REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 13088/2017
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
13/9/2022

In the matter between:

ABSA BANK LIMITED Applicant

And

LUCENT PROPERTIES 18 CC Respondent
(Registration number 2008/217919/23)

JUDGMENT

MAKUME, J:

[1] The Applicant seeks an order placing the Respondent under final winding up in the hands of the Master.

[2] The application was issued in the year 2017 and on receipt thereof the Respondent entered appearance to oppose during April 2017 through its attorneys.

Shortly during May 2017 Respondent appointed a second set of attorneys replacing the first one.

[3] The second set of attorneys Messrs Vally-Chagan and Another served a notice in terms of Rule 35(12) on the Applicant which was responded to.

[4] The application for winding up the Respondent was set down for hearing on the unopposed roll for the 8th November 2017 due to the Respondent having failed to file its answering affidavit.

[5] The Respondent challenged the notice of set down alleging that it had not been given the statutory period of 15 days to consider the Applicant's responses to the Rule 35(12) notice.

[6] Eventually the Respondent filed its answering affidavit on the 28th November 2017 in which it raised the following defences:

6.1 That the Applicant had failed to serve the application on its employees as well as at SARS in contravention of Section 9(4A) of the Insolvency Act 24 of 1936 (as amended).

6.2 That there are material disputes of fact which the Applicant ought to have foreseen and not to proceed by way of motion proceedings. The Respondent maintains that the dispute of facts are the following:

6.2.1 The Applicant's *locus standi* as a creditor i.e. whether its claims are *bona fide* disputed on reasonable grounds.

6.2.2 Whether the amounts were due and payable when the application was issued.

6.2.3 The value of the secured property.

6.2.4 Whether liquidation will be to the advantage of creditors.

6.2.5 Whether the Respondent is unable to pay its debts and actually insolvent.

6.2.6 Whether it is just and equitable that a winding up order be granted.

6.2.7 Whether the application is an abuse of court process.

[7] In the answering affidavit the Respondent admits having obtained commercial property finance from the Applicant in the amount of R10 700 000.00 which amount was used in acquiring two properties namely Erf [....] and Erf [....] Wynberg.

[8] On the 2nd March 2020 before Mudau J a settlement agreement was made an order of court between the parties in which the following was recorded:

8.1 The Respondent acknowledged itself to be truly and lawfully indebted to the Applicant in the sum of R12 330 838.10 plus interest at the rate of 9.75% to be calculated from 5th February 2020 to date of payment.

8.2 The Respondent acknowledged that the said amount was due and payable it further consented to judgment in the said amount and for an order of executability in respect of the two properties mentioned in paragraph 7 above.

8.3 In the settlement agreement the Respondent undertook to pay the agreed capital amount as follows:

8.3.1 By issuing a guarantee in the amount of R9 500 000.00 (Nine Million Five Hundred Thousand Rand) before 20 April 2020.

8.3.2 Payment of the guaranteed amount on date of transfer of property to be sold into the Trust Account of Tim Du Toit & Co. Inc being the Applicant's attorneys of record.

> 8.3.3 In paragraph 9 of the settlement agreement it is stated that "Should the Respondent fail to effect payment as set out herein above and or fail to comply with the conditions set out hereinabove, for any reason whatsoever the full outstanding amount will remain due and payable. The Applicant will be entitled within its full discretion to re-enrol the Liquidation application. The Respondent hereby withdraws its opposition and waives all defences in its answering affidavit. In the event of default, the Applicant shall be entitled to re-enrol the Liquidation application on the unopposed roll within 10 days' notice to the Respondent."

[9] It is common cause that the Respondent failed to comply with the terms of the settlement agreement as a result the Applicant as it was entitled to re-enrolled the Liquidation application for hearing on the unopposed roll. The affidavit seeking such re-enrolment is dated the 25th November 2020.

[10] On the 6th June 2022 a provisional winding up order was granted placing the Respondent in the hands of the Master. In the said order the Applicant was further directed to file an affidavit within 10 days after the date of that order confirming that it had complied with Section 197B of the Labour Relations Act 1996 by providing a copy of the winding up application to the employees of the Respondent.

[11] It was further ordered that the copy of the order be served in accordance with the provisions of Section 346A of the Company Act which section provides for service on the Trade Union as well as on the employees by affixing on a notice board or at the entrance to the business premises of the Respondent.

[12] In his affidavit dated the 12th August 2022 the Applicant's attorneys a Mr W du Randt says that service of the order on the employees, the Trade Union, SARS and the office of the Master was effected by the Sheriff. He attached the Sheriff's returns of service.

