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

CASE NO: 4784/2020

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

DATE: 12 MARCH 2021
Margaretha Engelbrecht

In the matter between:

BENNIE KEEVY N.O. First Applicant

GUNVANTRAI MUGGAN N.O. Second Applicant

And

LUBBE CONSTRUCTION (PTY) LTD Respondent

JUDGMENT

ENGELBRECHT, AJ:

1. This is an application by the joint liquidators of Secutron (Pty) Ltd (in liquidation) (Secutron) for the final winding up of the respondent (Lubbe Construction), as follows.

1.1. In terms of an order of this Court under case number 9595/2018 of 27 March 2018, Lubbe Construction is indebted to Secutron in the amount of R408 894.33 (excluding VAT), together with interest on that amount at the rate of 10,8% per annum from 10 October 2017 to the date of final payment, plus costs.

1.2. Secutron's efforts in April 2018 and early 2019 to satisfy the judgment debt were met with returns to the effect that there were insufficient movable goods and insufficient amounts available in Lubbe Construction's bank account to satisfy the judgment debt.

1.3. A further writ of execution of October 2019 rendered a return to the effect that Lubbe Construction had no attachable assets.

2. In the circumstances, the applicants submit that Lubbe Construction is deemed unable to pay its debts in terms of section 344(f) and 345(1)(b) of the Companies Act No 61 of 1973 (the 1973 Companies Act) and/or that Lubbe Construction is liable to be wound up in terms of section 81(1)(c)(ii) of the Companies Act No 71 of 2008 (the 2008 Companies Act).

3. Lubbe Construction has abandoned its *in limine* point that the applicants have no power to bring the proceedings, on account of being satisfied that the applicants were appointed as joint final liquidators of Secutron. However, before me it persisted in its second point *in limine*, in which it challenged the authority of the applicants to bring the application, and which point was elaborated upon in the heads of argument to explain that it the objection lies in the fact that the liquidators were not shown to have acted jointly.

4. I have grave reservations about the legitimacy of the point taken.

4.1. If an attorney acting for a party is authorised so to act, there is no need for any other person, whether he be a witness or someone who becomes involved, to be additionally authorised (see *Eskom v Soweto City Council* 1992 (2) SA 703 (W)).

4.2. Plainly put, in applications it is the institution of the proceedings and the prosecution thereof which must be authorised. It is irrelevant whether the deponent had been authorised to depose to the founding affidavit (*Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G–I).

4.3. In the present case, there was no case made out that the liquidators had not jointly given the instruction to the attorney, as had been the position in *Lynn NO and Anothers v Coreejes and Another* 2011 (6) SA 507 (SCA), which Mr. Marais (for the applicants) referred me to.

5. Be that as it may, the Supreme Court of Appeal made plain in the aforesaid *Lynn NO* case that, while the proceedings have not been finalized, ratification was in any event possible (at paras 6 and 14). Moreover, the issue of a lack of authorization is an issue between the liquidator and the creditors (at para 12).

5.1. In the present case, the applicants' attorney filed a confirmatory affidavit of the second applicant, which made clear that the objection based in the applicants allegedly not acting jointly was without merit.

5.2. The affidavit was filed as an additional affidavit, out of sequence and in response to the content of the heads of argument. That does not mean that I cannot take it into account.

5.2.1. in *PPE International Inc (BVI) and others v Industrial Development Corporation of South Africa Limited* 2013 (1) BCLR 55 (CC), the Constitutional Court emphasized that "*rules are made for courts to facilitate the adjudication of cases"*, and that the Superior Courts "*enjoy the power to regulate their processes, taking into account the interests of justice"* (at para 30), recognizing that in "*some cases the mechanical application of a particular rule may lead to an injustice"*, which must be avoided (at para 31).

5.2.2. In *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 279 (CC) this Court reiterated that courts have always been inclined to adopt a pragmatic approach in dealing with formalistic and technical objections (at para 37).

5.2.3. That judgment, in turn, made reference to the judgment of the Supreme Court of Appeal in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA), which sets as the "*overriding factor"* to be taken into account the "*question of prejudice"* and which baulks at the notion of a "*pointless waste of time and costs"* that may be brought about by a failure to condone technical irregularities.

5.2.4. In the interests of justice, I condone the filing of the additional affidavit. It would be pointless to refuse entertaining the application before me on the basis of the objection that the joint liquidators had not acted jointly when it is known at the time of adjudication that factually the submission lacks merit.

