

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

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DATE SIGNATURE

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DATE SIGNATURE

CASE NO: 32410/2022

In the matter between:

**THUSANYO INVESTMENTS (PTY) LTD** Applicant

and

|  |
| --- |
| JUDGMENT |

**NG NATIONAL CABLING SYSTEMSTELECOMS (PTY) LTD** Respondent

**VERMEULEN AJ**

1. This matter came before me as an opposed application for liquidation. At the hearing of this matter, Mr Furstenburg appeared on behalf of the applicant and Mr Muller on behalf of the respondent.
2. The respondent filed an opposing affidavit, but it was clear from the opposing affidavit that the defences raised did not have any substance. From the opposing affidavit, the following defences, which I could identify, appeared.
3. The respondent admitted the agreements that were entered into between the parties inclusive of a deed of settlement, but alleges, that due to the worldwide Covid-19 pandemic and the influence it had on all businesses, it struggled to perform and even to perform its responsibilities to the applicant as well.
4. In paragraph 3.2 the respondent states that it always held and still holds the intention to settle its indebtedness to the applicant. The respondent denies the allegation that it is materially insolvent in “as it has been trading as a solvent concern for more than a decade.”
5. Once again, I referred to the apparent struggles which it experienced during the Covid-19 pandemic. In paragraph 5.7 however, the respondent admits that the applicant is a creditor of the respondent and in paragraph 5.6 it admits having failed to settled its liabilities to the applicant. I wish to interpose and state that I was amazed at the content of paragraph 5.3 of the answering affidavit where the respondent, on its own accord, states that the respondent is reluctant to divulge its financial records to the Court and to the applicant. Due to the relevance of this paragraph, I wish to read it into the record as follows:
   1. “The respondent is however reluctant to divulge their financial record at this time, as we perceive the conduct of the applicant as an abuse of this process in order to gain undue insight into the operations and assets of the respondent. Also, such records may be made available to the honourable Court hearing, at a later stage.”
6. I may, just for the sake of completeness, state that no records were made available to Court. In addition to the aforementioned, it was further argued by Mr Muller and I may say, eloquently argued, that, in addition to the aforementioned:

6.1 That in view of the fact that the Court was only inclined to grant provisional relief, that the test to be applied today, is mere on a prima facie basis and not on a preponderance of probabilities.

6.2 That the applicant had also instituted an action in the High Court of South-Africa Gauteng South Division wherein it obtained a default judgment where, in respect of the same amount which forms the basis of the amount now the subject of this application for liquidation. Mr Muller argued that the Court should consider that what the applicant is attempting to do, is to enforce a debt collection procedure only to the benefit of the applicant itself and contrary to the advantage of the concursus creditorum of all after creditors of the respondent.

7. I would like to deal with these defences as follows. In the first instance, and I will start with the latter one. It is not denied that the applicant has filed and served a notice in terms of section 344 (f) read with section 345 of the Companies Act upon the registered address of the respondent and that the compulsory 21 days had expired.

As a consequence of the respondent not disputing same, there is a presumption of insolvency, at least commercial insolvency that arose against the respondent. I have referred Mr Muller to the judgment of Mackay v Cahi 1962 (4) SA 193 (O) 201(A) to (G), where the Court held that,

“Once insolvency is prima facie proved, the evidential burden shifts to the debtor to prove that its assets exceeds its liabilities. The evidential burden also entails an obligation upon the respondent to put evidence before this Court in respect of what he wishes to argue.”

8. No evidence were placed by the respondent before this Court to indicate what the extent and nature of his creditors are and whether he has any other creditors, save for the applicant. The argument of the respondent in respect of the disadvantage of the concursus creditorum that it will add no merit.

In respect of the action in the Johannesburg South Division there is no prohibition against a party to have a double-barrel approach. That is actually employed very regularly where a creditor who has launched or who intends to launch an application for liquidation also institute an action for the recovering of the debt premised upon the fears that the debt may, in the interim prescribe.