[13] On the 21st June 2022 the Respondent filed its second affidavit opposing the confirmation of the provisional winding up order granted on the 6th June 2022.

[14] In this second affidavit the Respondent through the mouth of Mr T Ventouris its sole member now says the following:

> 14.1 That the Applicant has failed to comply with the directive that the provisional order be served on the Respondent's employees accordingly that the application is defective and should be dismissed.
>
> 14.2 That the Applicant's attorneys Mr WA Du Randt had no authority to act for the Applicant when he served the application during November 2017.
>
> 14.3 Mr Ventouris queries the validity of the return of service marked Annexure A and in respect of the notice of motion.
>
> 14.4 The Sheriff of the Court failed to ascertain if the employees of the Respondent were represented by a Trade Union.
>
> 14.5 The Respondent says it has ten (10) employees comprising of two drivers,
> one security guard, four ironers and two packers and a cleaning lady.
>
> 14.6 He as the Respondent did inform his employees about the winding up.

[15] Other than this technical defence the Respondent has failed to raise factual dispute in his affidavit opposing the granting of a final order of Liquidation. What remains is whether the Applicant has established on a balance of probabilities that a final order should be granted.

[16] In the matter of **Paarwater V South Sahara Investments (Pty) Ltd [2005] 4 ALL SA 185 (SCA)** the court held as follows:

> "The degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere prima facie case need be established wherein the Court before it will grant a final order must be satisfied on a balance of probabilities that such a case has been made out by the Applicant seeking confirmation of the provisional order."

[17] In this matter the Respondent admitted liability to the Applicant in the amount of R12 330 838 .18 together with interest. In the settlement agreement that was made an order of Court he abandoned all defences that he had raised prior to the gravity of the provisional order. In its second affidavit the Respondent seems to be making a big issue on the fact of service of the provisional order on the employees and the Trade Union.

[18] The Respondent has failed to identify the employees and where they could be found to enable the Sheriff to effect service. In the absence of any co-operation from him as the employer the Sheriff's return remains unchallenged. The **SCA in the mater of EB Steam Co (Pty) Ltd v Eskom Holdings Soc Limited [2015] (2) SA 256 (SCA)** was faced with a similar defence wherein the Sheriff had served the application on the employees by affixing same to the front door of the registered office of the Respondent's company. The Respondent's company argued that the Section 346 A required that such services should be by way of affixing on the Notice Board not the front door.

[19] The Court held that whilst it is correct that the requirements to furnish the application to persons specified in Section 346 (4A) was peremptory it is so that the methods stipulated in Section 346 (4A) (a)(ii) for furnishing the application to employees were merely directory. To "furnish" the application meant to make available in a manner that was reasonably likely to make it accessible to the named person.

[20] The Respondent raised new defences challenging the authority of the Applicant's attorneys it also challenged the identity of the Applicant. He also challenged the mortgage bond itself and says it is not proof of the Respondent's

indebted. Mr Ventouris says that the Respondent's indebtedness to the Applicant has been securitised as a result the indebtedness had been discharged. Lastly he contends that the Applicant's certificate of balance does not establish a *prima facie* case.

[21] All these new defence are trumped by the settlement agreement which was made an order of Court which had not been set aside. In that order the Respondent not only admitted indebtedness but also abandoned all defences. When he signed the settlement agreement he was duly represented by a law firm and he cannot be heard to say that he was not told or advised about his or the Respondent's rights. He has not pleaded duress when he signed in fact he has avoided saying anything about the settlement agreement.

[22] There is in my view no merit in the new defences worth considering and same are rejected. The parties concluded a compromise agreement which was made an order of Court. Accordingly, the parties adjusted their difference by mutual consent. The Respondent waived whatever rights it may have had in relation to any dispute and acknowledged indebtedness in the amount of R12 330 823.18 which amount the Respondent is unable to pay.

[23] I do not deem it necessary to deal with the other issues raised namely the Rule 7(1) issue, the identity issue, the mortgage bond issue, the securitisation issue and lastly the certificate issue as I do not think they will affect my final verdict namely that the Respondent is unable to pay its admitted debt and should then be placed under a final winding up order. In the result I make the following order:

ORDER

i) The Respondent is hereby placed under final winding up in the hands of the Master.

ii) The costs of this application shall be the costs in the winding up of the Respondent.

Dated at Johannesburg on this 14 day of September 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING	: 26 AUGUST 2022
DATE OF JUDGMENT	: 13 SEPTEMBER 2022
FOR APPLICANT	: Adv Horn
INSTRUCTED BY	: Messrs Tim Du Toit Attorneys
FOR RESPONDENT	: In person
INSTRUCTED BY	: Mr T Ventoris (member of Respondent)