IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL HIGH COURT, DURBAN

REPORTABLE

Case No: 719/2008

In the matter between:

FIRSTRAND BANK LTD t/a WESBANK	APPLICANT
vs	
TIMEWISE COURIERS C.C (REGISTRATION NO. 2000/042105/23)	RESPONDENT

JUDGMENT

MADONDO J

INTRODUCTION

[1] The applicant seeks an order provisionally winding up the respondent on the ground that the respondent is unable to pay its debts as envisaged by the provisions of section 68(c) and (d) of the Close Corporations Act, no 69 of 1984 (the Act) read with the provisions of section 69(1)(a) of the Act.

[2] The applicant is the Firstrand Bank Ltd t/a Wesbank, a public company duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa with its principal place of business situate at no 9 Kerk Street, Bank City, Johannesburg.

[3] The respondent is Timewise Couriers CC, a close corporation duly registered and incorporated with limited liability in accordance with the Close Corporation Laws of the Republic of South Africa with its registered address situate at 82 Bulwer Road, Berea, 4001.

[4] The applicant relies on two grounds for the relief it seeks. In the first instance the applicant alleges that the respondent is indebted to it in a capital amount of R6,682.676.00, such amount being due and payable. The applicant alleges further that notwithstanding written demand, the respondent has failed to make payment of the said amount. In the circumstances, the applicant contends that it is entitled to a provisional winding-up order on the basis that the respondent is commercially insolvent and unable to pay its debts as envisaged by the provisions of section 68(c) read with section 69 of the Act. Secondly, the applicant alleges that it is entitled to relief in terms of the provisions of section 68 (d) of the Act on the basis that it is just and equitable that the respondent be wound up.

[5] The respondent does not dispute that it is indebted to the applicant in the amount referred to above. However, the applicant denies that it is in arrears with the payment of its installments. The respondent alleges that there is an error in the applicant's accounts and it attributes such an error to a change in the applicant's bookkeeping system to a new system known as "core".

[6] The respondent further alleges that with the change over to its new bookkeeping system, the applicant has failed to re-calculate the interest which was debited to the account at its inception, showing thousands of rands as being in arrears, when in fact there were no arrears. According to the respondent this has resulted in the applicant's inability to give it the settlement figure as it required a final figure in order to discharge its obligation to the applicant in full.

[7] The applicant has infact launched winding-up applications against the respondent and two other entities, namely; Precious Prospects Trading 3(Pty)Ltd and National Pride Trading 39 (Pty) Ltd. Each of the said entities is indebted to the applicant in substantial amounts. However, the two other entities share the same directors, shareholders and trade with the respondent. Since the matters are interlinked and the same argument would be advanced for all three of them, it was agreed between the parties that the decision in the present matter would determine an outcome in the two other matters.

FACTUAL BACKGROUND

[8] The respondent's indebtedness to the applicant arose from the Master Installment Sale Agreement entered into between the parties on 27 August 2004 at Durban, alternatively La Lucia Ridge. Pursuant thereto and on various dates subsequent thereto the parties entered into first schedules, being Addenda to the Master Installment Sale Agreement, which defined each vehicle the respondent

purchased from the applicant. Such schedules were subject to the terms and conditions set out in the Master Installment Sale Agreement. The schedules are in excess of 100 pages and not material to the issues in the present case.

[9] It was an essential term of the contract that the ownership of the purchased goods would vest in the seller until the payment of the last installment. In the event of the respondent breaching any of the conditions of the agreement or failing to pay any amount due to the applicant, the applicant would have the right (without affecting any of its other rights) to cancel the agreement and claim from the respondent the amount which it would have been paid had the respondent fulfilled all its obligations. In which event, the applicant would be entitled to take the goods back, sell them, and keep all the payments the respondent had made and claim the balance, if there was any, from the respondent or damages, if there were any, or the full amount owed in terms of the agreement would become due and payable.

[10] In breach of the terms of the agreement the respondent failed to punctually pay monthly installments. As a result, on 13 March 2007 the respondent was two installments in arrears. The applicant, accordingly, instructed its attorneys to take steps to force the respondent to comply with its obligations in terms of the agreement. In turn, Mr Coetzee of Rossows Incorporated telephonically contacted the respondent's legal representative, Yousuf Omarjee, and requested him to ask the respondent to honour its

obligations by paying the outstanding amounts forthwith. The respondent then made three payments.

[11] In a letter dated 19 March 2007, the applicants' attorneys told the respondent that should its account fall into arrears, even as little as for one day, the account would forthwith be cancelled and the assets repossessed. Subsequent thereto, the respondent made payment by means of a cheque. On 16 October 2007 the applicants' attorney wrote the respondent a letter acknowledging the receipt of the cheque deposited towards the settlement of the respondent's accounts.

