IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 17572/2018

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

02-May-2018 .....

DATE SIGNATURE

In the matter between:

MARALCO BUSINESS ADVISORS CC
trading as **MARALCO PLANT SERVICES** Applicant

and

GLOWAX PROPRIETARY LIMITED Respondent

Dates of Hearing	:	10 April 2018
Date of Judgment	:	02 May 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant seeks an order for the compulsory winding up of the respondent on the basis that the respondent is unable to pay its debts, as envisaged by section 344(f), read with section 345(1)(c), of the Companies Act 61 of 1973 (the Companies Act).[1] The respondent opposes the application, among others, on the basis that it does not owe the amount claimed by the applicant, alternatively that it has a counterclaim (for damages arising from breach of contract) against the applicant in excess of the applicant's claim predicating the liquidation application.

[2] The application was brought on an urgent basis and was heard on Tuesday, 10 April 2018. After listening to oral submissions by counsel, I reserved this judgment in order to further reflect on the issues. This was meant to be only for a few days, but the parties, through their legal representatives, requested that I delay this judgment until after 18 April 2018, for them to attempt settlement of the matter. I was informed on 24 April 2018 that the parties were not successful with their attempt at settlement.

[3] Apart from the determination of issues relating to the merits of the matter, I had to determine whether the matter was properly enrolled as urgent. Due to the fact that I held a preliminary view that the matter was urgent and considered the issues in the matter to be interlinked, I listened to argument on both merits and urgency simultaneously. I will deal with

[1] Despite, the repeal of the Companies Act 61 of 1973 (the Companies Act) by the Companies Act 71 of 2008 (the 2008 Companies Act), chapter XIV of the Companies Act continues to apply to the liquidation of insolvent companies in terms of item 9(1) of schedule 5 of the 2008 Companies Act.

the submissions made on urgency and formally make a ruling in this regard, after a brief narration of the background to this matter, which is next.

Brief relevant background

[4] Save as specifically indicated, the following are the common cause facts or facts which are not effectively disputed by the respondent, in the background of this matter:

[4.1] The applicant, whose registered office address is in Kempton Park, Gauteng Province, conducts business in renting out earthmoving and mining equipment (the plant).

[4.2] The applicant initially dealt only indirectly with the respondent in the renting out of its plant. Previously, the applicant would rent out its plant to an entity known as Corporate Structural Systems Africa (CSSA) and, in turn, CSSA would further rent out the plant to the respondent. CSSA went into liquidation.

[4.3] During August 2016, ostensibly due to the liquidation of CSSA and consequently CSSA's default in making rental payments to the applicant, the applicant wanted to remove its plant from the respondent's mining operations at Wonderfontein mine. It was at this moment that the respondent engaged the applicant in order to directly procure the continued rental of the applicant's plant. Consequently, in September 2016 the parties concluded a written agreement in this regard.

[4.4] According to the applicant, as at 10 February 2018, an amount of R3 285 196.87 was owing by the respondent to the applicant in respect of the hiring of its plant. As a result, on 02 February 2018, the applicant wrote to the respondent advising of its

intention to remove its plant from the respondent's premises, unless the outstanding amount or at least R2 million was paid by the respondent.

[4.5] In response, on 06 February 2018, a person named Sibusiso Manqele (Sibusiso) purporting to act on behalf of the respondent,[2] sent an electronic mail to the applicant and advised as follows:

> "Please find attached invoice indicating that the money we are going to receive from the mine is actually lesser that [sic] your invoice.
>
> We are currently in dispute with Lungisane (acting plant manger [sic]) because we cannot agreed [sic] on correct tonnage to be claimed from the mine, [sic] this has been going on for the last 4 months now. We have raised our concern with the acting mine manager but he told us that he has just started acting yesterday and the permanent plant manager will be back on the 1st March where [sic] this dispute can be amicably resolved between the parties. The payment of the attached invoice will be made tomorrow still need to pay the salaries of the employees and they are currently at home due to non payment of salaries.
>
> The rate adjustment issue is being attended too they [sic] have promised to respond this week on our proposals, we will keep you informed of the latest development"[3]

[underlining added for emphasis]

[4.6] The invoice attached to the aforementioned electronic mail quoted above was in a total amount of R862 400.38.[4]

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[2] The respondent disputes that Sibusiso had authority to act on behalf of the respondent in matters relating to the applicant.
[3] See annexure "FA6" to the founding affidavit on indexed p 62.
[4] See annexure "FA7" to the founding affidavit on indexed p 63.