9. As I have debated with Mr Muller, as I always understood the principle that the test in respect of the Badenhorst principle is, whether or not there is a bona fide dispute that can be raised in respect of the underlying debt in the liquidation proceedings.

If there is, then the applicant should not have proceeded with the application for liquidation. That principle is not applicable to the matter before the Court as I have indicated above, the respondent admits, both the underlying cause of action and the debt, and his indebtedness to the applicant, the subject matter of the present application for liquidation. I also do not see the present application as an abuse of process of the Court by the applicant.

10. The next aspect to be addressed is the respondent’s allegation that he is not materially insolvent. In matters of this nature, of sequestration or liquidation, I always favour to refer to the well-known decision of ABSA Bank v Rhebokskloof and others 1993 (4) SA 436 (C) 446 (I) to 447 (D) where the honourable Berman J, on page 446 (I) to 447 (D) held as follows:

“A debtor’s unexplained failure to pay his debt is, as was stated in Mackay v Cahi 1962 (4) SA 193 (O), referred to above at 204 (H), a fact to which the Court has always attached much weight in determining the question of solvency. The oft-repeated and with respect, eminently common-sensical and practical statement of Innes CJ in De Waard v Andrews and Thienhans Limited 1907 (TS) 707 is singularly apt in the instance content. This quotation to my mind, the best proof of solvency is, that the man should pay his debts and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.”

Words which were echoed by Briscoe J in his judgment in the same case in which was said at 739:

“After all, the prima facie test of whether a man is solvent or not is whether he pays his debts; and if he cannot pay them: that goes a long way towards proof that he is solvent.”

11. Similarly, in the matter of Afgri Operations Limited v Hamsfleet (PTY) Ltd 2002 (1) SA 91, the Supreme Court of Appeal upheld the principle of ex debito justitiae being that an unpaid creditor is as of a right entitled to a winding up order, had been additionally held at paragraph 12 as follows:

11.1 “The court a quo also did not heed the principle that in practice, the discretion of the Court to refuse to grant a winding-up order where an unpaid creditor applies therefore, is a very narrow one, that is rarely exercised and then in special or unusual circumstances only.”

12. The reason why I bring this in at this stage, is that at various points in my debate with Mr Muller, he implored upon me that the Court should exercise its general discretion in favour of the respondent not to award a provisional sequestration order as I have indicated, this discretion is a very narrow one that is very rarely exercised. I wish to continue.

13. In the unreported judgment of Marais v Westline Aviation (PTY) Ltd and others W193/2021 (2022) ZAFSHC 144 (30th of May 2022), the honourable Daffue explained the following (paragraph 23):

13.1 “It is also necessary to refer to the often quoted dictum of Berman J in ABSA Bank Ltd v Rhebokskloof (PTY) Ltd and others.

14. 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 could 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 exceeds 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 section 345 (1)(c) as read with section 344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up (24). Recently Wallis JA considered the test for commercial insolvency in a unanimous judgment of the Supreme Court of Appeal. He held as follows in Murray NO and Others v African Global Holdings (PTY) Ltd and others; third quotation (31):

15. The argument about timing, misconceived in nature of commercial insolvency, it is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company is able to meet its current liabilities, including contingent and prospective liabilities as they come due. Put slightly differently, it is whether the company – fourth quotation ‘has liquid assets already 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?’

16. Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able, in the ordinary course to pay its debts, existing as well as contingent and prospective and continue trading.’”

17. As I have indicated above, the respondent, knowing that an application for its liquidation was pending, and with full knowledge of the consequences thereof, make the decision not to disclose its financial position to either the applicant or this Court, in doing so, he left this Court in the position that I have nothing to consider his financial position in accordance with the tests as enunciated in the aforementioned case law. In the premises, the burden that has shifted to the respondent at this stage, they did not manage to discharge.

