IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: **6883/12**

In the matter between:

EDGE GEO LLC Applicant

and

GEOTHERMAL ENERGY SYSTEMS (PTY) LIMITED Respondent

(Registration NO.2008/014535/07)

JUDGMENT DELIVERED THIS 14TH DAY OF DECEMBER 2012

DOLAMO, AJ

[1] The Applicant, a limited liability company duly incorporated in the United States of America applied for an order placing the Respondent in provisional liquidation. The application is opposed.

[2] The facts that gave rise to the application are briefly as follows: On or about 18 August 2011 the Respondent ordered electrical heat pumps from the Applicant. The price of the pumps was said to be $170 365-75 which is approximately

R1 418 314-00. The Respondent accepted delivery of the heat pumps during or about December 2011 but later disputed that it was liable to pay alleging that the Applicant misrepresented that the heat pumps would function correctly at an electrical frequency of 50 hertz and that they will carry "CE" and "UL certifications. The pumps were alleged to operate at 25% lower efficiency. The Respondent also alleged that, as a result of this misrepresentation it had a damages counterclaim which is almost equal to the Applicant's claim.

[3] In a string of correspondence that Respondent repeatedly undertook to pay for these heat pumps.

[4] As a result of the Respondent's alleged failure to pay the Applicant delivered a letter in terms of section 345 of the Companies Act 61 of 1975. Paragraph 5 of this letter contained the usual allegation that if payment was not made within 21 days, the Respondent would be deemed to be unable to pay its debts. The Respondent did not respond to this letter. Consequently the application for a provisional winding up of the Respondent was launched initially on an urgent basis.

[5] The founding affidavit was deposed to by one Tony Lee Cooper who described himself as the President/Chief Executive Officer of the Applicant. The averments to substantiate the application are to be found in paragraph 4-6 of the affidavit.

[6] The respondent opposed the relief sought. It appears from the opposing papers that it does so on the grounds: that the founding affidavit was not properly commissioned in compliance with the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, nor has it been authenticated in compliance with the provisions of Uniform Rule 63; that the applicant failed to prove its very existence; that the application should not be determined as one of urgency and struck from the roll; and that the applicant's claim is bona fide disputed on reasonable grounds.

[7] It was conceded that the first three grounds of opposition were without merit and the respondent did not persist with opposing the relief sought on such grounds. However, the respondent continued to opposed the relief sought on the last ground, alleging that the applicant's claim was disputed on bona fide grounds. In addition it was submitted that the applicant was not entitled to rely on the 1973 Act to pursue the relief sought. While the 1973 Act was said not to be applicable it was submitted that it also failed to make any allegation whatsoever that could possibly allow for the winding up of the respondent in terms of the Companies Act 71 of 2008 ("the 2008 Act").

[8] The respondent argued that other than the transitional arrangements set out in Schedule 5 to the 2008 Act, the 1973 Act was repealed in its entirety upon the commencement of the 2008 Act. The argument was that Section 9(1) of Schedule 5 of the 2008 Act ("the Schedule") determines that Chapter 14 of the 1973 Act continued to apply with respect to the winding-up and liquidation of companies under

the 2008 Act as if the 1973 Act had not been repealed. Section 9(2) of the same Schedule determines that sections 343, 344, 346 and 348 to 353 of the 1973 Act does not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2 of the 2008 Act, whilst section 9(3) of the Schedule determines that the provisions of the 2008 Act shall prevail if there is a conflict between a provision of the 1973 Act and the 2008 Act with respect to a solvent company.

[9] By contrast the respondent referred to sections 79 to 81 of the 2008 Act which deal with the winding up of solvent companies. Accordingly, it was submitted that the provisions of the 1973 Act can be utilised and relied upon to obtain the winding up of a company, insofar as the respondent in such an application was not a solvent company.

[10] While the term "solvent company" is not defined in the 2008 Act the respondent submitted that it must mean a company, the assets of which exceed its liabilities especially if regard was had to the clear intention of the legislature to prefer business rescue proceedings for a company rather than the winding up thereof, in addition to which it was submitted that any other interpretation would render the provisions of part G of Chapter 2 of the 2008 Act nonsensical and superfluous. The respondent went on to state that the applicant did not make a single allegation that can be construed to mean that the liabilities of the respondent exceed its assets. Accordingly, the respondent concluded that the applicant cannot rely on section 344(f) of the 1973 Act as a ground upon which the respondent may be would up.