[4.7] After further interactions, the respondent made part payment in amount of R700 000.00 on 15 February 2018. This was after the applicant had already removed the plant from the respondent's premises and refused to return the plant, despite pleas from the respondent.

[4.8] According to the applicant, after payment of the R700 000.00, the respondent remained indebted to the applicant in amount of R2 585 196.87.

[4.9] On 20 February 2018, a representative of the respondent advised the applicant that the respondent was intending to sell two of its plant to a third party for an amount of R650 000.00, which it would utilise to reduce its indebtedness to the applicant and requested the applicant to prepare an agreement in this regard. However, the respondent did not sign the agreement.

[4.10] The applicant says that on 02 March 2018, it unsuccessfully attempted to enforce with a mining company, which is a dead time of the respondent, a cession of debts agreement it previously obtained in terms of an acknowledgement of debt by the respondent. The mining company, although not denying liability to the respondent, refused to recognise the validity of the cession.

[5] Ultimately, on 08 March 2018, this urgent application for the liquidation of the respondent was issued at the instance of the applicant.

Urgency

[6] As already indicated above, the issue of urgency was argued jointly with the issues relating to the merits of the matter. The respondent contended that the matter was not urgent at all to warrant its place on the urgent roll.

[7] The following were, significantly, the grounds of urgency as advanced by the applicant. On 06 March 2018, the applicant's attorneys of record obtained information from one of its other clients that the respondent was about to rent a plant for its operations at the Wonderfontein mine from an entity called Octo Plant, through a broker. The respondent had undertaken to make upfront rental payment for the plant. This was after the applicant had removed its plant from the aforementioned premises, due to the respondent's failure to keep up with the rental payments. The applicant viewed the undertaking to make upfront payment to Octo Plant as a potential preferential payment. Such payment would constitute an impeachable disposition, which would jeopardise the interests of other creditors including the applicant itself, although the disposition could later be set aside by the liquidator. The applicant decided to proceed by way of an urgent application, as there was no reason to wait any longer when the respondent was clearly "hopping from one supplier to the next as and when the suppliers refuse to further extend credit to the Respondent".[5] Further, it was feared that the respondent may dissipate assets or misappropriate available funds to the detriment of the general body of creditors. A liquidator had to be appointed urgently to take charge of the affairs of the respondent.

[8] On the other hand, the respondent argued that there was no of urgency as the dispute arose as far back as August 2017. Further, the respondent contends that due to the formalities embedded in an application for liquidation, like with regard to service of the application on the Master of the High Court, registered trade unions and employees, the South African Revenue Service and the furnishing of security for costs, a liquidation application is incompetent of being brought on an urgent basis. I hasten to point out that this submission is obviously incorrect. Although, it is correct that there are procedural requirements to be met, including those stated above, provided those requirements are complied with, an application for the

[5] See par 40 of the founding affidavit on indexed page 25.

liquidation of a company maybe brought on an urgent basis. A raft of other reasons were also advanced regarding urgency or the lack thereof, including that the refusal or failure to make payment by the respondent's client (Glencor Umsimbithi) in an amount of R2 594 512.00 after the applicant had made contact with the client; the alleged consequential damages suffered by the respondent and estimated at around R3 200 000.00 due to the applicant's breach of the rental agreement, and the availability of other remedies. Most of these reasons are actually applicable to the merits of the application.

[9] I preliminarily considered the matter to be urgent, hence I listened to argument on both merits and urgency simultaneously. In my view, the urgency in this matter arises primarily from the fact that the applicant had to act as it did under the circumstances in order to urgently protect its commercial interests.[6] There is a real danger that faced with its current financial difficulties, the respondent may further dissipate or misappropriate available funds or assets to the detriment of its creditors. Against the abovementioned submissions and authorities, I ruled that the matter was urgent. I now proceed to deal with the merits of the matter.