6. In the circumstances, the points *in limine* fall to be dismissed. Which brings me to the merits of the application.

7. Lubbe Construction advances the case that Secutron was not entitled to levy execution against it, because the amount owed under the judgment debt had not yet fallen due. For this submission, Lubbe Construction essentially relies on an alleged "*paymaster agreement"* described in the answer as follows:

"*… a meeting was thereafter convened between the Respondent and its sub-contractors in terms of which it was primarily agreed that the sub-contractors would suspend all actions which some of them may already have taken against the Respondent and that a 'paymaster' would be appointed to whom payment of the amount payable by the Department of Public Works would be paid and that such paymaster would then, on receipt of the payment, make payment directly to the various sub-contractors in respect of the project."*

8. The problem with the reliance on the "*paymaster agreement"* is that Lubbe Construction has not made the necessary allegations under Uniform Rule 18(6), and has not attached the agreement itself. Indeed, it is not known whether the agreement as alleged was concluded orally or in writing. The best evidence of such an agreement being in existence is a Final Statement of

Account issued by Lubbe Construction acknowledging a "*contract amount"* of almost R537 000, and dated 3 April 2018, i.e. some days after the grant of the order that gave rise to the present application. It records that "*All parties agree that payment will be as per the 3rd Party Paymaster Agreement"*. But what the terms of that agreement might have been, remain a mystery. This Court cannot be asked to speculate on the terms of the agreement, and, since Lubbe Construction remained unresponsive to a notice in terms of Uniform Rules 35(12) and (14), it cannot place reliance on the alleged agreement.

9. It is in any event questionable whether the applicants can be bound by any undertaking by Secutron not to enforce a debt due to it under an order of this Court.

9.1. The fundamental purpose of insolvency legislation (of which the relevant provisions of the 1973 Companies Act form part) is to secure the realisation of the remaining assets of an insolvent and the distribution of the resulting amounts among creditors in accordance with the order or preference laid down by law.

9.2. As Navsa JA made plain in *Standard Bank v Master of the High Court* [2010] 3 All SA 135 (SCA) at para 1, "*liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vest in them. Liquidators are required to act in the best interests of creditors"*. The best interests of creditors can only be served if the liquidators seek to enforce a judgment debt in favour of the company in liquidation. Surely, they cannot be expected to heed the alleged terms of an agreement allegedly struck, the contents of

which cannot be proven by the judgment debtor, and therefore not pursue enforcement of the judgment debt?

10. That then leaves only the question whether the applicants have made out a case for the final winding up of Lubbe Construction, on either of the bases contended for.

11. Section 344(f) provides that a company may be wound up by the Court if "*the company is unable to pay its debts as prescribed in section 345"*. Section 345(1)(b), for its part, provides that a company "*shall be deemed to be unable to pay its debts if … 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"* (emphasis supplied).

12. The requirement that must be met is that the Sheriff declares that he has not found sufficient "*disposable property"* to satisfy the judgment. What, then, is "*disposable property"*?

13. An extract from the commentary on non-satisfaction of a warrant of execution in *LAWSA* Vol 11 (2 ed) at paragraph 213 is worth reciting here (with emphasis supplied, and footnotes omitted):

"The term 'disposable property' is not confined to movable property but includes immovable property as well. A return that refers only to movables or movable property is, consequently, not adequate because, if a return is to be relied on as proof of an act of insolvency, it must indicate that the sheriff has found no

disposable property of any nature*. … Whilst it is correct to say that disposable property includes immovable property, it does not include immovable property which has been mortgaged, since such property is clearly not freely disposable."*

14. The commentary on section 345(1)(b) in *Henochsberg on the Companies Act* also states, by reference to the judgments in *Richard Goldman Finance & Investment Co (Pty) Ltd* 1977 (2) SA 624 (W) at 627 and *Cornelissen NO v Welkom Tractors & Auto's (Pty) Ltd* 1971 (3) SA 114 (O) at 116 - 117, that "*disposable property"* includes "*unencumbered immovable property"*. The commentary concludes that "*A return which contains an endorsement that the execution officer has not found sufficient movables to satisfy the judgment etc or that any movables found did not upon sale satisfy the process would accordingly be insufficient to enable s 345(1)(b) to operate"* (emphasis supplied).

15. In course of argument, Ms. Potgieter, who represented Lubbe Construction, referred me to the judgment in *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC). The judgment, concerned with whether an act of Insolvency had been established under section 8(b) of the Insolvency Act 24 of 1936, noted in para 12 that our Courts have consistently found that disposable property may include immovable property, and explained in para 27 that "*It is immaterial that if the property found by the sheriff is unbonded immovable property, an order of special execution against such property under the provisions of rule 46(1) remains a requirement, regardless of the identity of either the judgment creditor or the debtor, whether the property is a primary residence or not, or is*

owned by an individual or a company". The Full Bench there made the point (at para 28, emphasis supplied) that:

"If immovable property by its nature were to fall outside the definition of disposable property … unless an order of special execution had been granted in terms of rule 46(1) declaring the property executable and therefore disposable, the search for disposable property by the sheriff executing a writ against movables … would practically be limited to a search for movable property. The relative ease with which a writ against movables is capable of being obtained supports a conclusion that the process of execution is aimed at encouraging a judgment creditor to execute against movables first and in the event that insufficient movables are found to be available to satisfy the debt, then only against immovable property. Were it to be required … that for immovable property found to be considered disposable an order of special execution must already have been granted against the property, this could encourage execution against immovable property even before a writ had been executed against movables".

