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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

11 February 2022

DATE

SIGNATURE

CASE NUMBER: 34165/20

DATE: 11 February 2022

WACO AFRICA (PTY) LTD t/a FORM SCAFF

(Reg. No: 2012/000665/07)

Applicant

v

PHAKAMA SCAFFOLDING (PTY) LTD

(Reg. No: 2014/066618/07)

Respondent

JUDGMENT

KOOVERJIE AJ

- [1] This application has been instituted in terms of section 345 of the Companies Act, Act 61 of 1973 ("the former Companies Act").

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- [2] The applicant seeks the winding up of the respondent. The respondent disputed the winding up application on the basis that material disputes of fact exist. Such disputes of fact pertain to the applicant's entire claim and are *bona fide* and reasonable. In addition, the respondent raised various points *in limine*.
- [3] It was alleged that the indebtedness amounted to R2,254,934.01 and such indebtedness was based on the written agreement (credit facility) entered into between the applicant and the respondent. The applicant's claim was based on a statement and a certificate of balance.
- [4] It is the applicant's case that the liquidation is just and equitable and to the advantage of the creditors if the respondent is placed under winding up. The respondent is currently trading under insolvent circumstances.
- [5] The respondent disputed the amount of indebtedness. It was argued that the applicant's attempt to liquidate the respondent was nothing more than a misguided attempt to enforce payment of a debt which is disputed by the respondent on *bona fide* and reasonable grounds.
- [6] Section 344 of the Companies Act states, *inter alia*, that:
- "A company may be wound up by the Court if the company is unable to pay its debts as described in S 345",*
- [7] Section 345(1) of the Companies Act *inter alia* makes provision that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted, in the sum of not less than R100.00, has served on such company a demand requiring the company to pay the sum due.

- [8] The applicant submitted that it had satisfied the jurisdictional factors for its winding up namely that: there was a demand, and the application for winding up was delivered at the company's registered office¹. Consequently, the delivery of the statutory demand triggers the deeming provision of an inability to pay. The inability to pay debts becomes a ground for the winding up².
- [9] The applicant persisted with its argument that no disputes of fact existed and the legal points raised have no merit. Consequently, the applicant is entitled to an order in terms of section 345 of the Companies Act.
- [10] The nexus between the parties emanates from an agreement whereby the respondent was hiring certain scaffolding equipment from the applicant. It remained the applicant's case that the relationship between the parties was regulated by a written master agreement concluded between the parties on 24 October 2018 ("the master agreement").
- [11] The applicant conducts business in the construction industry. The applicant is a designer, manufacturer, hirer and supplier of formwork systems, support systems, access systems and safety equipment. The parties entered into an agreement on 24 October 2018. The respondent was represented by John Honeywell Warwick. By virtue of the agreement the respondent applied for credit facilities subject to the applicant's standard terms and conditions on the sale and lease of goods. The applicant was represented by Darryn Jacobs and Lizette Strydom.
- [12] On the papers, the respondent opposed this application primarily in respect of the amount of indebtedness as well as the nature of the agreement between the parties.

¹ BP & JM Investment (Pty) Ltd v Hard Road (Pty) Ltd 1978 (2) SA 481 T

² Absa Bank Ltd v Tamsui Empire Park 1 CC (11151/2013 [2013] ZAWCHC 187 at par 13

