



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 732/2022P

In the matter between:

ABSA BANK LIMITED

APPLICANT

and

**AFRIFURN MANUFACTURING (PTY) LTD
(REGISTRATION NO: 2016/338668/07)**

RESPONDENT

Coram: Mossop J

Heard: 14 March 2023

Delivered: 27 March 2023

ORDER

The following order is granted:

1. The respondent is provisionally wound up.
2. A rule nisi is issued calling upon the respondent and all interested parties to show cause to this court on 16 May 2023 at 09h30, or so soon thereafter as the matter may be heard, why the respondent should not be finally wound up.

3. The relief set forth in paragraph 1 of this order shall operate as a provisional order winding up the respondent with immediate effect.
4. A copy of this provisional order is to be served upon the respondent at its registered office, the Master of the High Court, the South African Revenue Service and the respondent's employees and trade unions.
5. A copy of the provisional order is to be published on or before 28 April 2023, once in the *Government Gazette* and once in a daily newspaper published and circulating in KwaZulu-Natal.
6. The costs of this application shall be costs in the winding-up of the respondent.

JUDGMENT

MOSSOP J:

[1] This is an opposed application in which the applicant seeks an order provisionally liquidating the respondent. The grounds for the relief claimed is that the respondent is deemed to be insolvent by virtue of the provisions of section 344(f), read with section 345(1)(a) and (c), of the Companies Act 61 of 1973 (the old Act), as read with item 9 of Schedule 5 of the Companies Act 71 of 2008.

[2] The applicant was represented when the matter was argued by Mr Pietersen and the respondent was represented by Mr Kissoon Singh SC who, I must point out, did not draw the respondent's heads of argument. Both counsel are thanked for the assistance that they have provided to the court.

[3] The applicant is a major financial institution that operates throughout South Africa. The respondent is a private company based in KwaDukuza, KwaZulu-Natal. On 19 June 2019, the parties concluded a written agreement, described on the face of that document as being a 'Mortgage Backed Business Loan' (the agreement), in terms of which the applicant agreed to advance to the respondent a loan in the

amount of approximately R5 million. The parties agreed that the respondent was to repay the loan in 120 monthly instalments. In the event of the respondent falling into arrears with its payment obligations, the parties further agreed that the applicant could establish the quantum of its indebtedness to the applicant by way of a certificate of balance (the certificate) given by an authorised employee of the applicant whose appointment and authority did not have to be proved. As security for the amount to be advanced to it, the respondent was required to pass a mortgage bond over certain immovable property that it owns in KwaDukuza. It did so.

[4] It is appropriate to mention at this juncture that there is an action proceeding in this court for the repayment to the applicant of the respondent's alleged indebtedness to it. I was advised from the bar that the respondent has pleaded to the applicant's particulars of claim, that pleadings had closed and that an amendment was then introduced to the particulars of claim but that the pleadings have now closed for a second time. The pleadings in the action have not been placed before this court.

[5] It has not been directly disputed in the answering affidavit that the applicant advanced the loan amount to the respondent. I shall therefore regard the loan as admitted. The applicant alleges that the respondent fell into arrears with its instalment payments. As the applicant bluntly puts it, the respondent 'stopped paying the monthly instalments', and as at 30 November 2021 was in arrears with its repayment obligations in the sum of approximately R730 000. The total amount owing to the applicant was the sum of approximately R5,9 million on that date. This was confirmed in the certificate that the applicant issued. The respondent appears to dispute all of these allegations.

[6] According to the applicant, as a consequence of the respondent's failure to make payments that it was obliged to make, a demand (the demand) was delivered to the respondent's registered address by the sheriff. It claims that it is a written demand as contemplated in section 345(1)(a) of the old Act.

[7] Section 345(1)(a) reads as follows:

'(1) A company or body corporate shall be deemed to be unable to pay its debts if—
(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor'.

[8] It is necessary to dwell for a moment on the content of the demand, given the excitement that it has generated in this matter. It plainly reveals that it was delivered in accordance with the provisions of section 345(1)(a) of the old Act. It demanded the repayment from the respondent of an amount of R5 894 028.43 within the statutorily defined period. It further stated the following:

'In this regard we draw your attention to Section 345(1)(a) of the Companies Act 61 of 1973, as amended, which states ...'.