Applicant's legal submissions

[10] As already stated above, the applicant seeks the winding up of the respondent on the basis of inability to pay debts on the part of the respondent. It is argued in this regard that the respondent, despite making part payment of the debt and unfulfilled undertakings to settle the remainder, remains indebted to the applicant. Further, that book debts due to the respondent from the mining company are, if anything, unlikely to assist the respondent and they are possibly ceded to the bank for the overdraft. The latter is borne by the cash flow projections

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[6] See *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* [1982] 3 All SA 679 (W), wherein the court found that urgency on commercial interests may justify the invocation of Uniform Rule 6(12), no less than any other interest, as each case must depend on its own circumstances

attached to the respondent's answering affidavit. The applicant relies on section 345(1)(c) of the Companies Act for its case that the applicant ought to be wound up due to inability to pay debts.

Respondent's legal submissions

[11] The respondent's answering affidavit was delivered out of the stipulated time frames. Therefore, the respondent required condonation for non-compliance with the rules in this regard. The respondent explained the cause of its default. And it does not appear, including from counsel for the applicant, that the applicant was strenuously opposed to the granting of condonation. Be that as it may, I am convinced that, under the circumstances, the respondent's answering affidavit was well admitted as part of papers.

[12] Further from the respondent's grounds advanced in opposition of the issue of urgency, the following submissions are made with regard to the merits of application. The essence of the respondent's defence is that the amount owed by its own debtor, being the mining company, is capable of settling the applicant's claim grounding the liquidation application. Also, albeit rather tentatively in my view, the respondent's disputes liability of the amount owing to the applicant. The attempts to dispute liability are also manifested by the respondent's denial of the authority of Sibusiso Manqele (Sibusiso) who admitted liability and made undertakings to pay the applicant. It is said that Sibusiso is neither a director, shareholder or employee of the respondent. I find this denial rather tactical, if not contrived. Sibusiso was clearly privy to the internal and external activities of the respondent when communicating with the applicant, for him to be labelled a complete outsider to the respondent. He is also included in other communications between the applicant and the respondent, without any objection from the

respondent, including the deponent to the respondent's answering affidavit.[7] If ever he embellished or lied about his role within the respondent, the respondent did nothing to prevent the applicant from acting on the misrepresentations, save for the belated bare denials in the answering affidavit. Actually, the issue of authority of persons acting on behalf of the respondent does not end with Sibusiso. I have noted that according to the documents filed in this matter, the only director of the respondent is one Mthandeki Ncane Prince Mbele and not the deponent to the respondent's answering affidavit, who claims authority to act on behalf of the respondent *qua* shareholder.[8] It is trite that a company may only act in terms of the board of directors and not the shareholders, unless provided otherwise by its memorandum of incorporation or the 2008 Companies Act.[9] Therefore, I consider the admissions to have been properly made, although the matter will not turn on this.

[13] The respondent further argues that the applicant's unilateral and unlawful removal of the plant from the respondent's premises constituted breach of the agreement between the parties. As a result of the applicant's conduct, the respondent suffered damages in an amount of R3 200 000.00. Also, that the applicant ought to have issued summons as opposed to a liquidation application. I understood this to mean that there is a dispute of facts with regard to this matter. The latter issue was, correctly in my view, disposed of by counsel for the applicant, when he pointed out that any dispute of fact that may have existed was resolved by the acknowledgement of debt furnished by the respondent. Therefore, the determination that has to be made regarding the charge that the respondent is unable to pay its debts, has to consider

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[7] See annexures "FA11" and "FA16" to the founding affidavit on indexed pp 73 and 84, respectively.
[8] See extracts of the respondent's records kept by the Companies and Intellectual Property Commission or CIPC (i.e. annexure "FA3" to the founding affidavit on indexed p 44), accessed through a third-party service provider. The respondent admitted the records.
[9] See section 66 (1) of the 2008 Companies Act, which reads in the material part: "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

whether the amount owed by the respondent's debtor is capable of settling the applicant's claim and whether the respondent's damages claim estimated in an amount of R3 200 000.00 ought to defeat the liquidation application. The determination will be made against consideration of the applicable legal principles.