- [13] It was further contended that the relationship between the parties was regulated by various oral agreements since December 2018. The respondent would hire scaffolding from the applicant on consignment and upon completion of the projects the respondent would return the scaffolding to the applicant. Payment for the hiring was based on agreed fees in respect of each hire.
- [14] The respondent's contention is not that the moneys are not due and owing to the applicant but rather there is a dispute in respect of the amount due and payable. The respondent made reference to the debtors list and submitted that on payment from its debtors, it would be able to settle the debt towards the applicant (Annexure "PM3") to the answering affidavit.
- [15] The respondent argued that it had already made payments in the amount of R733,286.55 which was not taken into account by the applicant. In its affidavit per Annexure "PM4", it attached various proof of payments claiming that these payments were not taken into consideration by the applicant.
- [16] It was pointed out that the master agreement made reference that each hire of equipment shall constitute a separate contract governed by such terms (clause 3.1 stipulates that each hire shall be a separate contract governed by these items); the changes for the hiring of equipment commenced from the date of delivery and the master agreement was silent on the quantity of goods hired on each order; the precise description of goods hired; the amount payable for hire of goods; and the date of delivery of the goods.
- [17] Consequently the quantity, description and amounts payable and delivery date for the goods hired were therefore only agreed on by a case-by-case basis in terms of the separate oral agreements. These terms were not regulated by the master

agreement. The applicant was therefore required to plead the terms of the individual hire contracts.

- [18] In essence the dispute centred on whether the contract between the parties emanates from the master agreement or in terms of each specific oral contract between the parties. It was argued that the goods were hired in accordance with the separate oral agreements. Such agreements were material and constituted the contracts between the parties. Such agreements set out *inter alia*: the amounts charged by the applicant, the nature and quantity of the hired goods (the scaffolding).
- [19] The respondent relied on the Badenhorst principle³ and submitted that the liquidation proceedings cannot proceed where the claims are *bona fide* and reasonably disputed. This court could therefore not entertain factual disputes in application proceedings. Oral evidence was necessary in order to properly adjudicate the factual disputes raised.
- [20] An application for liquidation will fail if the alleged liability to pay is disputed on *bona fide* and reasonable grounds. This principle was endorsed in **One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another 2015 (4) SA 623 (WCC) at 627 F-H**.
- [21] It is trite that a court will not ordinarily grant a provisional winding up order if the company on *bona fide* and reasonable grounds disputes its indebtedness to the creditor⁴.
- [22] The rationale for the said principle is that the procedure for winding up is not designed for the resolution of disputes concerning whether or not a debt exists. A party should

³ Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956(2) SA 346 at 347H – 348C

⁴ Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980 A-H

therefore not resort to the procedure as a means of putting pressure on a company to pay the debt which the company genuinely disputes on reasonable grounds.

- [23] At this stage in the proceedings I take cognisance of the fact that it is not necessary for the respondent to adduce actual evidence on affidavit on which it would rely on when the issues are properly ventilated via oral evidence. An alleged debtor need not prove that its defence to the claim will succeed at trial. All it has to prove is that it disputes the alleged indebtedness on grounds that are both reasonable and *bona fide*⁵.
- [24] Having considered the papers and argument before me, it is evident that a dispute exists in respect of the actual amount owing to the applicant. Only through oral evidence would these issues be properly ventilated and resolved. The amount reflected in the certificate of balance is contested by the respondent. However, the respondent presented as per Annexure "PM4" evidence that substantial payments were already made. A further dispute exists in respect of what constitutes the agreement between the parties.
- [25] A further dispute exists in respect of the nature of the agreement between the parties. The respondent's core argument was that although the master agreement is valid, it was necessary to have taken into account the separate hiring agreements. The applicant was required to illustrate the nature of the goods hired and the amounts in respect of the separate contracts.
- [26] The applicant's argument is that the relevant terms of the agreement, *inter alia*, were that:

⁵ Freshvest Investments v Marabeng (Pty) Ltd (1030.2015) [2016] ZASCA 168 (Freshvest matter)