18. Lastly, Mr Muller has raised the issue, although it was not raised in the answering affidavit, that the applicant disputes the authority of the deponent of the founding papers to properly act on behalf of the applicant and that the applicant has not annexed to its founding papers any resolution authorising it to proceed with the present application for liquidation.

I am of the opinion, after having debated this issue with both counsel, that there is no merit in this point. I have referred Mr Muller and Mr Furstenburg to the discussion as it appears in Erasmus, the well-known Erasmus Superior Court Practice, volume 2 in its discussion of rule 6, commencing on page RS18, 2022, D1-55 where it, in discussion of this aspect, inter alia states the following from (i).

“The applicant’s right to apply, that is, the applicant’s locus standi, per in Scott v Hanekom, it is said that it is trite that appropriate allegation to establish the locus standi of an applicant should be made in the launching affidavit and not in the replying affidavit.

19. The deponent to the affidavit need to be authorised by the party concerned to depose thereto. It is the institution of the proceedings and the prosecution thereof that must be authorised. It is submitted that authorisation to institute motion proceedings should not be conflated with locus standi in judicio in such proceedings. Authorisation concerns proper authority to act on behalf of a party in the proceedings. Locus standi materially concerns the direct interest of a party in the relief sought in the proceedings. For the reasons rule 7(1) should be applied when ‘the authority of anyone acting on behalf of a party’, is challenged. The rule does not limit such challenge to the authority of attorneys to act on behalf of a party only, but it is submitted, including challenges to authorisations to institute proceedings in general. Properly applied, this interpretation of rule 7(1) in motion proceedings should, in the words of Flemming Deputy Judge President, in Eskom v Soweto City Council, lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants.”

20. The citation of the Eskom matter, is Eskom v Soweto City Council 1992 (2) SA 703 (W), and the relevant passage at page 207(D) to (E). This matter has also found approval in the Supreme Court of Appeal in the well-known matter of Unlawful Occupiers School Site v City of Johannesburg of which I do not have the citation with me. I think it was a judgment by the honourable Appellate Justice Grant.

21. In the premises I am satisfied that there is no proper defence and opposition at this stage to the application for liquidation. I am satisfied by Mr Furstenburg had taken me through the relevant papers, that there was also compliance with more statutory requirements. I have requested Mr Furstenburg to prepare a draft order for the Court, making provision only for a provisional liquidation and I beg leave that it be handed up.

In the premises, I make the following order.

1. THE RESPONDENT IS HEREBY PLACED UNDER PROVISIONAL WINDING UP AND A RULE NISI IS ISSUED WITH RETURN BACK THE 2ND OF MAY 2023 AT 10H00, calling upon all interested parties to show cause why the respondent should not be placed under final winding up.

2. A copy of this order is to be served on:

2.1 The respondent at its business address at 67 Regency Drive, Unit 4B, Route 21 Corporate Park, Irene, Pretoria and if service cannot be successfully affected on the aforesaid on the aforesaid address, service can occur on the registered address of the respondent.

2.2. The employees of the respondent (insofar as there may be any), at 67 Regency Drive, Unit 4B, Route 21 Corporate Park, Irene, Pretoria, and if service cannot be affected on the aforesaid address (if there are any employees), service can be affected at the registered address of the respondent.

2.3. Every trade union of the employees of the respondent (insofar as there may be any), at Drive, Unit 4B, Route 21 Corporate Park, Irene, Pretoria or on the registered address if service cannot be affected on the first mentioned business address.

2.4. The South-African Revenue Services.

5. The Master of the High Court.

3. A copy of this order is to be published, once in the Government Gazette and in the daily newspaper which circulates within the area of operations of the respondent.

4. The cost of this application are costs in the liquidation.

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**P VERMEULEN**

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

**Appearances**

Counsel for applicant: E FURSTENBURG

Attorney for applicant: HATTINGH & NDZABANDZABA ATTORNEYS

Counsel for respondents: F F MULLER

Attorney for respondents: D E MEYER ATTORNEYS

Date heard: 2 MARCH 2023

Date of Judgment: 24 APRIL 2023