What thereafter appears in the demand is a verbatim narration of the provisions of section 345(1)(a) of the old Act. The demand goes on to state the following:

'8. Should you therefore neglect to pay the said amount or to secure or compound for it [sic] to the reasonable satisfaction of our client within TWENTY ONE (21) DAYS of receipt of this the demand, you will, in terms of the abovementioned Section, be deemed to be unable to pay your debts.

9. The effect of the abovementioned section is that our client will be able to proceed to apply for the liquidation of yourselves pursuant to section 345(1)(a) on the basis of your deemed inability to pay your debts.'

[9] The demand elicited no reaction from the respondent, which did not pay the amount demanded of it nor did it secure or compound that amount to the reasonable satisfaction of the applicant. Thus, so the applicant contends, the law deems the respondent to be insolvent.

[10] Multiple defences are raised by the respondent in its answering affidavit. Not all

of them were persisted with in argument. Those that were persisted with are trenchantly set out in the heads of argument prepared on the respondent's behalf. Each must be considered.

[11] The first defence raised is that the applicant has failed to establish a breach of the agreement. It is submitted that the applicant has not put up a schedule of the payments made by the respondent from which a missed payment or payments by the respondent can be discerned. That may be correct. However, in terms of section 345(1)(a) of the old Act, all the applicant had to establish was that the respondent was indebted to it in an amount not less than R100. It was not required to establish the respondent's indebtedness to it in granular detail.

[12] The specific allegation that the respondent 'stopped making payments' that it was obliged to make and consequently fell into arrears that totalled R730 000 by 30 November 2021 is a statement of some significance by the applicant. How that specific allegation is addressed in the answering affidavit is, in my view, also of some significance when considering this specific defence.

[13] In its answer to this allegation, the respondent did not deny that it was in arrears or that it had stopped making payments to the applicant. Instead, it raised other points of criticism of the applicant's case and then made an oblique reference to the effects of the Covid-19 pandemic, the high watermark of that reference being that it was alleged that because of Covid-19, the respondent's obligations 'were suspended'. This is a legal conclusion. For it to be upheld, the facts entitling this conclusion to be drawn must be revealed. The respondent has, however, been rather coy in doing so. The respondent has not specifically stated that it did not make all the required instalments. It rather prefers the court to infer that this is the case. This is presumably because it could not dispute that it was potentially in arrears if it conceded that it had not paid all the prescribed instalments. I can conceive of no need to make reference to the blight of Covid-19 if all payments due by the respondent to the applicant had been made. The inclusion of this allegation ineluctably drives one to the conclusion that it was mentioned because not all the

required instalments had been made by the respondent. Without disclosing the facts establishing the legal conclusion advanced by the respondent it is not possible to determine that the respondent has a bona fide defence to the applicant's allegations. The principle established in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*¹ accordingly does not avail the respondent.

[14] The applicant's allegations regarding the failure to pay and the quantum of the respondent's arrears needed, in my view, to be directly addressed by the respondent if this ground of defence was to be sustained. It did not do so.

[15] The respondent did, however, make the following statement in its answering affidavit:

'I dispute that the amount the applicant claims to be in arrears is correct in all material respects. The applicant has not alleged or proved what amounts constitutes the monthly instalments, for which amounts the respondent was allegedly in breach and how the sum it claims to be the total arrear amount has been calculated.'

Significantly, in this statement the respondent did not deny the fact of the arrears, but merely that it was not correct 'in all material respects'. That means that in certain material respects it is correct. What the incorrect aspects were was not identified. The further allegation that the applicant had not alleged or proved the amount of each instalment was incorrect. This was established by the applicant in at least three ways:

- (a) In the founding affidavit, where the applicant stated that each instalment was in the sum of R70 302.72 per month;
- (b) In the commercial terms part of the agreement where the amount of the instalment is stated to be R70 302.72 per month; and
- (c) By way of attaching a schedule to the agreement reflecting, inter alia, the date, day of the week, interest rate and amount of each instalment as from 7 January 2023: the figure of R70 302.72 appears in the last column throughout the schedule.