Applicable legal principles

[14] This application is premised on the provisions of section 344(f), read with section 345(1)(c), of the Companies Act on the basis that the respondent is unable to pay its debts as and when they become due or is commercial insolvent, and ought to be wound up. Section 345 of the Companies Act states three instances or situations when a company may be wound up due to inability to pay debts.

[15] Section 345 reads as follows in the material part:

> "(1) A company or body corporate shall be deemed to be unable to pay its debts if-
> (a) ...
> (b) ...
> (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
> (2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

[underlining added]

[16] Section 345(1)(c), evidently, provides for an unspecified or non-exhaustive possible instances under which a company may be found to be unable to pay its debts.[10] The applicant relied on this ground for its current application against the respondent. The following extract from *Henochsberg on Companies Act*[11] with regard to section 345(1)(c) is very helpful with regard to the determination to be made herein:

> "A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due is cogent *prima facie* proof of inability to pay its debts: "for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources" (*Rosenbach & Co (Pty) Ltd* v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 *per* Caney J). But other facts may afford such proof, eg that a number of creditors have sued the company for payment of moneys due to them, that assets of the company have been attached, or are being sold, in execution, that a negotiable instrument issued by the company has been dishonoured (see eg *In re Globe New Patent Iron & Steel Co* (1875) LR 20 Eq 337; *Cornhill Insurance plc* v *Improvement Services Ltd* [1986] 1 WLR 114 (Ch) at 117). Evidence of inability to pay its debts may be afforded by an unsatisfied demand insufficient for the purposes of s 345(1)(*a*) (*BP & JM Investments (Pty) Ltd* v *Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) at 487; *Re Capital Annuities Ltd* [1978] 3 All ER 704 (Ch) at 718; *Sunny South Canners (Pty) Ltd* v *Mbangxa* [2001] 1 All SA 474 (SCA) at 481) or by a return insufficient for the purposes of s 345(1)(*b*) (*Richard Goldman Finance (Pty) Ltd* v *Elmtree Finance & Investment Co (Pty) Ltd* 1977 (2) SA 624 (W) at 627). In *Kalk Bay Fisheries Ltd* v *United Restaurants Ltd* 1905 TH 22 it was held that the Court might properly find that the company was unable to pay its debts where it had admitted to its creditors that it could not pay, had failed to adhere to an agreement with them to effect payment in monthly instalments, had failed to pay interest due on its debenture stock and there was no explanation by it for these failures. In *In re Flagstaff Silver Mining Co of Utah* (1875) LR

[10] However in Delport, P.A. and Vorster, Q. *Henochsberg on Companies Act 61 of 1973* (electronic version) 5th edition at p 707 the following is stated regarding all three instances in terms of section 345: "And inasmuch as s 344(*f*) empowers the Court to wind up if the company is unable to pay its debts "as described in section 345", the situations in which the conclusion of law obtains, as set out in s 345, are the *only* situations in which, for the purposes of s 344(*f*), such conclusion can obtain (but *cf Ter Beek* v *United Resources* 1997 (3) SA 315 (C) at 331 (a case concerned with the winding-up of a close corporation, in which the court took the view that the provisions of s 69(1) of the Close Corporations Act were merely supplementary)); and *Body Corporate of Fish Eagle* v *Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) at 418, 428)."

[11] Delport, P.A. and Vorster, Q. *Henochsberg on Companies Act 61 of 1973* (electronic version) 5th edition.

20 Eq 268 a creditor whose claim under a judgment was paid after presentation of the application was awarded costs on the basis that the application contained evidence of the company's inability to pay its debts, namely that before the creditor had issued execution the company's solicitor had informed him that it had no attachable assets.