[12] However, on 19 October 2007 the aforesaid cheque was returned to the applicant unpaid. The applicants' attorneys then wrote the respondent a letter and informed it that the cheque it had drawn in favour of the applicant had been dishonoured by the Wesbank. The respondent's failure to honour its obligations in terms of the agreements, according to the applicant, resulted in the cancellation of the agreement on 22nd October 2007.

[13] In a letter dated 29 October 2007, addressed to the applicants' attorneys, the respondents' attorneys, Shaukat Karim & Co, enquired as to what the arrears were.

[14] On 30 October 2007 the respondents' attorneys wrote the applicants' attorneys a letter in which they advised the respondent that the applicant had cancelled all the agreements in respect of the equipment and that it was in the process of drafting papers for the recovery of its assets. Notwithstanding all this, the respondent failed to pay the amounts owing to the applicant.

[15] On 7 November 2007 the applicants' attorneys addressed the letter to the respondent in terms of the provisions of the Act, in which they listed the outstanding balance in respect of each vehicle. The letter was also demanding that the respondent should pay the amount due, owing and payable by it to the applicant within three (3) weeks of the delivery of the notice.

[16] Further, the respondent was in such letter advised that should it fail to pay the required amount within the time given in the letter, it would be deemed to be unable to pay its debts. The respondent was further notified that the letter also served as a demand in terms of section 69(1)(a) and that the failure to fully comply with such letter might result in the applicant proceeding with an application for an order winding up the respondent.

[17] Notwithstanding such demand, the respondent failed to make any payment towards the settlement of its accounts. In consequent thereof, the applicant has concluded that the respondent is unable to pay its debts.

[18] The applicant holds security for the respondent's indebtedness to it, being deeds of suretyship signed by the respondents' members, cession of book debts as well as the immovable property hypothecated in favour of the applicant. However, the applicant alleges that such security is insufficient.

ISSUES

[19] The issues to be determined in this matter are whether;

19.1 the respondent is unable to pay its debts, alternatively, whether the respondent be deemed to be unable to pay its debts;

19.2 It is just an equitable that the respondent be wound-up.

[20] Section 68 Provides:

" Liquidation by Court-
A corporation may be wound up by a Court, if –
(a) …
(b) …
(c) the corporation is unable to pay its debts; or
(d) it appears on application to the Court that it is just and equitable that the corporation be wound up."

[21] The onus is on the respondent to dispute the claim, upon which the liquidation application is predicated, on *bonafide* and reasonable grounds. See *Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346(T) at 348B; Kalil v Decotex (Pty)Ltd and another 1988(1) SA 946 (A) at 980 B-D; Halse-Reuter and another v Heg Consulting Enterprises (Pty) Ltd 1998(2) SA 208(C) at 219F- 220A.*

[22] The question to decide is whether the respondent's defence relating to an error in the bookkeeping system of the applicant, can be said to be *bonafide* and based on reasonable grounds. The respondent avers that the applicant has failed to re-calculate the interest, which was debited to the account at its inception and that as a result, this has caused the account to incorrectly show thousands of rands as being in arrears. However, the respondent has failed to demonstrate how the alleged situation could have occurred, by providing documentary proof thereof. In the premises, this renders the respondent's defence statement not only bald but also vague and sketchy. See *Breytenbach v Flat SA (Edms) Bpk 1976(2) SA 226 (TPD) 228D-F.*

[23] Notwithstanding the allegations that there are errors in the applicant's accounts caused by a change in its bookkeeping system to a system known as "Core", the respondent never addressed a letter to the applicant complaining about its accounting system. Nor has the respondent on such ground disputed an amount owing. In the premises, I am not satisfied that the respondent has on the balance of probabilities shown that the dispute to its indebtedness to the applicant is *bonafide* and based on reasonable grounds.

[24] About the proper approach to be adopted in deciding the question whether a company should be wound on the ground of its inability to pay its debts, **Cane J** in *Rosenbach & Co (Pty)Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597C-D* had the following to say:-

> "… 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 cause of business, it is in the state of commercial insolvency."

[25] It is apparent from the decided authorities that the decisive factor in this regard is whether the company can pay its debts in the sense of meeting current demands. See *Exparte De Villiers NNO In re: Carbon Developments (Pty) Ltd 1992(2) SA 95 (W) 112B-F.* In the present case, it is not in dispute that since the day a cheque, the respondent had drawn in favour of the applicant in settlement of its accounts was dishonoured, 19 October 2007, to the date of the hearing of this application, 15 May 2009, the respondent had not made any payment towards the settlement of its accounts with the applicant. Notwithstanding a threat by the applicant to repossess the assets, in the event of the respondent failing to make any payment within three (3) weeks of the letter of demand, the respondent failed to make any payment towards the settlement of its accounts.