[16] The respondent also denied the accuracy of the certificate relied upon by the applicant to establish the respondent's total indebtedness to it. No explanation was forthcoming for this denial: the respondent chose merely to dispute the accuracy of

¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

the certificate but gave no hint as to why it contended that it was inaccurate. It did not state, for example, that it had made payments to the applicant that had not been accounted for by the applicant. It is settled law that where parties have agreed to the use of a certificate of balance, they may agree that it constitutes *prima facie* proof of what is stated therein. In *Ex parte Minister of Justice: In re R v Jacobson and Levy*,² Stratford JA stated:

“*Prima facie*” evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence.’

If the *prima facie* evidence or proof remains unrebutted at the close of a case, it becomes ‘sufficient proof’ of the fact or facts (on the issues with which it is concerned) which are required to be established by the party bearing the onus of proof.³

[17] To baldly deny something without disclosing the reason for such denial does not, in my view, create a genuine dispute of fact. As was stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*:

‘A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.’⁴

The respondent, which bore the onus of disturbing the accuracy of the certificate, has not, in the circumstances, done so. I must therefore conclude that the respondent is indebted to the applicant in an amount of approximately R5,9 million. There is accordingly no merit in the first ground of defence.

² *Ex parte the Minister of Justice: In re Rex v Jacobson and Levy* 1931 AD 466 at 478.

³ *Salmons v Jacoby* 1939 AD 588 at 593.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

[18] The second ground of defence is that the provisions of the agreement did not allow for the full indebtedness then in existence to immediately fall due on the occurrence of a breach of the agreement. In other words, there was no provision permitting the applicant to claim the accelerated payment of the total indebtedness upon the occurrence of a breach by the respondent.

[19] Clause 22 of the standard terms applicable to the agreement is headed 'Events of Default'. The preamble to the clause reads as follows:

'Each of the events or circumstances set out in this Clause 22 is an Event of Default (save for clause 22.15 (consequences of default))'.

Clauses 22.1 to 22.14 then appear below the abovementioned words, each sub clause being linked by the conjunction 'or'. The fifteenth sub-clause under this heading is not linked by that conjunction and reads:

'22.15 any event occurs in relation to a Relevant Party in any jurisdiction which is substantially similar to any of the events specified in clause is 22:1 to 22.14 above then, in any such case the Bank may, in addition to any other rights it may have in law, on written notice to the Borrower:

- (a) review the Facility;
- (b) cancel the Available Facility;
- (c) increase the Interest rate Margin by a further 2% per annum for so long as the default continues;
- (d) declare that all or any part of the Loan become immediately due and payable;
- (e) claim immediate payment of all or any part of any amounts outstanding under any Finance Document;
- (f) exercise its rights under any Security;
- (g) cancel this Agreement; and/or
- (h) institute action for damages.'

[20] Clause 22 accordingly does contain an acceleration clause. The respondent contends, however, that based upon the wording of that clause, the applicant only had the right to accelerate payments insofar as any event of default arose in respect of a 'relevant party'.

[21] At first blush, that argument held some attraction, as this is what the agreement, on a simple reading thereof, appeared to state. However, to maintain this

attraction, it would be necessary to overlook the fact that it was passing strange that the applicant, who drew the agreement, only afforded itself the right to accelerate the payment of amounts due to it if an event of default occurred in relation to a 'relevant party' and not to the respondent itself. Could this, possibly, be so?

[22] The answer is to be found in the definition of the term 'relevant party'. On the first page of the agreement, it is defined as follows:

'The Borrower and The Guarantor(s) and their Subsidiaries and any other person who has given a guarantee or a Security Interest in relation to the Facility.'

The agreement defines the respondent as 'the Borrower'. The respondent is thus both the borrower and a relevant party. The right to take any of the actions mentioned in clause 22.15 of the agreement accordingly applies to the respondent as well. The applicant thus did have the right to accelerate the respondent's payments. The second ground of defence must also fail.

