**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 45678/2018**

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

26/08/20
Date

ML TWALA

In the matter between:

**VANTAGE MEZZANINE FUND II PARTNERSHIP** — **FIRST APPLICANT**

**CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** — **SECOND APPLICANT**

**AND**

**CEDAR PARK PROPERTIES 39 (PTY) LTD**

## JUDGMENT

**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 11h30 on the 26th August 2020.

**TWALA J**

[1] Before this Court is an application wherein the applicants seek an order placing the respondent in final winding-up in the hands of the Master of this Court with costs to be costs in the winding up.

[2] The respondent filed a notice to oppose the application but did not file any answering affidavit. Instead an application to place the respondent under supervision and that the business rescue proceeding commence was launched by the entity, for the purposes of this judgment, I shall refer to as the shareholder in the respondent under case number 5586/19. During the business rescue proceedings, the second applicant brought an application for leave to intervene and be joined as an applicant in these proceedings since it was making common cause with the applicant. The intervention application was granted on the 30th of June 2020 when the business rescue application was dismissed.

[3] On the 20th of July 2020, a case management meeting was held before me wherein the date for the hearing of the application for leave to appeal the dismissal of the business rescue application and thereafter this application for the liquidation of the respondent was agreed upon as the 21st of August 2020. I then directed the respondent to file its answering affidavit on or before the

31st July 2020 and the applicants to file their replying affidavits, if any, on or before the 11th August 2020. Furthermore, the respondent requested that it be given the benefit of the weekend and file its papers on the 3rd of August 2020 instead of the 31st of July 2020 which request was acceded to.

[4] It is worth noting that on the 31st July 2020 the respondent launched an application in terms of Rule 6(5) (d) (iii) of the Uniform Rules of Court in which it sought an order suspending the liquidation proceedings in terms of section 131(6) of the Companies Act, 71 of 2008 ("the Act") read with section 18 of the Superior Courts Act, 10 of 2013 by virtue of the pending application to subject the respondent to business rescue proceedings before this Court under case number 5586/19.

[5] It was submitted by Advocate Potgieter that the respondent took a conscious decision not to file its answering affidavit on the 31st July 2020 as directed. The respondent relied on its application in terms of rule 6 and section 18 of the Superior Courts Act to suspend the liquidation proceedings. It was submitted further that if the application for leave to appeal is dismissed, the respondent is not asking for time to file an answering affidavit and the matter may be disposed of as unopposed.

[6] Advocate van Huysteen SC contended that there was no business rescue application pending before this Court but an application for leave to appeal the decision of this Court dismissing the application for business rescue. Section 131(6) is applicable only when the Court is dealing with the business rescue application but not the application for leave to appeal. However, so it was submitted, if the Court were to dismiss the application for leave to appeal, then the hearing of the liquidation application may be finalised immediately

after judgment on the application for leave to appeal without further hearing oral submissions from the parties since it is not opposed by the respondent.

[7] Mr Sedumedi for the second applicant made common cause with the first applicant and supported that this application be proceeded with and be determined on the papers as it is not opposed by the respondent.

[8] It appears on the record that the respondent, as at 31st August 2018, was indebted to the first applicant in the sum of R300 682 476.92 and has been unable to pay this amount to date. Furthermore, the respondent is indebted to the second applicant in the sum of R454 185 002 which excludes a further R63 231 890 owed to other creditors. In the preceding two financial years the respondent has suffered loses to the tune of R15 872 770 and its income is a mere R8 607 454 for the last financial year.

[9] It has long been settled that a company may be wound up if it is unable to pay its debts. Furthermore, a company is deemed to be unable to pay its debts if a demand to pay its indebtedness is served on the company and it fails to pay the debt or to secure or compound it to the reasonable satisfaction of the creditor.

[10] Section 345 of the old Companies Act, 63 of 1973 provided as follows:

*"345 When company is deemed unable to pay its debts:*

*(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 due; or*

*(ii) ……*

*(b) ……*

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

*(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent liabilities of the company."*

[11] In *Henochsberg on Companies Act, 61 of 1973, 5th edition at page 707* the author stated the following:

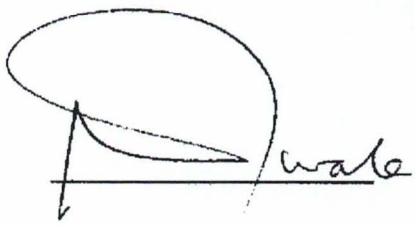
> *"A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due is cogent prima facie proof of inability to pay its debts: 'for a concern which is not in financial difficulties ought to be able to pay its way from current revenue on readily available resources.'*

[12] I am satisfied that the respondent is unable to pay its debts considering the amount of its income and the debts that it has accumulated. The total contingent liability of the respondent is a sum of more than R800m. The first applicant made a demand for payment of the sum of just over R300m as it fell due on the 31st of August 2018 and to date it has remained outstanding and unpaid. The inescapable conclusion is therefore that the applicants have made out a case in their papers that the respondent is unable to pay its debts as envisaged in section 345 of the Act. The applicants therefore succeed in their application that the respondent be placed under final winding up in the hands of the Master of this Court.

[13] In the circumstances, I make the following order:

1. The respondent is placed under final winding up in the hands of the Master of the High Court;

2. The costs of this application to be costs in the winding up.



**TWALA M L**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

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|---|---|
| **Date of hearing:** | **21st August 2020** |
| **Date of Judgment:** | **26th August 2020** |
| **For the 1st Applicant:** | **Adv. K J van Huyssteen** |
| **Instructed by:** | **Fluxmans Inc Attorneys**<br>**Tel: 011 328 17000** |
| **For the 2nd Applicant:** | **Mr T Sedumedi** |
| **Instructed by:** | **Mncedisi Ndlovu & Sedumedi Attorneys**<br>**Tel: 011 268 5225** |
| **For the Respondent:** | **Adv. MvR Potgieter SC**<br>**Adv. T Scott** |
| **Instructed by:** | **Smit Sewgoolam Inc**<br>**Tel: 011 646 0006** |