[26] However, the respondent has alleged that on 3 December 2007 it applied for a settlement figure in order to discharge the applicant's claim in full. According to the respondent the applicant failed to give a final figure and as a result, the respondent failed to discharge its obligations in terms of the agreement in full. It is common cause that for the final figure the applicant referred the respondent to its legal department. It is also common cause that the respondent did not do as the applicant requested it to do. Instead, the respondent deridingly found it a mystery that the settlement figure had to be obtained from the applicant's

attorneys who, according to the respondent, presumably do not have the final computerized figures.

[27] The respondent has a duty to prove that it has paid all amounts owing to the plaintiff. See *Breytenbach* case, *supra, at 223.* The applicant has at not stage tendered any documentation as proof that the amounts owing to the applicant has been paid at all. Requesting the final figure, in my view, does not constitute tendering payment. Nor has the respondent indicated by how much it intended to settle its account in full. All this, clearly shows that the respondent was engaged in delaying tactics and not intending to make any payment at all. The respondent's intention to discharge of its obligations to the applicant in full, was dependent on the applicant's supply of a settlement figure to the respondent and it was therefore conditional. This, in my view, is sufficient to manifest an intention not to settle its accounts with the applicant even by a fraction. See also *Body Corporate of Fish Eagle v Group Twelve Investments 2003 (5) SA414 (WLD) 430A-B.*

[28] The respondent has failed to disclose to this Court its financial statements as proof of its ability to pay its debts. Nor has the respondent put up sufficient facts upon which this Court can weigh up the question whether the respondent can pay its debts. See *Hart v Pinetown Drive – in Cinema (Pty) Ltd 1972(1) SA 464 (A) at 469.* In *Johnson v Hirotec (Pty) Ltd 2000 (4) 930 (SCA) 933J- 934 A,* it was stated that factual insolvency may, in an appropriate case, be indicative of

the company's inability to pay its debts. In *Exparte De Villiers, In re Carbon Developments (Pty) Ltd (in liquidation) 1993(1)SA 493(A) at 502E,* factual insolvency was held to be a relevant and material factor in deciding whether a Court should exercise its discretion to grant a winding-up order.

[29] Failure to pay a debt has been held to be a clear indication of inability to pay debts. *Prudential Shoppers SA Ltd v Tempest Trading Co. Ltd 1976(2) SA 856 (W) at 869 D.*

[30] On this question, **Stegmann J** in *Exparte De Villiers and another NNO: in re Carbon Developments 1992 (2) SA 95* said:

> "…a company's failure to pay an undisputed debt currently due is in certain circumstances accepted as evidence of 'commercial insolvency' sufficient to justify at least a provisional winding –up order without wanting to determine whether or not the company's liabilities in fact exceed its assets."

The respondent by its conduct has, in my view, sufficiently demonstrated that it is commercial insolvent. This provides a sufficient ground for the granting of an order provisionally winding-up the respondent. A company is commercial insolvent even if its assets exceed its liabilities. See *Taylor and Steyn NNO v Koekemoer 1982(1) SA 374 (T).*

[31] It has been argued on behalf of the respondent that the respondent has sufficient security for its indebtedness to the applicant. However, it is not in dispute that the three entities referred to above, hold one and the same security

for its indebtedness to the applicant. As a result, the applicant contends that such fact renders the security in question insufficient. The applicant alleges further that the amounts by which the respondent is in all three entities, namely; Precious Prospects Trading 3(Pty) Ltd, National Pride Trading 39(Pty) Ltd and the respondent corporation, indebted to the applicant, put together, far exceed the value of the security the respondent has furnished. Each of the three entities is indebted to the applicant in substantial amounts of money. Therefore, the issue relating to the adequacy of security falls to be resolved in favour of the applicant.

[32] The applicant has correctly submitted that the registered mortgage bond constitutes illiquid security. For the applicant to derive any benefit there from, it must first obtain judgment against the surety. I know of no law in this country which requires the unpaid creditor to do an excursion first before approaching the High Court for an order winding-up the defaulting debtor company.

[33] I now move to determine the alternative issue whether the respondent can be deemed to be unable to pay its debts. Section 69 provides:-

> "Circumstances under which corporation deemed unable to pay its debts –
> (1) for the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if -
> (a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office a demand requiring the corporation to pay the sum so due; and the corporation has for 21 days thereafter neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the creditor; or
> (b) …

(c) It is proved to the satisfaction of the Court that the corporation is unable to pay its debts."