The mere fact that the value of a company's assets may exceed the amount of its liabilities does not preclude a finding that the company is unable to pay its debts: such a finding may be made if these assets are not readily realisable and the company has no funds with which to meet current demands – if, in other words, the company is "commercially insolvent"; in the *Rosenbach* case *supra* at 597 Caney J stated: "The proper approach in deciding the question whether a company should be wound up on this ground appears to me . . . to be that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency." The fact that a company in such a state is solvent in the sense that the value of its assets exceeds its liabilities is, however, a factor to be taken into account in the exercise of the Court's discretion whether or not to wind up; the "court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order" (*ABSA Bank Ltd* v *Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F–441A; and *Nedbank Ltd* v *Migolie Investments CC* [2007] JOL 19341 (T) at para 42…"[12]

[underlining added for emphasis]

[17] From the quotation above and the authorities cited therein, it is clear that for a liquidation application based on section 345(1)(c) to be successful, the company's inability to pay its debts ought to be proved, in any manner. In this matter, the applicant admitted liability through electronic mail and other means made by one Sibusiso, although as stated above, this is denied by the respondent. However, the respondent included cashflow projections (dated 01 April 2018) as attachment to its answering affidavit in which the respondent reflects the

[12] See *Henochsberg on Companies Act 61 of 1973* at pp 709-710.

applicant as one of its creditors in an amount of R3 285 197.00.[13] This is a clear and unequivocal admission of liability and the cashflow projections confirm that the respondent is unable to meet its obligations within existing agreed timeframes. Further, available evidence paints a picture of a respondent or debtor who is dependent on payment from its mining operations which are either insufficient to meet the current obligations or cannot be timeously secured to enable the respondent to pay its debts, as and when they become due. The respondent appears to be hopeful though and even refers to increment in rates or charges to its clients to boost its revenues. This may well be fine for the future, but it does not bode well for the current situation. The possibility of the alleged damages claim (estimated at R3.2 million) against the applicant does not change the outcome. In fact, there is nothing proffered by way of evidence establishing the basis for the alleged damages claim. There is also doubt regarding the merit of the alleged counterclaim, as available evidence appears to suggest that the applicant removed its plant because of breach of contract by the respondent by not adhering to the rental payment terms, rather than the other way around.

Conclusion and costs

[18] Therefore, I am satisfied that the respondent is unable to pay its debts as and when they become due and that the winding application ought to be granted as envisaged by the provisions of section 345(1)(c) of the Companies Act.

[19] Counsel for the respondent submitted that should the Court be convinced that liquidation a case is made out for liquidation, only provisional order should be issued as

[13] See par 15.8 of the answering affidavit on indexed p 106; annexure "M3" thereto on indexed p 126.

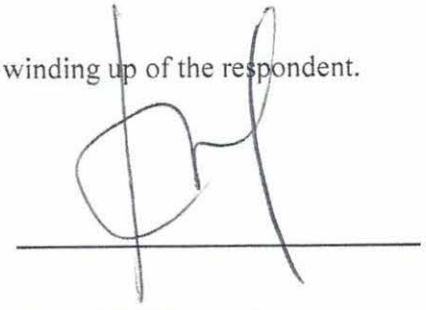
opposed to final order of liquidation. I understood this submission to have been aimed at providing the respondent with the possible opportunity to settle the debt owing to the applicant. However, when a creditor invokes the machinery of insolvency in order to recover its debt, it does so, for the benefit of the general body of creditors. Therefore, in my view, settlement of the debt owing to the applicant does not fully resolve issue of inability to pay debts on the part of the respondent, as all creditors of the debtor-respondent has to be taken into consideration. Besides, this judgment was delayed to allow the respondent to attempt amicable settlement of the matter, but in vain. Therefore, the order to be granted in this matter will be for final liquidation. I will also order that costs of the application shall be recoverable as part of the costs in the administration of the affairs of the company in liquidation.

Order

[20] For the abovementioned reasons, an order is made in the following terms:

(a) the respondent is placed under a final winding up order in the hands of the Master of the High Court, and

(b) costs of the application shall be costs in the winding up of the respondent.



K. La M. Manamela

Acting Judge of the High Court

02 May 2018