

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 45726/2017

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

22.03.2018

DATE

SIGNATURE

HA 23/3/18

In the matter between:

HOLOGRAPHIX PROPERTIES 144 (PTY) LTD

Applicant

and

DUNCAN YARDS REAL FOOD T/A PAPPAS REAL FOOD

Respondent

Date heard: 19 February 2018

Date delivered: 23 March 2018

J U D G M E N T

STRIJDOM AJ:

[1] The applicant issued and served an application for the liquidation of the respondent, alternatively that the respondent be provisionally wound-up with such a return date as the court might deem appropriate.

[2] The applicant also seeks condonation for the late delivering of the applicants replying affidavit, practice note and heads of argument.

[3] Having considered the merits of the condonation application it was dismissed by this court for the following reasons:

- (3.1) The respondent served his answering affidavit to the liquidation application on 15 August 2017. The applicants replying affidavit was to be served on or before 29 August 2017. The replying affidavit was only filed on 9 November 2017 and therefore two months out of time.
- (3.2) The applicants practice note and heads of argument were only filed on the 6th day of February 2018 approximately three months after the filing of the replying affidavit and less than two weeks prior to the hearing of this application.
- (3.3) There is no proper explanation for the fact that approximately three months lapsed since the service of the answering affidavit to the date when the replying affidavit was filed. There is further no indication of any steps taken between the 3rd of October 2017 and the 9th of November 2017.
- (3.4) There is no proper explanation why the applicants failed to file a practice note and the heads of argument subsequent to the filing of the replying affidavit.

[4] The applicant is a private company represented by the sole director of the company. The applicant alleges that it is a substantial creditor of the respondent in the sum of R259 973.10 (two hundred and fifty nine thousand rand and seventy three rand and ten cents) which amount remains outstanding despite demand.

[5] The applicant seeks to liquate the respondent in accordance with the provisions of section 345 (1)(b) read with section 348 of the Companies Act 61 of 1973 (amended by Act 71 of 2008).

Background

[6] On 12 June 2012, the applicant, represented by Karen Klasina Prinsloo as lessor, and the respondent duly represented by Mr Louis Minnaar as lessee entered into a commercial lease agreement in respect of the property situated at 1204 Prospect Street, Hatfield.¹

[7] The material terms of the agreement were inter alia, the following:

- (7.1) The amount payable in respect of rental will be R32 400 (Thirty two thousand four hundred rand inclusive of VAT) per month.
- (7.2) Rental shall be paid in advance on the 7th day of each month, free of any deduction or set-off.
- (7.3) In addition to the rental invoice, a monthly statement from Protea Metering towards

¹ See agreement annexure "C" p 21 founding affidavit

the usage of electricity will be added and a service charge of R19 per month (excluding VAT) payable to the applicant.

[8] On the 6th April 2017 the applicants attorneys served a notice in terms of section 345 of the Companies Act 61 of 1973 on the respondent, whereby payment of R206 482.32 was demanded within 21 days of service of the demand, failing which it shall be deemed that the respondent is unable to pay its debts if and when they fall due committing an act of insolvency.²

[9] Despite demand the respondent has to date, failed to pay the amount due and owing to the applicant.

[10] The respondent denies that it is indebted to the applicant in the amounts alleged or at all.

[11] It was submitted by the respondent that the applicant's application is flawed in a number of respects and that the application should be dismissed with costs.

[12] The applicant rely on section 345 (1) (b) of the Companies Act and stated in paragraphs 5 and 10 of the founding affidavit that the application for liquidation is based on the provisions of section 345 (1) (b) of the Companies Act 61 of 1973.

[13] Section 345 (1) (b) provides as follows:

"345 When company deemed unable to pay its debts

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

(b) Any process issued on a judgment, decree or order of any court in favour of a creditor of the companies returned by the Sheriff or the messenger with an endorsement that he has not found sufficient disposal property found did not upon sale satisfy such process."

[14] There is no indication in the application that there was at any stage any process issued on a judgment, decree or order of any court in favour of the applicant against the respondent. There is also no suggestion in the founding papers of any return of service by the Sheriff or the messenger of court to the effect that he has not found sufficient disposal properties to satisfy a judgment, decree or order.

² See notice annexure "C" attached to the founding affidavit

[15] It is also the uncontested allegation on behalf of the respondent that he is indeed able to pay its debts and does not fall within the ambit of section 344 (f) of the Companies Act.

[16] The applicant relies on a lease agreement annexed to the papers as annexure "C" to the founding affidavit for the allegation that the respondent owes the applicant money.

[17] It was submitted by the respondent that it appears ex facie the lease agreement that the respondent was not a party to the agreement. The tenant is described as Pappa's Real Food with no indication of any registration number or reference to the respondent. There is also no indication that the agreement was signed by and/or on behalf of the respondent. It appears that the basis for applicants' claim is one for arrear rentals for a period in 2017. The agreement stated that the lease period ended on the 30th April 2016. In terms of clause 2 of the lease relied on it is specifically stated that it ended on the 30th day of April 2016.

[18] There is no allegation in the founding affidavit to the effect that the respondent is in debt to the applicant for a specific amount within the ambit of the Companies Act. Applicant is described in the founding affidavit as a substantial creditor of the respondent in the sum of R259 973.10 in paragraph 8 of the founding affidavit. A notice in terms of section 345 of the Companies Act was served on the respondent whereby payment of the amount of R206 482.32 was demanded. In paragraph 2.2 of the section 345 notice (annexure "D") it was alleged that respondent failed to make payment of the required amounts relating to rental in the amount of R206 482.32 in terms of clause 3 of the written agreement. In paragraph 3 of the notice (annexure "D") it is stated that applicant demand payment from the respondent in the amount of R602 482.32. There is no explanation for these three different amounts that applicant demands from the respondent.

[19] The deponent stated in paragraph 12 of the founding affidavit that the property was sold and registered in the name of the new purchaser on the 15th May 2017. He then made the following allegation:

"Due to the change in ownership the existing lease was no longer valid due the principles of huur gaat voor koop, which entails that the amount due to the applicant could not be collected by means of summons."

[20] It is clear that because the applicant laboured under a wrong understanding of the legal position that the applicant proceeded to file this application.

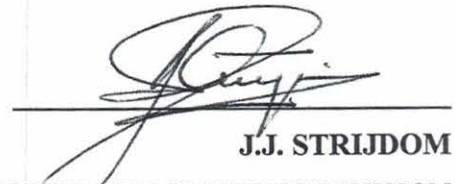
[21] It was submitted by the respondent that if the applicant on its own understanding does not have locus standi to issue summons against the respondent on what basis does the applicant have locus standi to issue liquidation proceedings against the respondent.

[22] The issues raised by the respondent in limine were not contested by the applicant in a replying affidavit. Condonation for the late filing of the replying affidavit was dismissed.

[23] In my view the issues raised by the respondent in limine were valid considerations and should be upheld.

[24] Having considered the submissions made by counsels for the applicant and respondent in limine and having read the papers I am of the view that for purpose of my judgment it is not necessary to consider the merits of this application.

[25] In the result the application is dismissed with costs on the scale of attorney and client including the costs of senior counsel.



J.J. STRIJDOM

ACTING JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

For the plaintiff: Adv. A Bosman SC
Instructed by: Jacques Classen Attorney

For the defendant: Adv. J.G. Cilliers
Instructed by: Rina Rheeders Attorneys