[23] The third and final ground of defence hinges on an allegation that the statutory demand relied upon by the applicant, namely the service of the demand, is defective and does not permit the applicant to rely upon the deemed ground of insolvency found in section 345(1)(a) of the old Act. The basis for this is that despite the explicit content of the demand, the deponent to the founding affidavit asserted in that affidavit that the demand had been served in terms of section 69 of the Close Corporations Act 69 of 1984 (the Close Corporations Act) and not in terms of section 345 of the old Act. In its replying affidavit, the applicant acknowledged that it had referred to the incorrect Act in its founding affidavit. The respondent, nonetheless, argued that the applicant had not made out a case for the relief that it claimed in its founding affidavit by virtue of the incorrect reference to the applicable Act.

[24] The respondent is plainly a private company and not a close corporation. The demand itself, as previously set out in this judgment, only makes reference to section 345(1)(a) of the old Act. There is no reference whatsoever to the Close Corporations Act in the demand. In substance, the demand complies with the requisites of the old Act. The fact that the deponent to the affidavit refers to the incorrect Act does not detract from the efficacy of the demand or its consequences. To hold that the

demand was compromised by an incorrect description of the Act would be to elevate appearance over form.⁵ When the demand was received by the respondent, it could not have been clearer to anyone reading it that it was being delivered in terms of section 345(1)(a) of the old Act. What was required of the respondent was made explicit by the narration of the provisions of that section. The respondent was not at liberty to ignore the demand based upon an expectation that the Act that the demand was predicated on would later be misdescribed in a future liquidation application. The demand was sent with the requisite intent and knowledge of the consequences of non-compliance with it and that intent cannot be eroded by an error in description made at a later date.

[25] It was further argued by Mr Kissoon Singh that another demand may well have been sent in terms of the Close Corporations Act and that the founding affidavit may thus be correct when it makes reference to that Act. I fail to see the relevance of this. If another demand was sent in terms of the Close Corporations Act, it would have no legal effect as the respondent is not a close corporation. But one can be reasonably confident that this is not what occurred: if a second demand had been delivered to the respondent in terms of the incorrect Act it would surely have been attached to the answering affidavit. It was not.

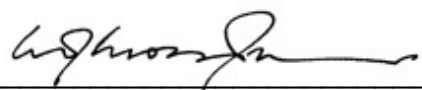
[26] As pointed out in the replying affidavit, this ground of defence is entirely opportunistic in its nature. The argument that the applicant did not make out its case in the founding affidavit cannot be sustained. The third ground of defence to the application must accordingly fail.

[27] I accordingly find that the applicant has established that it is a creditor of the respondent in excess of the statutory threshold amount, that it served a demand upon the respondent in terms of the provisions of section 345(1)(a) of the old Act and that the respondent failed to pay the amount demanded, or to secure or compound it to the reasonable satisfaction of the applicant, and is thus deemed to be insolvent. The respondent has not demonstrated the existence of a bona fide defence to the applicant's claim.

⁵ *Goncalves and another v Franchising to Africa (Pty) Ltd t/a Gold Brands* [2016] ZAGPPHC 960 para 28.

[28] I therefore grant the following order:

1. The respondent is provisionally wound up.
2. A rule nisi is issued calling upon the respondent and all interested parties to show cause to this court on 16 May 2023 at 09h30, or so soon thereafter as the matter may be heard, why the respondent should not be finally wound up.
3. The relief set forth in paragraph 1 of this order shall operate as a provisional order winding up the respondent with immediate effect.
4. A copy of this provisional order is to be served upon the respondent at its registered office, the Master of the High Court, the South African Revenue Service and the respondent's employees and trade unions.
5. A copy of the provisional order is to be published on or before 28 April 2023, once in the *Government Gazette* and once in a daily newspaper published and circulating in KwaZulu-Natal.
6. The costs of this application shall be costs in the winding-up of the respondent.



MOSSOP J

APPEARANCES

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Date of Hearing : 14 March 2023

Date of Judgment : 27 March 2023