IN THE NORTH GAUTENG HIGH COURT. PRETORIA

(REPUBLIC OF SOUTH AFRICA

CASE NO: 33193/2013

DATE: 12 MARCH 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

And

SOUTHERN SPIRIT PROPERTIES 8 (PTY) LIMITED
(REG. NO: 2002/026177/07) **Respondent**

JUDGMENT

KGANYAGO AJ:

[1] The applicant has brought an application against the respondent in which they are applying for the final winding-up of the respondent. Counsel for the applicant submitted in the alternative, that I may also consider issuing a provisional winding-up order. The respondent is opposing the application.

[2] The winding-up application is based on the grounds that the respondent is unable to pay its debts as intended by the provisions of section 344(f) read with sections 345(1

)(c) and 345(2) of the Companies Act no 61 of 1973 ("the old Act").

[3] According to the applicant's founding affidavit the respondent is indebted them in amounts arising from two home loans. The first home loan was for R2 400 000-00 whilst the second home loan was for R2 500 000-00.According to the applicant, the respondent has been in arrears with their bond repayments. The respondent has made several unfulfilled undertakings to settle the arrears. According to the applicant as at 15th April 2013 the arrears for the first home loan amounted to R2322-98 whilst for the second home loan amounted to R1 512 792-44.

[4] The applicant submitted that the respondent has failed to put up any balance sheet or cash flow statements which indicate their solvency, its liabilities and its ability to pay its debts as they fall due.

[5] Counsel for the applicant submitted that the respondent is unable to pay its debts and that their failure to submit its financial statements is an indication that they are commercially insolvent.

[6] According to the respondent, the applicant has failed to proof the amount due to them. The respondent is disputing that they are owing the amount as stated in the applicant's founding affidavit. The respondent contends that the failure by the applicant to attach a certificate of balance renders them to unable to proof what amount is due to them. The respondent is of the view that the applicant did not bring the application on basis that it is just and equitable that they be wound-up.

[7] In a final winding-up application, the onus is on the applicant to prove the grounds upon which it relies. The test for commercial insolvency is whether the company carrying on business is having liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading. It does not matter whether the company's assets, fairly valued, far exceed its liabilities. See ***ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others 1993 (4) SA 436 CPD.***

[8] In ***Kalil v Decotex (Pty) Ltd And Another 1988 (1) SA 943 AD at page 980 B-C*** *the court said the following:-*

"Consequently, *where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on reasonable grounds, the court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtness is disputed on a bona fide and reasonable grounds. "*

[9] It is not in dispute that the respondent has taken two loans with the applicant through mortgage bonds. Even though the respondent is disputing that it is owing the respondent the amount of arrears as stated in the applicant's founding affidavit, there is overwhelming evidence that the respondent is not update with its bond repayment. The respondent has made several undertaking to settle its arrears, but has failed to honour them.

[10] There is evidence that the respondent was given ample opportunity to update its arrears but was unable to do so. At some point in time the applicant has threatened to liquidate the respondent if it continues to fail to honour its undertaking of updating its arrears.

[11] The respondent's previous attorneys in one of their letter written to the applicant's attorneys, stated as follows: - *"It is still our submission that any legal action at this*

stage, will not be benefial to any of the parties involved. It is doubtful if creditors will receive a dividend should you proceed with applications for liquidation and/or sequestration. If your client is indeed prepared to take the risk not to receive any dividend, please advise the percentage of unsecured debt your client will be prepared to settle for to enable our clients to consider their respective positions."

[12] In my view, this is an admission by the respondent's previous attorneys that the respondent was in financial problems and was also struggling to pay its debts.

[13] In ***Kalil v Decotex (Pty) Ltd and Another supra, at page 979 B,*** they court held that where on the affidavits there is prima facie case (ie a balance of probabilities) in favour of the applicant, then in my view, a provisional order of winding-up should normally be granted.

[14] Counsel for the respondent has argued that the applicant is making a vague allegation of indebtness by the respondent as they have failed to attach a certificate of balance proving the respondent's alleged indebtness. In an email dated 15/04/13 to the applicant's attorneys the following is stated:

"These are the current arrears and balances:

Home Loans

Crause Home Loan a/c 361874383
Arrears: R1 063 349-01
Balance: R4 148 077-84

Broadbrush Investments 60 (Pty) Ltd a/c 363377891
Arrears: R2 393 912-96
Balance: R8 194 138-91

Southern Spirit 361545371

Arrears: R1 512 792-44

Balance: R7 515 82Í-18

Southern Spirit 212853074

Arrears: R2 322-98

Balance: R2 114 914-35

You will note that the arrears (save for second Southern Spirit account) are substantial.

My client requires immediate payments of these amounts.

In addition, the Crauden Family Trust Account no 4[….] is indebted to my client in the amount of R7 751 146-53.

My client also requires payment of this amount.

Unless all of these amounts are paid by this coming Wednesday April 172013, my intrucsts are to proceed to wind up the companies and sequestrate the Trust and Mr Crause's estate.

I am reserving all my client's right. "

[15] There is no email or letter sent to the applicant's attorneys informing them that they are disputing the contents of their email. However, in their answering affidavit, the respondent dispute the contents of this email.'

[16] There is proof that the respondent has been making some payments in reduction of their arrears even though it was not regular. The respondent is disputing that it is owing the arrears as claimed by the applicant. Clause 6 of the covering mortgage bond read as follows:- " *A certificate signed by any of the Bank's managers, whose appointment need not be proved, will, on its mere production be proof, unless the*

contrary is proved, of the following stated in the certificate.

16.1. the amount due to the Bank at any time ("debt");

16.2. the fact that the debt is due and payable;

16.3. the rate of interest payable;

16.4. the date from which the interest is calculated; and

16.5. any other matter relating to the Mortgagor's indebtness secured by this bond."

[17] The applicant contends that the certificate of balance is not a requirement to proof the indebtness of the respondent. However, in terms of the covering mortgage bond, that is a contractual requirement and the applicant is bound by it.

[18] The question is not whether the respondent is indebted to the applicant or not, but whether the respondent's disputed amount is bona fide and reasonable. In my view, since the respondent has been making payments, even though not regular, they acted bona fide and were also reasonable is disputing the arrears claimed by applicant as it did not reflect the payments they have made. There are two conflicting versions which cannot be resolved on the affidavits. There was no submission that should I find that there is a dispute of fact, I should refer the matter for hearing of oral evidence.

[19] The applicant when embarking on this application should have attached the certificate of balance which on its mere production would have proved the indebtness of the respondent. Now it is not clear how much the respondent is owing if ever it is owing. It is not in dispute that the respondent has been attempting to update its arrears. Therefore in my view there is a genuine dispute of fact in relation to the outstanding arrears.

[20] In the result I make the following order:

1. The application is dismissed with costs.

MF KGANYAGO

ACTING JUDGE OF THE HIGH COURT