REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 31872/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: ~~YES~~/NO

2.OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

3.~~REVISED~~

20/10/2020

DATE **SIGNATURE**

In the matter between:

POLY-BAG INDUSTRIES CC t/a JOHNSON AGENCIES Applicant

And

TRIO BAGS (PTY) LTD Respondent

JUDGMENT

DIPPENAAR J:

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 20th October 2020.

[1] The applicant sought the provisional winding up of the respondent on three different grounds. Primarily, on the basis that the respondent is deemed to be unable to pay its debts as envisaged by s345(1)(a) of the Companies Act[1] ("the Act"), pursuant to a letter of demand claiming payment of an amount of R1 145 305.93 under the said section dated 16 July 2019 due, owing and payable in respect of goods sold and delivered by it to the respondent("the demand"). In the alternative, the applicant relied on s345(1)(c) of the Act in contending that the respondent was commercially insolvent. Lastly, reliance was placed on s344(h) of the Act in contending that it was just and equitable to wind up the respondent.

[2] The respondent opposed the application on various main grounds, characterised as: (i) statutory non-compliance with the provisions of 346(4A)(a)(i) and (ii) and s345(1)(a) of the Act; (ii) a bona fide challenge to the respondent's indebtedness, invoking the so called Badenhorst principle[2]; (iii) the existence of irresoluble factual disputes and (iv) no just and equitable basis to wind up the respondent.

[3] It was common cause that there had been no service of the application on the employees of the respondent or any trade unions representing them as required by s346(4A)(a)(i) and (ii) of the Act. It was further not disputed that the respondent had some 48 employees, of which the applicant only became aware pursuant to delivery of the respondent's answering affidavit. The respondent contended that this failure rendered the application fatally defective. The applicant on the other hand contended that it was only seeking a provisional winding up order and thus that the application could be served on

[1] 61 of 1973, applicable in terms of item 9 of schedule 5 of the Companies Act 71 of 2008
[2] Badenhorst v Northern Construction Enterprises Ltd 1956 (2) SA 346T at 348A-B

the employees and trade unions prior to the return date as service was only required prior to the granting of a final winding up order.

[4] The provisions of s346(4A)(4)(a) requires service of the application on the employees and trade unions representing them *"when an application is presented to the court in terms of this section*". The normal position is that the application is to be served on these parties prior to the hearing of the application so that they are able to assess their position. There may however be circumstances in which a court may condone the failure to serve the application on such parties prior to the granting of a provisional order and it is not impermissible for a court to do so if a proper case is made out[3]. Service must however be effected on the employees and any trade unions representing them, prior to the granting of a final winding up order.

[5] The applicant did not in its affidavits or service affidavit advance any reasons why it should be excused from complying with the statutory requirements pertaining to service on the respondent's employees or the trade unions representing them prior to the granting of a provisional order. The applicant further made no attempt in its papers to explain why service was not effected on the employees or the trade unions. It did not aver that there were no employees and no facts were presented that there were any difficulties with establishing the existence or whereabouts of the respondent's employees. Considering the nature of the respondent's business it would be reasonable to expect that the respondent had some employees.

[6] It would have been a simple matter for the applicant to serve the application on the employees and trade unions in accordance with the methods stated in s346(4A)(a)(ii)(aa). The application itself was not served on the respondent at its registered address, as required, but rather at its principal place of business on one of its employees.

[3] EB Steam (Pty) Ltd v Eskom Holdings SOC Ltd 2015 (2) SA 526 SCA at paras 11-12, 17 and 24-26

[7] The application could further have been served at any time prior to the hearing of the application, even after the respondent alerted the applicant to the issue in its answering papers in November 2019. The applicant elected not to do so.

[8] In my view the applicant has not established any reasons justifying this court to consider the granting of a provisional order absent the requisite service. The applicant did not seek a postponement to rectify the service issue. I am not however inclined to dismiss the application on this basis alone as there are other issues with the application which render it necessary to deal with it on its merits.

[9] The relevant portion of s345(1)(a)(i) provides:

> *"A company … shall be deemed to be unable to pay its debts if- a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due- has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due….and the company … has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor."*

[10] The debate centered around whether substantial compliance with the requirements of s345(1)(a) of the Act was sufficient[4] or whether service had to be effected strictly in compliance with the provisions of s345(1)(a) of the Act. The applicant in its papers provided no reasons why the statutory requirements of s345(1)(a)(i) were or could not be complied with.

[11] In *BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd* [5], Moll J held that the provisions of s345(1)(a)(i) must be strictly complied with. On appeal, Margo J, writing for the full court stated: *"But to avail himself of the benefit of the deeming provisions contained in para (a)(i) of 345(1), an applicant must at least comply with the requirements stated by the Legislature therein. There is no justifiable basis evident for me for*

[4]Relying on Nathaniel & Efthymakis Properties v Hartebeestpoort Landgoed CC [1996] 2 All SA 317T, pertaining to the Close Corporations Act
[5] 1977 (3) SA 573(W) and the appeal judgment 1978 (2) SA 481 (T)

substituting for the words, 'by leaving the same at its registered office' some other words such as 'by delivering it to the company'".[6] On the facts of that matter, the full court found it unnecessary to decide the issue of substantial compliance because there was no proof that the remand was received by the respondent.

[12] In the present instance, the applicant made no attempt to explain why it did not even attempt to comply with the requirements stated by the Legislature. The requirements are clear and the applicant neither served the application on the respondent nor served it at its registered office. Instead, the demand was simply sent via email to the respondent at office@triobags.co.za. Although it was common cause that the demand was received by the respondent and responded to by its attorney of record, there was no attempt by the applicant to comply with the statutory requirements of the section at all. The majority of the authorities favour strict compliance with the statutory requirements of s345(1)(a) [7]. It is however not necessary to decide the issue in this application as the applicant in any event falls short of the mark in illustrating the substantial compliance contended for.

