



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

5 JUNE 2023

.....
.....
DATE

Case Number: 23631/2022

JAN HENDRIK BRITS

Applicant

and

SWEET EQUITY INVESTMENTS 2 (PTY) LTD

Respondent

JUDGMENT

SC VIVIAN AJ

1. In motion proceedings, the Applicant's case must be made out in the founding affidavit. The founding affidavit in this application does not make out a case for the relief sought by the Applicant.
2. The Applicant seeks an order placing the Respondent in winding up. There are different pathways for the winding up of solvent and insolvent companies. Solvent companies are wound up on terms of Part G of the 2008 Companies Act.¹ Insolvent companies are wound up in terms of Chapter 14 of the 1973 Companies Act.² The Applicant relies on Chapter 14 of the 1973 Companies Act.
3. There are two main elements that are required for the Court to place an insolvent company in voluntary winding up. First, the Applicant must show that he has *locus standi* in terms of Section 346(1) of the 1973 Companies Act. In this case, the Applicant relies on the assertion that he is a creditor of the Respondent. Second, the Applicant must establish one of the circumstances for winding up in terms of Section 344 of the 1973 Companies Act. The Applicant expressly confines his application to two of the circumstances listed in that section:
 - 3.1. The Respondent is unable to pay its debts – Section 344(f));
 - 3.2. It is just and equitable that the company should be wound up – Section 344(h).

¹ Act 71 of 2008

² Act 61 of 1973. Chapter 14 of the 1973 Companies Act is still in force by virtue of paragraph 9 of Schedule 5 to the 2008 Companies Act.

4. The Applicant does not refer to Part G of the 2008 Companies Act. That Part provides for the winding up of solvent companies. Chapter 14 of the 1973 Companies Act only applies to insolvent companies. The term “insolvent company” has been held to mean a company that is unable to pay its debts, i.e. commercially insolvent. A commercially solvent company can only be wound up under Part G of the 2008 Companies Act. A commercially insolvent company can only be wound up under Chapter 14 of the 1973 Companies Act.³

5. Accordingly, the Applicant must, in its founding affidavit, make out a case that the Respondent is commercially insolvent (unable to pay its debts) in order for Chapter 14 of the 1973 Companies Act to apply. This is so even where it relies on Section 344(h). However, in **Barbaglia**, de Villiers AJ held that because of the overlap between the provisions of Section 81(1)(d)(iii) of the 2008 Companies Act and Section 344(h) of the 1973 Companies Act: “... *it matters not that the wrong legislation was relied upon, provided that the basic contentions were made (the case was pleaded for a winding-up on a just and equitable basis), and the facts have been established. It woud [sic] be placing form over substance to hold otherwise.*”⁴

6. In a very brief founding affidavit, the Applicant referred to a related application that he had instituted against one Anthony Frederick Britz, who he describes as “the director” of the Respondent (“the related application”). It will be noted that the Applicant is Brits and the director is Britz. The Applicant did not annex the affidavits in the related application to his founding affidavit, save for limited extracts from the answering affidavit deposited to by Britz.

³ Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA) at para 22

⁴ Barbaglia N.O and Others v Noble Land (Pty) Ltd and Others (A5041/2020) [2021] ZAGPJHC 85 (24 June 2021) at para 27

7. The Respondent annexed the affidavits in the related matter to its answering affidavit. In his replying affidavit, the Applicant said that he admitted the founding affidavit and its content. But he did not refer to specific paragraphs and did not incorporate the content in his replying affidavit.
8. The Applicant's heads of argument commences with an explanation of the "background". The facts set out in this section are drawn entirely from the founding affidavit in the related application. Every reference in that section is to that affidavit.
9. Cloete JA warned:

*"It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence ... and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."*⁵

⁵ Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA) at para 43

10. I accordingly base my judgment on what is contained in the affidavits in this application, and in particular the founding affidavit.
11. The Applicant begins his explanation of his case in the founding affidavit as follows:

“In short Mr. Britz on the 14th of December 2020 informed me that he decided that he did not want any further association with me and that I would not gain any further access to the farms for which I jointly paid for the development. Britz instructed the farm manager to change the locks to the farm gate. We have issued several demands for payment letters which have been ignored. During recent interaction between the parties, we again issued a complete financial reconciliation setting out all payments made to and on behalf of Sweet Equity in order to resolve the issue. We also tendered an offer of a settlement amount acceptable to the applicant which was declined.”