[11] The respondent argued that section 81 of the 2008 Act is the only source of the court's power to grant a winding-up order in terms of such act. Section 81(1)(c), which is the only portion of such section that can be of any application in this matter, determines that a court may order a solvent company to be would up if one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that: The company's business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c) (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or it is otherwise just and equitable for the company to be wound up.

[12] Accordingly, the respondent submitted it is clear that in the absence of any allegation that the respondent is factually insolvent, the only ground upon which this court may possibly grant an order for the winding up of the respondent was if the applicant applied for an order to wind up the respondent on the grounds that it is just and equitable to do so. Since it is clear from the papers that the applicant did not do so, the respondent concluded that for this reason the application must accordingly be dismissed.

[13] The respondent further argued that it was disputing the claim on bona fide grounds and that it is trite that winding-up proceedings should not be resorted to in order to enforce payment by the company on reasonable grounds as the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt. In this respect it found support in the judgment of *Badenhorst Northern construction Enterprises (Pty} Ltd* 1956(2) SA 346 (T) at 347-

348 (and authorities there cited); Henochsberg: Commentary of section 344 of the 1973 Act and *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers Ltd* 1971(1) SA 524 (T) at 529-530.

[14] The respondent in my view correctly submitted that the onus is accordingly on the respondent to show that it bona fide disputed the applicants' claim on reasonable grounds. In the discharge of its onus, the respondent does not have to prove its defences. However, it has to satisfy this court that the grounds advanced for disputing the claims are not unreasonable. In so doing, it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it will rely at the trial. It is sufficient if the respondent alleges facts which, if proved at a trial, would constitute a good defence to the claims made by the applicants, and this court is satisfied that it has done so bona fide. The respondent submitted that it has discharged its onus in this regard.

[15] The applicant argued that the new Companies Act did not do away with liquidations of a company on the grounds of commercial insolvency. Applicant further submitted that as a commercial reality, winding up applications brought by creditors are based on commercial insolvency, i.e. the inability of the respondent company to pay its debts. A creditor is less concerned with a respondent company's actual insolvency than its commercial insolvency, because many companies are able to pay their debts despite the fact that their liabilities exceed their assets. The corollary is that a company's assets may exceed its liabilities, but selling those assets may cripple the company as a going concern, or it may not be possible to realise the

assets. If a creditor were unable to wind up a debtor on the basis of commercial insolvency, then a respondent company would have to do no more to resist a winding-up application than remain silent as to its own financial affairs. An applicant, hamstrung by its lack of knowledge as to the respondent's inner workings, would be unable to wind up a debtor company. The winding-up process would be rendered futile. The applicant submitted that it cannot have been the intention of the legislature to require proof of actual insolvency by a creditor bringing a winding-up application, that "solvent" companies are not "commercially insolvent", and that the respondent company ought to be placed in provisional winding-up.

[16] The applicant further submitted that the respondent's dispute over its indebtedness was not bona fide. The applicant referred to the correspondence between the parties and submitted that the respondent has acknowledged its indebtedness, has, for the most part, blamed non-payment on the bank, has raised alleged breaches of the sale agreement but has, through its conduct and communications, elected to abide by the sale agreement. Even if the respondent successfully claims a reduced purchase price in terms of the *action quanti minoris*, it will still be liable to the applicant for payment.

[17] The absence of bona fides of the respondent in relation to every dispute of fact is abundantly clear, and altogether manifest, and substantially beyond question. In any event, even if the alleged terms did form part of the sale agreement and were breached the respondent was put to the election to rescind or abide by the

agreement. The respondent has by its conduct chosen to abide by the agreement, notwithstanding any alleged breaches.

[18] The first argument by the respondent means that because of the exclusion of section 344 of the Companies Act, 1973 by the provisions of item 9(2) of Schedule 5 to the new Companies Act in respect of a "solvent company" a court is no longer empowered to liquidate a company that is "commercially insolvent" in the sense that it is unable to pay its debts and that the deeming provisions of section 345 of the Companies Act, 1973, although not excluded, is of no assistance any longer. This in my view cannot be correct.

