REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17889/2019

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

SIGNATURE ..... DATE 27/5/2021

In the matter between:

ATLAS COPCO COMPRESSOR TECHNIQUE **Applicant**

A DIVISION OF ATLAS COPCO INDUSTRIAL

SOUTH AFRICA (PTY) LTD

and

NUGEN TECHNOLOGIES (PTY) LTD **Respondent**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 27 May 2021*

SENYATSI J:

[1] This is an opposed application for the final winding up of the respondent in terms of the provisions of s 334, and s 345 of the Companies Act 61 of 1973 ("the 1973 Act")

[2] The applicant avers that it is a bona fide creditor of the respondent in the undisputed amount of R4 196 918.08 which it alleged arose out of breach of the respondent's payment obligations towards the applicant in terms of a written agreement. The obligations furthermore, are in relation to goods sold, delivered, and commissioned in terms of the said agreement pertaining to the two Eskom projects, namely Medupi and Kusile.

[3] The respondent was contracted by Eskom to provide power generation capacity systems to it. This capacity covers mechanical, electrical, civil, and structural engineering areas and in particular power transformers and power generators including auxiliary solutions.

[4] The respondent was contracted to construct, commission, and complete the Kusile Power Station in Emalahleni, Mpumalanga, and the Medupi Power Station near Lephalale, Limpopo. The respondent in turn procured goods and services from the applicant in terms of the said written agreement.

[5] The respondent would be bound by the applicant's standard in terms and conditions of trade attached to the agreement concluded between the parties. The respondent would place orders or goods from time to time. Payment to the applicant for the goods purchased would be within 30 days from the date of the tax invoice for the goods sold and delivered by the applicant to the respondent.

[6] The respondent purchased and was supplied with goods by the applicant with an aggregate value of invoices amounting to R14,5 million. Of this amount, the respondent paid R10.7 million. This was in respect of the Medupi project and the balance is R3.8 million.

[7] In respect of the Kusile project, goods were also sold and delivered to the respondent by the applicant aggregating the sum of R15, 5 million in total invoices of which R14.8 million was paid by the respondent leaving the balance of R676 000.

[8] The applicant contends that as of 6 March 2019 and in breach of the agreement, the respondent was in arrears in the aggregate amount of R4.5 million.

[9] The Applicant sent a demand letter for payment through its lawyers, for payment on 3 February 2019 in terms of section 345 (1)(a)(1) of the Companies Act of 1973 read with item 9 of Schedule 5 of the Companies Act 2008 calling on the respondent to make payment to the applicant of the full amount outstanding in relation to the Medupi Project. The amount demanded was R3.8 million. The demand letter advised the respondent that if it failed to make payment within three weeks of the receipt of the letter, the respondent would be deemed to be unable to pay its debts.

[10] In opposition to the application, the respondent contends that the application amounts to an abuse of court process. The basis for the contention is that winding-up proceedings are not a debt collection mechanism. It furthermore contends that the debt relied on to pursue these proceedings is disputed on bona fide and reasonable grounds. It further contends that the original service of the section 345 letter of demand on the respondent, its employees, and trade unions was defective.

[11] The respondent furthermore contends that the terms of the contracts between the parties are in dispute and also that the invoices were issued prior to the hand-over commissioning and that the amount was not due, owing and payable in terms of the agreement. It furthermore contends that certain payments were made subsequent to the s 345 letters of demand and these were tendered by the respondent as the only payments, in fact, due and payable. These payments, so contends the respondent were accepted by the applicant in its supplementary affidavit.

[12] The respondent also contends that each project for which goods were sold and delivered, a 10% retention amount.... This is the fee that, will be retained for a period after the hand-over and commission of each project for the latent defects. In respect of the Kusile project, the retainer of 10% was the sum of R 1 192 188.06 in total.

[13] The retainer for the Medupi project was also 10% which amounted to R 1 471 965.03. However, it must be maintained at this stage that in both projects, the 10% retention was related to the respondent who contracted directly with Eskom. The contract forming the basis of this winding-up application had no

such provision. For that reason, it was not applicable to the applicant and consequently bears no relevance to the rights and obligations created by the agreement forming the subject of this applicant. I say so because, in a letter dated 1st October 2018 by the respondent to the applicant, the respondent states that it has issued a notice of the dispute to Eskom (Medupi), this is a result of several disagreements in terms of the contract interpretation thereof and payment restraints, as a result of this. The letter apologised for the disruption but it is common fact between the parties that this dispute did not involve the applicant.

[14] The legal principles applicable in this application are trite. Section 345 of the ("1973 Act") provides as follows:

> "*345. When company 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 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; or*

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or [Para. (b) substituted by s. 26 of Act No. 59 of 1978.]

(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 and prospective liabilities of the company."

It is without doubt that once so served with the letter of demand for payment, if the company neglects or fails to make payment within 21 days, then it is deemed unable to pay its debts.

[15] In applying the test whether a company is unable to pay its debts the court in *Boschpoort Ondernemings Pty Ltd v ABSA Bank Ltd*[1] held as follows:

[16] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).

