THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 205/14
Reportable

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

HAMMERLE GROUP (PTY) LTD **RESPONDENT**
(Formerly Clidet No 773 (Pty) Ltd)
(Registration number: 2007/018552/07)

Neutral citation: *Absa Bank v Hammerle Group* (205/14) [2015] ZASCA 43 (26 March 2015)

Coram: Brand, Maya, Cachalia, Mhlantla and Mbha JJA

Heard: 13 March 2015

Delivered: 26 March 2015

Summary: Winding-up – where debt giving rise to application for winding-up has been subordinated to other creditors of the respondent – applicant is a contingent creditor and is entitled to institute winding-up proceedings against the respondent – admission of insolvency – exception to what would otherwise be privileged communication.

ORDER

On appeal from the North Gauteng High Court, Pretoria (Mabuse J) sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the North Gauteng High Court, Pretoria, is set aside and substituted with the following order:
'(a) The respondent is liquidated in the hands of the Master of the High Court.
(b) Costs of the application, including the cost of two counsel, will be costs in the winding-up of the respondent.'

JUDGMENT

Mbha JA (Brand, Maya, Cachalia and Mhlantla JJA concurring)

[1] The appellant launched an application in the North Gauteng High Court, Pretoria for the winding-up of the respondent on the ground, inter alia, that the respondent was commercially insolvent and unable to pay its debts as envisaged in s 345 of the Companies Act 61 of 1973 (the Act). The court a quo (per Mabuse J) dismissed the application on the basis that (a) part of the debt giving rise to the application was extinguished by prescription; and (b) the remainder thereof was not yet due and payable as it had, by agreement between the parties, been subordinated to the debts of other creditors of the respondent. This appeal against those findings is with leave of the court a quo.

[2] The relevant background to the dispute can be summarised as follows. Pursuant to a loan agreement concluded between the parties on 6 December

2007 (the loan agreement), the appellant advanced a loan of R4 million, which together with interest thereon would be repayable in 60 instalments of R96 045,70 from 1 January 2008. The purpose of the loan was to finance the respondent and its business. The indebtedness arising under this loan agreement was secured by a Special and General Notarial Covering Bond (the Bond) which was registered by the Registrar of Deeds in favour of the appellant on 13 December 2007. In terms of clause 2 of the bond, the respondent bound certain of its movable property specially and generally as security for its obligations to the appellant.

[3] On 19 November 2007 the appellant, the respondent, Mfiso Investments (Pty) Ltd and Uwe Christian Hammerle concluded a Subscription and Shareholders Agreement (the subscription agreement) in terms of which the appellant loaned and advanced to the respondent the sum of R10 million. The purpose of this loan, which took on the form of a shareholders loan, was to enable the respondent to fund the acquisition of the respondent's business and assets. By virtue thereof, the appellant acquired a minority shareholding in the respondent. In terms of the subscription agreement the loan was repayable in 60 (sixty) equal monthly instalments consisting of the capital repayment amount and interest and became repayable immediately under certain circumstances, for example, if the respondent breached any material term or condition of the agreement.

[4] The appellant averred in the founding affidavit that as at 31 May 2011, the respondent was indebted to it in the total amount of R21 005 197,46. This amount comprised of (a) R4 693 437,78 owing under the loan agreement and the notarial bond, and (b) R16 311 759,68 arising from the subscription agreement. The respondent denied in the answering affidavit that it was indebted to the appellant and raised two defences. First, that the appellant's claim under the loan agreement had prescribed and consequently that the debt had become extinguished. Secondly, that the loan advanced to the respondent in terms of the subscription agreement was in terms of clause 11.3.3 thereof subordinated in favour of the respondent's creditors and as the

respondent was indebted to its creditors in the amount of R2 205 657,07, the amount claimed by the appellant was not due and payable.

[5] In so far as the defence based on the subordination clause is concerned, reliance was placed on a judgment dated 15 October 2010 under case number 14203/2010 (the first liquidation application). In his judgment Blieden J dismissed the appellant's application to wind-up the respondent, inter alia, on the basis that the amount claimed under the subscription agreement was not due and payable as it was subordinated to other creditors to whom the respondent owed R452 513,28 in total, at the time. The respondent averred accordingly that regard being had to the subordination clause in the subscription agreement, the issue as to whether or not any amounts were due and payable under this agreement were res judicata and could not be raised again in these pleadings.

[6] The denial in the papers that the amount owing at the time of the institution of the application and consequently that the appellant was not a creditor as was required by the Act, was resolved at an early stage of the hearing on appeal. Counsel for the respondent conceded at the outset that the appellant was a creditor of the respondent, albeit a contingent creditor. Moreover, that the respondent was commercially insolvent and unable to pay its debts as envisaged in s 345 of the Act. He then contended that this court, in the exercise of its discretion, should nonetheless grant a provisional order only, instead of a final winding-up order. I shall revert to this aspect in due course.

[7] In my view all those concessions were well made. With regard to the debt under the subscription agreement, the respondent admitted both in its answering affidavits in the first liquidation application and in this case, that it owed creditors R452 513,28 and which at the time of the launching of the current proceedings, had escalated to R2 205 657,07. Although the appellant's contention in the founding affidavit, that the respondent was clearly unable to pay its debts was only met with a bare denial, no iota of evidence

was presented to prove the contrary or that any claims or debts of the creditors were being met.

[8] On 4 July 2011 the appellant's attorney of record addressed a letter of demand to the respondent for payment of the arrears under the subscription agreement within 30 days of receipt of the letter, failing which the entire capital and interest outstanding would immediately become due and payable. The respondent's attorney replied to the demand on 5 July 2011 stating quite significantly, that the respondent would tender payment only if there were surplus funds available subject to the subordination clause contained in the subscription agreement. The respondent's indebtedness to the appellant in the amount claimed was not disputed. This, in my view, was a clear admission of both the respondent's liability and its inability to pay its debts.