16. The consequence of the judgment must be that a party seeking to rely on section 344(f), read with section 345(1)(b), must show that such party has first excused all movable property, and then immovable property. Only if the judgment debt is not satisfied after these steps, can reliance be placed on the act of insolvency, or deemed inability to pay a debt.

17. In the present case, correspondence of 25 April 2018 concerning the goods that were attached by the Sheriff in a first attempt to satisfy the judgment debt stated that "*there are no other movable goods on the premises belonging to*

the defendant which could be attached". On 4 February 2019, ABSA Bank Ltd responded to a warrant of execution served on it, advising that there were insufficient funds available in the relevant account to attach.

18. A further writ of execution dated 27 September 2019, issued by the Registrar on 9 October 2019 and received by the Sheriff on 11 October 2019, read (with emphasis supplied):

"*You are directed to attach and take into execution the movable goods of LUBBE CONSTRUCTION CC, the abovementioned defendant with registered address and principle [sic] place of business situate at 23 Webber Road, Dellville, Johannesburg and of the same cause to be realized by public auction the sum of R408,894.33 (four hundred and eight thousand eight hundred and nine four rand and thirty three cents), excluding VAT constituting the judgment amount, together with interest at a rate of 10.8% per annum, compounded monthly as contemplated in Clause 31.11, to be calculated from 10 October 2017 to date of payment in full on the judgment amount plus the costs of execution"*.

19. On 21 October 2019, the Sheriff issued a return which read as follows:

"*The WRIT OF EXECUTION in this matter, which service address is 23 WEBBER ROAD DELLVILLE JOHANNESBURG, is returned herewith on this 16th day of October 2019 at 15:30 as COMPANY HAS NO ATTACHABLE ASSETS, ALL ASSETS WE SOLD ON SHERIFF'S AUCTION IN SEPTEMBER 2018, INFORMATION FURNISHED BY MS ARMSTRONG, PA TO OWNER"*.

20. What is evident from the foregoing, is that the writ of execution was limited to movable goods, so that the return must be taken to be one that is confined to movable goods. Indeed, the applicants make that very point, submitting in the founding papers, that "*the respondent is the registered owner of no less than 14 (fourteen) properties"*, relying for that proposition on a Windeed Spider Report "*indicating the various properties owned by the respondent"*. On the applicants' own papers, it cannot be concluded that Lubbe Construction owns no "*disposable property"*. Whilst the Windeed search shows that one of the properties is bonded to Absa Bank Ltd, it appears that at least certain of the properties are not subject to a bond. On the evidence before me, I cannot come to the conclusion that Lubbe Construction does not hold "*disposable property"*, and the return of service certainly does not support such a conclusion.

21. In these circumstances, and on the interpretation of the provisions that I have referred to, the applicants cannot satisfy the requirements for the grant of winding up order under section 344(f), read with section 345(1)(b) of the 1973 Companies Act. Lubbe Construction is not called upon in the circumstances to put up grounds justifying a finding that it is not able to pay its debts for purposes of these provisions.

22. That leaves the consideration of the alternative basis for the grant of the order, namely section 81(1)(c)(ii) of the 2008 Companies Act. That provision allows a Court to wind up a solvent company if one or more of the company's creditors have applied for a winding up order on the grounds that it were "*just and equitable for the company to be wound up"*.

23. For section 81(1)(c)(ii) to find application, the first requirement to be met is to establish whether it is a "*solvent company"* and then the second is to consider whether, if it is, it would be just and equitable nonetheless to order that it be wound up.

24. The Supreme Court of Appeal considered the question of what a "*solvent company"* is in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2014] All SA 507 (SCA). For present purposes, I consider it necessary to quote at length the Court's exposition on the question.

"*[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). See, for example, Johnson v Hirotec (Pty) Ltd; Ex parte De Villiers and another NNO: In re Carbon Developments (Pty) Ltd (in liquidation); Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd.*

[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which 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 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. Were 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 section 7(l) 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 section 345 of the old Act was retained in terms of sub-item 9(1) of Schedule 5 of the new Act. Sub-item 9(2) provides that section 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 2 of the new Act, more particularly sections 79 to 81 thereof, relate to the winding-up of solvent companies. As we have seen, section 344(f) and section 345 of the old Act are fastened together by the clasp in section 344(f) that refers to a company being unable to pay its debts "as described in s 345". The seeming anomaly may be resolved if one recognises that section 345 was retained in sub-item 9(1) to enable a determination to be made in terms of section 79(3) of the new Act that a company "is or may be insolvent" – even though the application was made in terms of either section 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 section 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 section 345 of the old Act, is a clear indication of what is meant by an insolvent company in the new Act. <u>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</u>.