[19] It is trite law that for the winding-up of a company, in addition to the concept of "actually (or factually insolvent" on the inability of a company reliance can be placed on of the deeming provisions of section 345. In Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993(4) SA 436 (C) in which Berman J remarked at 440F as follows:

> *"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercial sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be would up as commercially insolvent is whether or not it has 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-in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is*

entitled to, and should, hold that the company is unable to pay its debts within the meaning of s345(1)(c) as read with s34(f) of the Companies Act 61 of 1973 and is accordingly liable to be would up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962(4) SA 593 (D) at 597E-F:

> *'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not depending upon the circumstances, lead to a refusal of a winding-up order, the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'*

Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay, in such a case the creditor is entitled, ex debito justitiae, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)"

[20] I differ fundamentally with the contention that the legislature intended to do away and in fact did away with this well established "commercially sensible" approach which has been followed in our law for decades. In the absence of an express provision in the new Companies Act that the legislature intended, to do away with the principle that a company may be liquidated on the grounds of its "commercial insolvency", the deeming provision of section 345 of the Companies Act

193 will continue to be applicable where a company is commercially insolvent. This view is confirmed by the fact that section 345 of the Companies Act 1973 was left intact.

[21] Furthermore the expression "solvent company" in item 9(2) of Schedule 5 to the new Companies Act relates to solvent companies, being companies that are either not "actually (or factually insolvent" or "commercially insolvent", envisaged in Part G of chapter 2 of the new Companies Act, in contrast to companies that are insolvent, being companies that are either "commercially insolvent" or "actually (or factually) insolvent" which are to be dealt with in terms of Chapter XIV of the Companies Act, 1973.

[22] I also agree with the applicant's argument that the respondent's failure to raise a dispute over its indebtedness for a period of 7 months (August 2011 to April 2012), and Praetor's repeated undertakings to make payment, even when aware of a 50hz/60hz issue and various alleged difficulties with the heat pumps demonstrates that there is no genuine dispute over the existence of the debt.

[23] I furthermore fully agree with the applicant that the respondent never alleged any counterclaim in his correspondence until 25 April 2012, when the opposing affidavit was signed. From August 2011 to January 2012, Praetor repeatedly undertook to pay the applicant's price and made no mention of a supposed million-rand counterclaim. If that equipment had been defective to the extent that the

respondent would suffer damages of "approximately R1 107400.00", Praetor would not have acknowledged indebtedness and he would have communicated the respondent's damages He would not have blamed the bank for non-payment. Respondent furthermore did not provide a breakdown how the sum of R1 107 000.00, was calculated and arrived at other than to allege that "I estimate". In my view the counterclaim is not genuine, and I dismiss it as a fiction crafted in an attempt to evade the liquidation of the respondent.

[24] The conclusion I came at, in the circumstances is that the applicant has succeeded in proving, by the deeming provisions of section 345 of the Companies Act 1973, that the respondent was commercially insolvent and ought to be

[25] The order I therefore make is the following:

25.1 The respondent is provisionally would up;

25.2 A *rule nisi* is issued calling upon the respondent, and all interested parties, to give reasons, if any, on Monday, 18 February 2013;

25.2.1 A final order should not be granted;

25.2.2 The costs of the application should not be costs in the liquidation.

25.3 That this order be served on the respondent's registered address by the Sheriff of the Court;

25.4 That this order be:

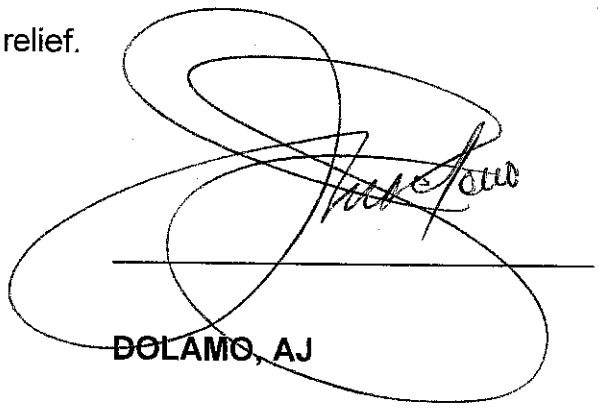
25.4.1 Served on the South African Revenue Service; and

25.4.2 Published in one edition each of "DIE BURGER" and "CAPE TIMES" newspapers.

25.5 That this order be served on the respondent's employees by affixing a copy thereof to a notice board in which respondent's employees have access to inside the respondent's principle place of business;

25.6 That this order be served on known Trade Unions to which the respondent's employees belong;

25.7 Further and/or alternative relief.



DOLAMO, AJ