12. The Applicant does not explain what the relationship was between himself and Britz. The furthest that he goes is to say that the pending application is *“predicated on a supposition”* that Britz and the Applicant are partners in a farming venture. He points out that Britz denies this partnership. But what the Applicant’s current version is cannot be deduced from the Founding Affidavit. Does he still rely on the supposition that he and Britz were in partnership? Or does he now accept that they were not in partnership?
13. The Applicant does not explain what the *“demands for payment letters”* are or to whom they were addressed. No demands for payment are annexed to the

founding affidavit. There is no explanation for the payments made to and on behalf of the Respondent.

14. The Applicant continues by referring to the version in the answering affidavit in the related matter. He does not say that he agrees with this version or set out his own version. Indeed, he says that the testimony of Britz is untrue.
15. The Applicant annexes extracts from the Respondent's bank statements that show that he made payments to the Respondent. He also annexes a schedule of payments made on behalf of the Respondent. These payments are not disputed in the answering affidavit.
16. The Applicant avers that the fact of these payments makes him a creditor of the Respondent. But it is one thing to prove that payments were made to a company. It is another to prove that the company is obliged to repay that money. It all depends on the reason for the payments. The furthest that the Applicant goes is to say that the payments were made at a time when he believed that he was contributing to the capital of a partnership with Britz. He says that he did not owe the Respondent any debt, was not donating the money to the Respondent or Britz and he "... *received nothing in return, or if Britz is to be believed: rights to shares.*"
17. It was argued that the payments were accordingly *sine causa* and that the Respondent has been unjustly enriched. No such case is made out in the founding affidavit. Payments made *sine causa* are recoverable using the *condictio sine causa*. But if payment was made due to an excusable error in the mistaken belief that the payment was owing, then such payment is recoverable

using the *condictio indebiti*. The distinction between the two *condictiones* is discussed in **Govender v Standard Bank**.⁶ If the Applicant's version is that he believed that he was contributing capital to the partnership with Britz, then, if he has a cause of action against the Respondent, it is in terms of the *condictio indebiti*. Either *condictio* requires the Applicant to plead and prove that the Respondent was enriched and he was impoverished. The *condictio indebiti* requires the Applicant to plead and prove that his error was reasonable.⁷ None of these allegations appear in the Applicant's founding affidavit. Accordingly, the Applicant does not make out a case that he is a creditor of the Respondent.

18. But even if the Applicant is a creditor of the Respondent, the Applicant does not make out a case that the Respondent is unable to pay its debts. The furthest that he goes is to assert that he believes that the Respondent does not have sufficient cash to refund the payments that he made to it or to pay its debts as contemplated in section 345(1)(c) of the 1973 Companies Act. He asserts no facts upon which this belief is based.
19. The Applicant did not make demand for payment in terms of Section 345(1)(a) of the 1973 Companies Act and accordingly cannot avail himself of the deeming provision in that subsection.
20. In terms of Section 345(1)(c), a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts.

