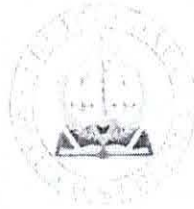


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22-11-2022 *[Signature]*
DATE SIGNATURE

CASE NO: A88/2021

In the matter between:

FIRSTRAND BANK LIMITED
and

Appellant

IBEST (PTY) LTD

Respondent

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This is an appeal against the whole of the judgment of the court *a quo*, wherein the application of the appellant to wind up the respondent was dismissed. Leave to appeal was granted on 2 December 2021.

[2] The application for winding up was premised on section 344(f) read with section 345(1)(a) of the Companies Act No 61 of 1973 ("the Act") in that a demand in terms of section 345(1)(a) was not met, and section 344(f) read with section 345(1)(c) of the Act, that it was proven to the satisfaction of the court that the respondent was unable to pay its debts.

[3] It is common cause that the respondent is indebted to the appellant by virtue of a credit facility agreement in terms whereof the appellant granted a credit facility of R3 340 000-00 to the respondent. This was repayable in installments. The respondent failed to comply with the terms of the agreement and despite demand failed to rectify its breach. The facility was cancelled by the appellant. On 18 December 2015 the respondent was indebted to the appellant in the amount of R3 296 109-63 together with interest.

[4] On 9 December 2015 a demand in terms of section 345(1)(a) of the Act was served on the respondent. Despite the lapse of more than 21 days the respondent failed to make any payment to the appellant. The appellant launched an application for the respondent's liquidation (the first winding up application).

[5] The first winding up application was settled between the parties and the following were terms of the agreement:

- a) The respondent undertook to pay the appellant the amount of R4 000 000-00 by 31 January 2018;
- b) The respondent granted a Power of Attorney to the appellant in respect of the respondent's immovable property;
- c) Should the respondent fail to pay the aforesaid amount on the due date, the appellant would be entitled to proceed with the sale of the immovable property in terms of the Power of Attorney.

[6] The respondent failed to make payment as agreed on 31 January 2018. The appellant proceeded to take steps to arrange an auction to sell the immovable property as agreed. The respondent however disputed the appellant's entitlement to proceed to sell the property by way of auction. The property was not sold. This then resulted in the second winding up application which was dismissed by the court *a quo*.

[7] The court *a quo* found that reliance on section 345(1)(a) should fail because the respondent denied receipt of demand and no proof of proper service of the demand was provided. The second problem according to the court *a quo*, was that the demand delivered during December 2015, was at the time of the hearing three and a half years old. The court *a quo* concluded that the appellant could not prove that the respondent's financial position had not changed, applying the same practice applicable in the instance of a *nulla bona*

return, namely that no reliance can be placed on a *nulla bona* return that is older than six months.

[8] Although the aforesaid approach may in certain circumstances be salutary, the facts and history of the respondent's management of the credit facility and failure to comply with its obligation can hardly be ignored. If the respondent's financial position improved it would have made good on his obligation towards appellant. In my view it is obvious that one's financial situation may change as time goes by, but if a debtor, not only fails to pay a debt that it had previously admitted, but also failed to comply with a settlement agreement that it will pay that debt, it can safely be inferred that its financial position did not improve and that it is unable to pay its debts. One should take into account all the surrounding circumstances and not only focus on the effluxion of time.

[9] The court *a quo* correctly found that a company's inability to pay may be proved in any manner. In my view the mere fact that the respondent did not pay its debt in terms of either the demand, or the later settlement is sufficient proof of an inability to pay its debts as envisaged in the Act. It is also significant that the respondent did not deny its inability to pay its debts in the papers before the court. The fact of the matter is that the respondent had not paid its debt since 2015. Also of importance is that the respondent's case before the court was not based on any allegation that it is indeed able to pay its debts. Our

courts have found that failure to pay on demand is *prima facie* proof of an inability to pay a debt.¹

[10] The respondent opposed the application on the basis that liquidation is not appropriate where the appellant has another, less invasive remedy available. In this instance the sale of the immovable property. The court *a quo* found that the director of the respondent was not obstructive when he refused to allow the sale by way of auction. The papers reveal that the director refused to co-operate with the auctioneer as he alleged that the Power of Attorney did not make provision for the sale of the immovable property on an auction. A perusal of the Power of Attorney reveals that it provides for the sale of the property by private treaty or auction. The property was not sold and the appellant decided to proceed with the winding up application.