[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law that has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have, and courts are more comfortable with readily determinable and objective tests

[1] 2014 (2) SA 518 (SCA) at para [16] to [23]

such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Where the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act set out in s 7(1) thereof.

[18] In view of the long established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company, it must be presumed that the legislature was aware of this fact. The principle that Parliament is presumed to be acquainted with the interpretation of earlier legislation by the court, applies where there has been a settled and well-recognised judicial interpretation before the relevant legislation was passed.

[19] It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend to alter the law as it had previously stood. Accordingly, it must be presumed that the legislature deliberately refrained from defining 'solvency'. It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect. The meaning of those terms must be one that leads to a sensible and business-like result. See Natal Joint Municipal Pension Fund v Endumeni Municipality.

[20] I referred earlier to the fact that s 345 of the old Act was retained in terms of subitem 9(1) of schedule 5 of the new Act. Subitem 9(2) provides that s 344 of the old Act shall not apply to the liquidation of 'solvent' companies, 'except to the extent that it is necessary to give full effect to the provisions of Part G of Chapter 2'. Part G of chapter two of the new Act, more particularly ss 79 to 81 thereof, relate to the winding-up of solvent companies. As we have seen, s 344(f) and s 345 of the old Act are fastened together by the clasp in s 344(f) that refers to a company being unable to pay its debts 'as described in s345'. The seeming anomaly may be resolved if one recognises that s 345 was retained in subitem 9(1) to enable a determination to be made in terms of s 79(3) of the new Act that a company 'is or may be insolvent' - even though the application was made in terms of either s 80 or 81 for its winding-up as a so-called 'solvent' company. The deeming provisions concerning the inability to pay its debts, contained in s 345 of the old Act may be used to establish the

insolvency of a company. In this regard, I agree with King AJ in Standard Bank of SA Ltd v R-Bay Logistics CC.

[21] This conclusion is significant in determining what is meant by a 'solvent company'. The retention by the legislature in the context of a winding-up of a solvent company in the new Act, of the deeming provisions as to when a company is unable to pay its debts as contained in s 345 of the old Act, is a clear indication of what is meant by an insolvent company in the new Act. It can only mean a company that is commercially insolvent. It therefore follows that a solvent company must be the converse, namely a company that is commercially solvent.

[22] Consequently, in order for a solvent company to be wound-up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the old Act, as is provided for in subitem 9(i) of schedule 5 of the new Act.

[23] The confusion which has arisen as to when a company may be wound up in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense."

[16] It is therefore now settled that a company is unable to pay its debts when it is unable to meet current demands on it or its day-to-day liabilities in the ordinary course of business. The test is not whether the company's liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually insolvent.[2] It follows that the defence by the respondent that it is solvent is of no consequence.

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[2] See Murray and Others NNO v African Global Holdings (Pty) Ltd (306/2019) [2019] ZASCA 152 (22 November 2019)

[17] I now deal with the other defences raised by the respondent in regard to the contention that the letter of demand did not comply with the requirements of s 346 of the 1973 Act, I hold the view that this defence has no legal basis as the applicant sent subsequent demand letters to the registered addresses of the respondents. The defence is in my view simply technical and intended to delay these proceedings.

[18] The respondent also raised a defence by disputing the terms of the agreement. There is no factual or legal basis for this contention. The payments were made relating to both Medupi and Kusile projects totalling over R30 million to the applicant. These were all based on the agreement and the standard terms and conditions of the applicant. The fact that the respondent had declared a dispute with Eskom has no bearing on its contractual obligations with the applicant. The defence based on the alleged disputed agreement must therefore fail.

[19] The respondent averred that the application ought to be dismissed due to a dispute of fact. I am not in agreement with this submission in that the debt itself cannot be disputed. The bone of contention by the respondent is that because of the 10% retainer between itself and Eskom, the applicant is not entitled to raise invoices as it did. As already stated above, there is no legal basis to tie up the applicant to the relationship the respondent has with Eskom. This is not borne out by any evidence from the agreement between the applicant and respondent.

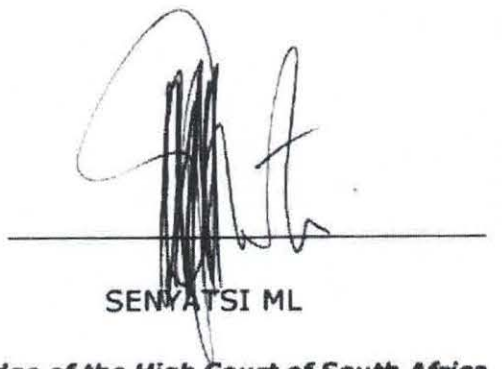
[20] Consequently, I am of the view that the respondent is unable to pay its debts within the purview of s 345 of the 1973 Act. It follows that the respondent stands to be wound up due to commercial insolvency.

ORDER

[21] The following order is made:

(a) The respondent is placed under final liquidation in the hands of the Master of this Court;

(b) The costs of this application are costs in liquidation of the respondent.



SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 08 October 2020

Date of Judgment: 27 May 2021

Applicants Counsel: Adv P Lourens

Instructed by: Werksmans Attorneys

Respondent's Counsel: Adv JP Snijders

Instructed by: Cox Yeats Attorneys