Apart from the grounds of opposition to the application, to which I have referred to above, counsel for the respondent has raised an argument that since the applicant has elected to repossess the assets, sell same, credit the respondent's account and claim damages should there be any, it elected to proceed by way of an illiquid damages claim, and that such an election has rendered the utilization thereafter of section 69(1)(a) of the Act inapplicable.

[34] In *Effune v Hancock 1923 Tpd 355 at page 364* **De Waal J**, said the following:-

> "where a creditor alleges an act of insolvency and proves his claim, he has the unfettered right to choose his form of execution, one of which is to sequestrate the debtors estate."

The great weight of authority is that generally speaking an unpaid creditor has a right *ex debito justitiae* to a winding- up order against a company unable to pay its debts. *Service Trade Suppliers Ltd v Dasco & Sons Ltd 1962 (3) SA 424(TPD) 428.*

[35] In clause 14 of the Sale Agreement, headed, "Breach", it is provided:-

> "If you fail to comply with any of the conditions of this agreement …, or fail to pay any amounts due to the Seller, or commit any act of insolvency, or you have made misleading or inaccurate statements to the Seller relating to financial affairs … then the Seller will have the right (without affecting any of its other rights):

14.1.1 to cancel the Agreement and claim from you the amount which the Seller would have been paid had you fulfilled all obligations. To this end, the Seller will be entitled to take the goods back, sell the goods, keep all payments you have made and claim the balance (if any) from you as damages; or
14.1.2 to claim immediate payment of the full amount that the Seller could claim in terms of the Agreement, as if it was the due by you."

[36] It is apparent from clause 14 that the applicant is entitled to repossess the assets without jeopardizing any of its other rights, obviously, including its right to a winding-up order against a debtor company which is unable to pay its debts. The mere indication by the applicant to the respondent that it intended to repossess the assets, which did not materialise, could not bar the applicant from choosing another form of execution which it deemed more appropriate. Since the applicant did not repossess the assets, as it had threatened, and its claim is for a liquidated amount of money, which in terms of the sale agreement is due and payable, I do not find any merit in the argument raised on behalf of the respondent that the applicant elected to proceed by way of an illiquid damages claim. The applicant had a choice to repossess the assets or to wind-up the respondent and it eventually chose to do the latter.

[37] However, it has been argued on behalf of the respondent that the letter of demand in terms of section 69 of the Act had not been delivered at the registered address of the respondent's close corporation. The papers do not raise such an issue, despite the fact that the applicant had in its founding affidavit (paragraph 6.4) categorically stated that the Sheriff served the letter of demand at the respondent's registered office.

[38] The perusal of the papers, however, indicates that the allegation by the applicant that the letter of demand was served at the registered address of the respondent could not be true and correct in that the respondent's registered office is 82 Bulwer Road, Berea, and the letter was served at 358 South Coast Road, Durban, being the respondent's main principal place of business, instead. No explanation has ever been furnished as to why the letter was not served at the registered office of the respondent. Normally, the application should fail on this ground alone. See *Investments v Hardboard (Pty) Ltd 1977 (3) SA 753 (WLD) 760A.*

[39] In *Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004(1) SA 35,* it was held that in an application for an order deeming the respondent to be unable to pay its debts, there must be due compliance with the provisions of section 69(1)(a) of the Act. However, having been satisfied on the main issue that the respondent is unable to pay its debts, I hold, the applicant's failure to comply with the provisions of section 69(1)(a) will have no bearing on the outcome of this application.

[40] In the light of my decision on the first issue, I find it unnecessary to determine the second issue raised in this matter, whether it is just and equitable to wind-up the respondent.

ORDER

In the result, I make the following order:-

1. A provisional winding-up order is granted against the respondent returnable on 15 December 2009.

2. That a copy of the order be served forthwith upon the respondent at its registered office.

3. That a copy of the order be published on or before 20 November 2009, once in the Government Gazette and once in a newspaper published in Durban and circulating in KwaZulu-Natal.

4. That the costs shall be costs in the winding-up of the respondent.

Date Reserved on:	22 May 2009
Date Handed down:	16 October 2009
Counsel for Applicant:	Adv Meyer
Instructed by:	M/S ROSSOUWS ATTORNEYS C/O LEGATOR McKENNA INC. (Ref: M12786(3)JJ Coertze/dg)
Counsel for Respondent:	Adv Pillemer SC
Instructed by:	SHAUKAT KARIM & COMPANY (Ref: Mr S Karim /PM/T337)