[9] In my view the appellant is, in light of the subordination clause in the subscription agreement, a contingent creditor of the respondent in terms of s 346 of the Act.[1] The appellant was accordingly well within its right to have applied, on this ground alone, for the winding-up of the respondent.[2] It follows accordingly that the court a quo erred (as did Blieden J in the first liquidation application) when it refused to wind-up the respondent on the basis that the debt, specifically under the subscription agreement, was not as yet due and payable, because it had been subordinated to other creditors of the respondent.

[10] I now turn to consider the respondent's liability to the appellant with regard to the loan agreement and the plea of prescription raised by the respondent. On 7 June 2011 the appellant's attorney despatched a notice in terms of s 345(1) of the Act calling upon the respondent to settle all outstanding arrears in terms of the aforesaid agreement within three weeks

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[1]Section 346(1) of the Companies Act 61 of 1973 provides:
'(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made
(a) . . . .
(b) by one or more of its creditors (including contingent or prospective creditors);
. . . .'

[2]*Premier Industries Ltd v African Dried Fruit Co (1950) Ltd* 1953 (3) SA 510 (C) at 513D-F.

after delivery of the aforesaid notice, failing which the appellant would apply for the liquidation of the respondent.

[11] On 24 June 2011 the respondent replied stating that '[o]ur client has always indicated that it would like to make [a] settlement proposal . . .'. It also stated in the same letter that '[n]otwithstanding the aforesaid, please note that our client has been struggling to turn the business around. However, our client believes that it may in due course turn the business around by making it profitable. At this stage our client has not been able to make any meaningful profit in the business'.

[12] In my view the contents of this letter again serve, not only as an unequivocal acknowledgement of indebtedness by the respondent in the amount claimed under the loan agreement, to the appellant. It also shows that the respondent is unable to pay its debts and, is in consequence, commercially insolvent. The respondent contended that the letter was written with a view of settling a dispute and was as such inadmissible. It accordingly applied that the letter be struck out, which application was granted. Although the offending paragraphs, which reflected the settlement proposals, were blocked out, the respondent's argument that the entire document was rendered inadmissible was upheld.

[13] It is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A *concursus creditorum* is created and the trading public is protected from the

risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained by the words of Van Schalkwyk J in *Absa Bank Ltd v Chopdat*,[3] when he said:

'[A]s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations. A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

In the final analysis, the learned judge said at 1094F:

'In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.'[4]

[14] Moreover, in this case, the unequivocal admissions of liability by the respondent were not even made in the course of any negotiations, but in response to a letter of demand for payment of the arrear instalments due in terms of the loan agreement. The court a quo accordingly erred in granting the application to strike out reference to the respondent's admissions of liability.

[15] The further consequence of my finding that the respondent unequivocally admitted its liability to the appellant of the amount claimed in the letter of 24 June 2011, is that the plea of prescription cannot be sustained. This is because such admission would have interrupted the running of

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[3] *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H-1094F.
[4] *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) paras 23-24 which affirmed the principle enunciated in *Chopdat*.

prescription, if any.[5]

[16] As alluded to earlier, counsel for the respondent, having conceded at the outset that the respondent was insolvent and that the appellant had locus standi, sought to persuade us to exercise our discretion and not grant a final winding-up order but rather to grant a provisional winding-up order against the respondent. He reasoned thus. The prescription point raised by the respondent remains a live issue which could succeed on the return day, and the effect of the subordination clause in the subscription agreement is that if the respondent is finally liquidated the appellant's claim will die a natural death. This argument cannot, in my view, be sustained as it is the appellant's prerogative to institute the liquidation proceedings even though it might not be able to successfully prove a claim before the liquidator. With regard to the request for a provisional winding-up order, he sought to place reliance on the decisions in *Jhatam v Jhatam*[6] and *Santino Publishers CC v Waylite Marketing CC*,[7] where a similar point about prescription of a debt was raised.

[17] In my view these cases are clearly distinguishable. In *Santino Publishers* both counsel agreed that the appellant's claim had become prescribed. The Full Court accordingly held that it should not, in the exercise of its discretion, grant an application for a (final) winding-up of the respondent on a claim which had prescribed. Furthermore, the application for the winding-up of the respondent in that case had since become academic. Similarly, in *Jhatam*, Holmes J in the exercise of his discretion, felt constrained to grant an order for compulsory sequestration on a claim which could well turn out to be unenforceable on the ground that the petitioning creditor's claim had become prescribed.

[18] In light of my finding that the respondent unequivocally acknowledged its indebtedness to the appellant and thus interrupted prescription, it follows that the point pertaining to prescription being still alive, is clearly not good.

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[5]Section 14(1) of the Prescription Act 68 of 1969 reads:
'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.'
[6]*Jhatam v Jhatam* 1958 (4) SA 36 (N) at 38C-G.
[7]*Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 58A-C.

The court a quo accordingly further misdirected itself in refusing to wind-up the respondent on the basis that the debt arising from the loan agreement, had become prescribed.

[19] In the circumstances I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the North Gauteng High Court, Pretoria, is set aside and substituted with the following order:

'(a) The respondent is liquidated in the hands of the Master of the High Court.

(b) Costs of the application, including the cost of two counsel, will be costs in the winding-up of the respondent.'

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B H MBHA
JUDGE OF APPEAL

APPEARANCES:

For appellant:	F H Terblanche SC H R Fourie Instructed by: Tim du Toit Attorneys, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For respondent:	S L Joseph SC H J Fischer Instructed by: DMS Attorneys, Sandton Molefi Thoabala Attorneys, Bloemfontein