⁶ *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C); approved in *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) at 284 G to I

⁷ *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 634 A to B

21. This requires there to be at least some evidence in the founding affidavit that the respondent company is unable to pay its debts. A creditor who launches a winding-up application without any evidence that the respondent company is unable to pay its debts is abusing the process of court.
22. The failure to pay an admitted or undisputed debt is cogent evidence of an inability to pay debts.⁸ But where there has been no demand for payment, and there is no evidence of an admission of liability, this inference cannot properly be drawn. The Applicant did not even point to any demand for payment of the alleged debts, save for the extremely vague assertions that I referred to above. The Applicant's counsel conceded in argument that there is no evidence of a demand for payment made to the Respondent prior to the winding up application being launched.
23. In such a case, something more is required. There is no closed list of evidence that can be produced from which the Court can reasonably infer that the respondent company is unable to pay its debts. But evidence is required before the Court can be satisfied that the Respondent is unable to pay its debts.
24. In this case, the Applicant has produced absolutely no evidence that the Respondent is unable to pay its debts.
25. The Respondent asserts that it is "... *not only solvent, but very solvent.*" That, of course, is not the test. A solvent company may be unable to pay its debts. It attaches an extract from its financial statements for the year ended 28 February 2021. The extract is the Respondent's statement of financial position (which used to be referred to as a balance sheet). This shows that the Respondent's

⁸ Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597 G to H

assets exceed its liabilities. But its primary liability is a “loan from shareholder”. The Respondent says that this debt has been subordinated. The statement of financial position shows that current assets significantly exceed current liabilities.

26. It is not possible to ascertain how the Respondent accounted for the payments from this Applicant from this single page. However, the inference that the Respondent is unable to pay its debts cannot be drawn from the statement of financial position.
27. There is accordingly no evidence in the founding affidavit that the Respondent is unable to pay its debts. To the extent that it is permissible for this to be cured by the answering affidavit, the evidence in the answering affidavit does not cure this deficiency. Accordingly, the circumstance in Section 344(f) has not been established.
28. For the reasons set out above, this is also fatal to the Applicant’s reliance on Section 344(h). As the Applicant has not established that the Respondent is unable to pay its debts, it has not established that Chapter 14 of the 1973 Companies Act is applicable.
29. As I noted above, in terms of the decision in **Barabaglia**, having found that the company is commercially solvent, the Court could still place the Respondent in winding up in terms of Section 81(1)(d)(iii) of the 2008 Companies Act on the basis that it is just and equitable to do so. However, this is “*provided that the basic contentions were made (the case was pleaded for a winding-up on a just and equitable basis), and the facts have been established.*”

30. Malan JA explained in **Thundercats** that:

“[15] A winding-up on this basis 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up'. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground ...

[16] Some of the categories that have been identified are the disappearance of a company's substratum; illegality of the objects of the company and fraud connected in relation to it; a deadlock; oppression; and grounds similar to the dissolution of a partnership.”⁹ [footnotes omitted]

31. Other than a passing reference to Section 344(h), the Applicant does not even assert in the founding affidavit that it is just and equitable to wind up the Respondent. In reply, the Applicant says that it is just and equitable to wind up the Respondent because Britz locked him out of the farm. This is not explained in any of the affidavits in this matter and appears to be drawn from the affidavits in the related application. That is of course not sufficient.

32. What is apparent is that there is a dispute between the Applicant and Britz. Britz is a director of the Respondent, but he is not a shareholder of the Respondent. The sole shareholder is another company. It may well be that Britz

⁹ *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA)

has an interest in that company, but that is too far removed from the Respondent.

33. The Applicant does not assert any facts that place this matter in any of the categories referred to in **Thunder Cats**. I am not persuaded that the facts justify the extension of these categories.
34. The Applicant has accordingly failed to make out a case for the Respondent to be placed in winding up.
35. The Respondent seeks a punitive costs order. In my view, this is justified. The application is an abuse of the process of court, particularly as the founding affidavit contains no factual allegations to support a conclusion that the Respondent is unable to pay its debts or that it is just and equitable to place the Respondent in winding up.
36. I accordingly grant the following order:
 - 36.1. The application is dismissed.

36.2. The Applicant is ordered to pay the costs of the application on the attorney and client scale.

Vivian, AJ
Acting Judge of the Gauteng Division
of the High Court of South Africa

APPEARANCES:

For the Applicant: Adv C. Zietsman

For the Respondent: Adv J Eastes

Date of hearing: 31 May 2023

Date Delivered: 5 June 2023