[22] Consequently, in order for a solvent company to be wound-up in terms of either section 80 or 81 of the new Act, <u>it must be commercially solvent</u>. If it

is commercially insolvent it may be wound-up in accordance with Chapter 14 of the old Act, as is provided for in sub-item 9(i) of Schedule 5of the new Act.

25. What, then, is the position in the present case?

25.1. It is not disputed that there is a judgment debt that Lubbe Construction has not satisfied. Lubbe Construction accepts that it is liable for payment (although it seeks to argue that the debt may be paid at a later stage, given the alleged "*paymaster"* agreement). What is also evident from the returns of service and correspondence attached to the founding papers, is that Lubbe Construction has insufficient money in its bank account and no movables to sell in order to satisfy the judgment debt. It does, however, own a number of properties, together representing a significant value.

25.2. In the answering affidavit, no allegation is made on behalf of Lubbe Construction that it is a solvent company, whether commercially or otherwise. In submission before me, Ms. Potgieter sought to explain that Lubbe Construction was indeed commercially solvent, and that the failure to make payment was not a consequence of an inability to pay, but rather the fact that it did not consider the judgment debt to be due and payable, given the alleged "*paymaster agreement"*. The submission does not serve Ms. Potgieter's client, for if I accept that submission, then I may enter the question of whether the winding up would be just and equitable; if I reject it, on the other hand, then I must conclude that section 81(1)(c)(ii) of the 2008 Companies Act cannot

be relied on by the applicants, because Lubbe Construction is commercially insolvent.

25.3. Mr. Marais, for the applicants, insisted in reply that Lubbe Construction was commercially insolvent. Equally, that submission does not serve his client, because commercial insolvency as asserted would exclude the operation of section 81(1)(c)(ii), on which reliance was placed.

26. In light of the conundrum raised by counsel's submissions, I return to the *Boschpoort Ondernemings* judgment of the Supreme Court of Appeal. It held (at para 24) that "*Factual solvency in itself is … not a bar to an application to wind-up a company in terms of the Old Act on the grounds that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts"*. Commenting of the judgment of the court below, it considered that a finding that the company had been unable to pay its debts excluded the operation of section 81(1)(c)(ii), but nonetheless justified an order winding-up the company on the basis of section 344(f), read with section 345 of the 1973 Companies Act.

27. In the present case, the facts before me lead to the conclusion that Lubbe Construction is commercially insolvent: it is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities. I am able to reach this conclusion on the basis of the results of Secutron and the applicants' efforts to satisfy the judgment debt, in particular the absence of funds from the bank account of Lubbe Construction, as well as on the basis of the allegation in the founding affidavit that "*the Respondent was unable to*

effect payment of the amounts due to its sub-contractors engaged on the project by reason of the fact that it simply did not receive timeous payment of performance draws from the Department of Public Works". That was the very basis for the alleged conclusion of the "*paymaster"* agreement. If I accept that such an agreement was concluded for the reasons advanced (albeit that its terms are not known), then I must accept this as a concession of an inability to pay a debt.

28. In accordance with the reasoning of the Supreme Court of Appeal, a winding up order may therefore be granted on the basis of section 344(f), read with section 345(c) of the 1973 Companies Act. What would stand in the way of such an order is that the applicants did not plead specific reliance on section 345(c). Does that mean I cannot order the winding up? I think not. Even if section 345(c) is not specifically referred to, the facts pleaded sustain a finding that Lubbe Construction is unable to pay its debt to Secutron. Moreover, direct reliance was placed on section 344(f), which provides for a grant of an order if a company is unable to pay its debts as described in section 345 as a whole. It would be a complete waste of the time and effort of all parties concerned, this Court not least, to insist that, where a case for winding up of a company has been made out on the facts, the application ought to be dismissed merely because the applicants omitted to plead express reliance on the relevant subsection of the statute. The effect would be the issue of virtually the same papers, only to invoke the identified section.

29. In the circumstances, I conclude that a case has been made out for the final winding up of Lubbe Construction. I make an order as follows:

29.1. The respondent is placed under final winding up in the hands of the Master;

29.2. The applicants' costs are to be costs in the liquidation of the respondent.

Margaretha Engelbrecht

MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 MARCH 2021.

Date of hearing:	2 March 2021
Date fo judgment:	12 March 2021

Appearances

For the applicants:	Adv. BSW Marais
Instructed by:	Richer Attorneys
For the respondents:	Adv. K. Potgieter
Instructed by:	Klopper Jonker Inc