[13] It follows that the applicant is not entitled to rely on the deemed insolvency of the respondent as envisaged by s345(1)(a) of the Act. It remains to be determined whether the applicant has proved to the satisfaction of the court that the company is unable to pay its debts as envisaged by s345(1)(c) of the Act.

[14] In its answering affidavit, the respondent admitted the applicant's locus standi. It is bound by that admission. It however challenged the amount of the applicant's claim and challenged the applicant to provide the purchase orders, delivery notes and invoices. It further disputed the repayment terms of the agreement averred by the applicant.

[15] It was common cause that the agreement between the parties was oral and initially the payment terms were cash on delivery. It was also common cause that the repayment

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[6] At 487 A-B

[7] A similar view was expressed by Moleko J in Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004 (1) SA 35 (N) at 44 A-C

terms were orally varied by the parties during or about August 2018. The applicant averred that the repayment terms were varied to be 30 days from date of invoice, whereas the respondent contended that the parties agreed that payment would be due when the respondent received payment from its customers. The amount claimed by the applicant was also in dispute. In its replying papers, the applicant provided substantial documentation pertaining to invoices, delivery notes and statements, although not all the relevant documents were provided. The respondent correctly pointed out that documentation was inconsistent and contradictory and that the aggregate value of these documents yielded different amounts and did not correlate with the amount claimed by the applicant.

[16] The applicant argued that the respondent's version regarding the repayment terms should be rejected on the papers as untenable, as its version was not businesslike and improbable and no documentary evidence was provided corroborating its version.

[17] The respondent argued that it disputed applicant's claim on bona fide and reasonable grounds, specifically that there was any indebtedness due and payable to the applicant, invoking the so-called Badenhorst[8] principle[9]. It was further argued that there were irresoluble disputes regarding the indebtedness, which should result in dismissal of the application.

[18] Considering the respondent's admission of the applicant's locus standi as creditor I am not persuaded that the respondent's reliance on the Badenhorst principle avails it. However, whilst it was not incumbent on the applicant to prove its precise claim in the

[8] Fn 2 supra at 348A-B

[9] The principle is: "A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order."

present proceedings and its locus standi as creditor admitted, the disputes of fact regarding such indebtedness and the inconsistencies in the documentation presented by the applicant are relevant in considering whether the applicant has established that the respondent is unable to pay its debts and is commercially insolvent, as it alleged.

[19] The applicant's own documentation did not support its version inasmuch as its own invoices referred to the repayment terms as cash on delivery and were inconsistent and contradictory in respect of the amount allegedly due and payable by the respondent. Respondent averred that the applicant was its only creditor. This was not controverted by the applicant. As the respondent's liability to the applicant is central to its financial position and insolvency, the applicant had to illustrate that the respondent is factually insolvent. It was undisputed that commercial insolvency of the respondent would be sufficient for purposes of the application[10].

[20] In argument, the applicant placed great reliance on a letter from the respondent's attorney dated 6 August 2019, pursuant to its demand. In the letter, the attorney stated: "*Nonetheless, I understand your client's contention- and although our client is indebted to yours, our client is not insolvent and the problem is short term. There is certainly a plan forward and instructions to settle which is not before me now…"*. It was argued that this constituted an acknowledgment of liability and an indication of commercial insolvency[11].

[21] I agree that the letter does acknowledge an unidentified indebtedness to the applicant. It was common cause that the applicant is a creditor of the respondent. However, insofar as the letter may be an indication of commercial insolvency, it does not of itself constitute sufficient proof of such insolvency for purposes of s345(1)(c) of the Act.

[22] On the respondent's version, it denied its insolvency and averred that its debtor's book of some R1.5 million exceeded the alleged amount of applicant's claim, which if its

[10] Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 528 (SCA)
[11] Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA)

version of the repayment terms were to be accepted, would negate any commercial insolvency. The aggregate amounts of the invoices and delivery notes produced by the applicant are inconsistent and at variance with the amount claimed. Considering the inconsistencies in the applicant's case, its criticism of the respondent's lack of documentary corroboration for its version, lacks merit.

[23] In my view, there are factual disputes on these issues which cannot be resolved on the papers insofar as it relates to the respondent's commercial insolvency and the respondent's version cannot be rejected as palpably false[12].

[24] I am thus not persuaded that the applicant has illustrated on a preponderance of probabilities even on a prima facie basis that the respondent is commercially insolvent as envisaged by s345(1)(c) of the Act[13].

[25] In my view, the applicant's reliance on s344(h) of the Act is misconceived and it has presented no facts which would render it just and equitable, as envisaged by the said section, to wind up the respondent. Although not a *numerus clausus*, the section does not create some "catch all" ground for relief[14]. The grounds advanced by the applicant do not render the section applicable and no case for relief on this basis has been made out.

[26] For these reasons, it follows that the application cannot succeed.

[27] The normal principle is that costs follow the result. There is no reason to deviate from this principle.

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[12] Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 85 (SCA)
[13] Kalil v Decotex 1988 (1) SA 943 (A) at 979E-980F
[14] Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA) par [16]; Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) 349A-G

[28] I grant the following order:

The application is dismissed with costs.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATES OF HEARING	:	13 October 2020
DATE OF JUDGMENT	:	20 October 2020
APPLICANT'S COUNSEL	:	Adv. G.V. Meijers
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