- 26.1 The respondent would place an order with the applicant to lease certain goods *alternatively* the applicant would quote the respondent on the lease of certain goods;
- 26.2 The basis upon which the applicant would pay the rental as set out in the terms and conditions of the agreement must be read with the applicant's written quotation and/or acceptance of all the documents;
- 26.3 The respondent would lease certain goods from the applicant on a weekly basis on the terms and conditions set out in the applicant's standard terms and conditions read with the applicant's written quotation and/or acceptance of all the documents;
- 26.4 Whilst the rental would be calculated on a weekly basis the applicant would prepare invoices on a monthly basis and rental would be payable in cash to the applicant within 30 days from the date of the monthly statement.
- 26.5 The applicant would continue charging rental which would be payable after termination of the lease until the goods so leased are restored to the applicant's possession.
- 26.6 In the event that the respondent failed to pay the amount the applicant would be entitled, without notice to the respondent, to cancel the agreement and to demand return of the goods by the respondent at the respondent's own cost.
- 26.7 A certificate signed by the applicant setting out the particular amount due and payable will constitute prima facie proof of the contents thereof.

[27] I have particularly considered the relevant clauses pertaining to the issues in dispute between the parties and I reiterate the respective terms that appear in the master agreement namely:

- "1. The terms hereof shall form part of and apply to all contracts entered into unless specifically excluded or amended by the parties ...*
- 2. Unless otherwise specifically stipulated in writing to the contrary by Form-Scaff, the terms hereof shall supercede and prevail over any terms and conditions contained in any document submitted by the Customer.*
- 3. The following specific provisions apply in the event that the transaction entered into between Form-Scaff and the customer is the hire of goods namely:*
 - 3.1 Each hire shall be a separate contract governed by these terms ...*
 - 3.10 Should the Customer default in the punctual payment on due date of any amount payable in respect of the hire of goods or default in a punctual observance or performance of any of its other obligations or undertakings hereunder commit an act of insolvency as defined in the Insolvency Act, then Form-Scaff shall have the right and without notice immediately cancel this contract in respect of the hire of goods and to demand that the customer forthwith return, at its own expense, any goods delivered to the customer failing which Form-Scaff shall have the right to take whatever action it deems necessary to enforce its rights in terms thereof ..."*

[28] It is noted that the applicant proceeded to claim the amount due and payable in terms of the aforesaid clause.

[29] Clause 4 further stipulated:

- "4. The following specific provisions shall apply in the event that a transaction entered into between Form-Scaff and the customer is a sale of goods namely:*
 - 4.1 Each sale shall be a separate contract governed by its terms.*

4.2 *Unless otherwise stated, the prices quoted are ex works and the Customer shall take delivery of the goods as soon as they are placed at the Customer's disposal at Form-Scaff's premises and shall bear and be liable for all charges and risks in and to and in respect of the goods from the time when they have been so placed at the Customer's disposal provided that the goods have been clearly set aside or otherwise identified as the contract goods."*

- [30] I have noted the outstanding amount as set out in Annexure "W4", the customer statement sets out in detail the respective amounts owing to the applicant from February 2018 to April 2020. The certificate of balance setting out such amount appears at Annexure "W5". As alluded to above, the respondent disputed the amount and expressed same in Annexure "W10".
- [31] Ultimately this court has a discretion to refuse a winding up order or to grant the order in the applicant's favour. Such discretion has to be exercised in terms of having regard to the jurisdictional factors in set out in section 345. This further includes a determination as to whether the respondent has demonstrated that it is not insolvent.
- [32] It is evident therefore that disputes of fact exist not only in relation to the amount of indebtedness but in relation to the agreement between the parties. In my view I find that the disputes raised are material and goes to the root of the merits of the liquidation application.
- [33] I therefore find that factual disputes exist on the said issues which cannot be resolved on the papers insofar as it relates to the respondent's commercial insolvency.
- [34] Insofar as costs are concerned, the normal principle is that costs follow the result. I find no reason to deviate from this principle.

[35] The following order is made:

The application is dismissed with costs.



H KOOVERJIE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv M Jacobs

Instructed by:

*D Paleologu Attorneys
Pretoria*

Counsel for the Respondent:

Adv M Cajee

Instructed by:

*Ka-Mbonane Cooper
Johannesburg*

Date heard:

19 October 2021

Date of Judgment:

11 February 2022