[11] The court *a quo* correctly held that as a general proposition there is no obligation on a creditor who has made out a case for winding up to follow a more benevolent route. The court *a quo* however held that the appellant's reliance on the respondent's failure to pay the settlement amount during January 2018, while it tendered the sale of the immovable property was insufficient to establish that the respondent was unable to pay its debts. In my view this approach cannot be correct if one considers the history of the matter. What is common cause is that the respondent had failed to pay the debt of the appellant since 2015. If the respondent was indeed able to pay its debt, it

¹ See *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962(4) SA 593 (D), *Kalk Bay Fisheries Ltd* 1905 TH 22.

should have done so. Despite the expiry of seven years no attempt has been made to pay the debt, consequently an inference that the respondent is still unable to pay its debt is the only rational inference to be made.

[12] The court *a quo* relied on its discretion to refuse the winding up. In my view the discretion was not exercised correctly and judicially in light of the present and historical facts. It is trite that the mere fact that the value of a company's assets may exceed the amount of its liabilities does not preclude a finding that the company is unable to pay its debts and such a finding may be made if the relevant assets are not readily realisable.² The actions of the director in preventing the sale of the property, caused a further delay and as a result the asset was not readily realisable

[13] The appellant was well within its right to bring a second winding up application. The court had a discretion to refuse the winding up, but a court's discretion is limited where a creditor has a debt which the company cannot pay. The creditor is entitled, *ex debito justitiae* to a winding up order³. The court's discretion to refuse the granting of a winding up order where an unpaid creditor applies for it is a "very narrow one", is rarely exercised and only in special or unusual circumstances.⁴

² Rosenbach *supra* 597. See also Murray NO and others v African Global Holdings (Pty) Ltd 2020(2) SA 93(SCA)

³ Henochsberg on the Companies Act 71 of 2008, vol 2, APPT -42[issue15], Rosenbach *supra* 597

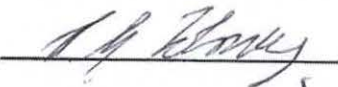
⁴ Afagri Operations Ltd v Hamba Fleer Management (Pty) Ltd (542/16) ZASCA 24 (24 March 2017) see also Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd 1962(3) SA 424 (T) at 428B; Orestisolve (Pty) Ltd t/a Essa Investments v NDF Investment Holdings (Pty) Ltd and others 2015(4) para 18 and Victory Parade Trading 74 (Pty) Ltd t/a Agri-Best SA v Tropical Paradise 93 (Pty) Ltd t/a Vari Foods (13641/2006) [2007] ZAWCHC 32; [2007] JOL 200096 (C) para 28.

[14] It is clear that the respondent could and cannot meet current demands on it and a winding up order should follow.⁵ It is also trite that where proper grounds for winding up are established a court ought not to exercise its discretion against someone seeking a winding up order, unless there exists an improper or ulterior motive.⁶ On the papers no such ulterior motive could be inferred nor was there any evidence of such a motive. In my view there exists no bona fide dispute of facts, that would require that the matter be referred to oral evidence.

[15] In the light of all the facts the appeal should be upheld.

[16] I propose the following order:

1. The appeal is upheld;
2. The order of the court a quo is set aside and the following order made:
 - 2.1 The respondent company is hereby placed under final winding up.
 - 2.2 The costs to be costs in the liquidation.

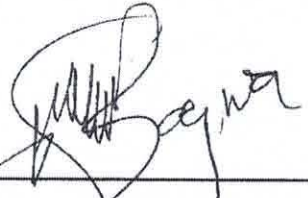


R G TOLMAY


JUDGE OF THE HIGH COURT

⁵ Absa Bank V Rhebokskloof (Pty) Ltd & Others 1993(4) SA 436 (C).

⁶ Wackrill v Sandton International Removals (Pty) Ltd & Others 1984(1) at 293.



SELBY BAQWA
JUDGE OF THE HIGH COURT



C SARDIWALLA
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv N.G Louw

Instructed by: RWL Inc.

For the Respondent: Adv AR Coetsee

Instructed by: Prinsloo Bekker Attorneys

Date of appeal: 13 April 2022

Date of judgment: 2022 - 11 - 22