' and to the 'Possible Trade Union Representatives of EQ Emporium (Pty) Limited', was supposedly served on the employees by the Sheriff at the registered address of the said company, which, we know, is in fact the residential address of the sole director. This means, so the argument by Mr Saint goes, that the application was not properly served on the employees – which reportedly are about eighty in number – as required by subsection (4A)(ii).

[22]. There appears to be merit in this contention on behalf of EQ Emporium. However, as was held by this court in *Intello Capital CC v Sigge Managed Solutions (Pty) Limited*⁵, on the SCA authority in *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd*⁶, even if the applicant is, for whatever reason, not able to furnish the application papers to the employees before the hearing, a court could still grant relief in the form of a provisional winding-up order. Put another way, there will be circumstances in which a court will be justified in granting a provisional winding-up order. An important consideration in that

⁵ *Intello Capital CC v Sigge Managed Solutions (Pty) Limited* 2023 JDR 0644 (GJ).

⁶ *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA).

regard would, in my view, relate to whether or not the respondent is *bona fide* in its opposition to the winding-up application.

[23]. In my view, such a case is made out *in casu* in that an overwhelming case is made out on the papers for the grant of a winding-up order.

[24]. In all the circumstances, I believe that a provisional winding-up order should be granted against the respondent.

Conclusion and Costs

[25]. Accordingly, a provisional winding-up order should be granted against the respondent.

[26]. As regards costs, I am of the view that the standard costs order normally granted in liquidation applications should be granted in this matter, that being an order to the effect that the costs of the winding-up application should be costs in the winding-up of the respondent. I therefore intend granting such a costs order.

Order

[27]. Accordingly, I make the following orders: -

- (1) The respondent be and is hereby placed under provisional winding-up in the hands of the Master of the High Court of South Africa.
- (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 **Monday, 10 June 2024, at 10:00** am or so soon thereafter as the matter may be heard.
- (3) A copy of this order shall be served by the Sheriff of this Court on the respondent at its registered office.
- (4) A copy of this order shall be published forthwith once in the Government Gazette.
- (5) A copy of this order shall be forthwith forwarded to each known creditor by electronically receipted telefax transmission or by electronically receipted email.

- (6) A copy of this provisional winding-up order must be served on: -
- (a) Every trade union or trade union representative who represents any and/or all of the employees of the respondent;
 - (b) The employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's business premises and/or principal place of business, or if there is no access to the premises or to the principal place of business by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises or the place of business from which the respondent conducted any business at the time of the presentation of the application;
 - (c) The South African Revenue Service; and
 - (d) The respondent.
- (7) The costs of this application shall be costs in the winding-up of the respondent.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON: 4th March 2024

JUDGMENT DATE: 26th March 2024 – judgment handed down electronically.

FOR THE APPLICANT: Advocate George Kairinos SC

INSTRUCTED BY: Du Toit – Sanchez – Moodley Inc, Darrenwood, Randburg

FOR THE RESPONDENT: Advocate F A Saint

INSTRUCTED BY: Reddy Incorporated, Bedfordview