Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case numbers: 9530/2020
and 9531/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 11 February 2021
Judgment: 16 February 2021

In the matters between:

DRAKENSTEIN MUNICIPALITY Applicant

and

CASTLE ULTRA 300 (PTY) LTD Respondent

And between:

DRAKENSTEIN MUNICIPALITY Applicant

and

DE OUDE PAARL TRADING (PTY) LTD Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 16 February 2021.)

BINNS-WARD J:

[1] These two applications came up for hearing together. The applicant in both matters is the Drakenstein Municipality, which has its council offices in Paarl. The Municipality applies in each application for the provisional winding up of the respondent company.

[2] The respondent companies are interrelated in the sense that their respective sole shareholder and director is one Gerhard Meyer. De Oude Paarl Trading (Pty) Ltd, which is the respondent in case no. 9531/2020, is the registered owner of certain immovable property in Paarl, and the other company, Castle Ultra 300 (Pty) Ltd, rents the property and sublets it to a commercial tenant at a rental of just over R107 000 per month, excluding VAT.

[3] As these applications are for provisional orders, it is therefore at this stage only necessary for the Municipality to make out a prima facie case in the sense explained in *Kalil v Decotex* 1988 (1) SA 943 (A). The applicant is entitled to the relief it seeks if it shows on a balance of the probabilities as they appear from the papers that it is a creditor of the companies and that they are unable to pay their debts. I therefore do not intend in this judgment to traverse the facts in the detail that might be appropriate in support of a decision granting final relief. It is not in dispute that the Municipality is a creditor of the respondent companies. It relies on the deeming provisions of s 345 of the Companies Act 61 of 1973 to establish that the companies are unable to pay their debts.

[4] The Municipality has a claim for unpaid property rates and service charges against the property-owning respondent and a claim for unpaid electricity accounts against the tenant company. A number of actions for payment of the amounts claimed by the Municipality have been instituted in the magistrates' court. Apart from one case, in which default judgment was obtained against Castle Ultra 300 (Pty) Ltd for just over R180 000 in February 2015, none of these actions has been brought to trial.

[5] A *nulla bona* return was rendered when the Municipality endeavoured to obtain execution of its judgment. The Municipality abandoned any reliance on the judgment and the *nulla bona* return in its counsel's argument in support of the winding up application. That was a sensible decision because there do appear to have been questions pertaining to the efficacy of the service of the process in that action. The applicant's counsel did stress, however, that the respondent in that matter had failed to apply for the rescission of the judgment. Any rescission application would, of course, require the judgment debtor to show

that it had a defence to the claim and, in order to demonstrate its bona fides, also disclose the nature thereof in sufficient detail to persuade a court of the genuineness thereof.

[6] The respondents have been somewhat equivocal in their response to the applications. On the one hand, represented by the aforementioned Mr Meyer who deposed to the respondent companies' answering affidavits, they contend that the Municipality's claims are bona fide disputed and that it should be required to proceed to trial with the actions pending in the magistrates' court, as winding-up proceedings are generally inappropriate where a money claim on which it is premised is disputed (cf. *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (3) SA 346 (T)). On the other hand, however, they assert that the actions '*were not set down by the* [Municipality] *for trial, as the parties involved in the legal actions arrived a settlement agreement, the terms of which settlement agreement the* [Municipality] *has breached, inter alia, by refusing to accept payment of its claims against the respondent [i.e. Castle Ultra 300 (Pty) Ltd] and* ***PAARL TRADING*** *in 36 instalments as per the agreement arrived at between the parties, contained in annexures "****SJ14"*** *and* ***"SJ15"*** *to the* [Municipality's] *founding affidavit*'.

[7] I consider that this court is entitled to infer from Mr Meyer's averments that were the Municipality to proceed to trial in the pending actions, the respondents would amend their pleadings to plead that the Municipality's claims had been compromised. Inherent in what Mr Meyer has said is that the respondents admit their indebtedness to the Municipality at least to the extent that might be deduced from the content of annexures SJ14 and SJ15 to the applicant's founding affidavit.

[8] The relevant part of SJ14, which is a letter from the Municipality's attorneys to the respondents' attorneys, dated 6 April 2018, records that the Municipality's books indicated a total amount of R1 581 442,66 as owing by the respondents. The letter proceeds to state (in para 5 thereof) that the respondents would pay 20% of that amount (R316 288,84) into the local authority's attorneys' trust account within seven days and that the dispute concerning the exact balance owing by the respondents would be referred to a mutually agreed upon firm of accountants and auditors for independent assessment and determination. It recorded that the auditors' determination would be regarded as final and binding. It also recorded that the amount[s] so determined would be paid in 36 equal instalments. It appears from the papers that the amount of R316 288 was duly paid. Payment in that amount had been a prerequisite in order to have the municipal services to Paarl Trading's property reconnected so that it

could be occupied by the aforementioned commercial tenant in terms of the lease then recently concluded between Castle Ultra 300 (Pty) Ltd and the said tenant.

[9] Suffice it to say that it is apparent from the papers that the Municipality's claims have been the subject of settlement attempts between the parties over an extended period. The property-owning company has contended that the rates have been incorrectly assessed by reason, amongst other matters, of the alleged failure by the Municipality to make the appropriate adjustments after the property in question had been the subject of a consolidation of several erven a few years ago. There was also an issue concerning a reduction in the number of toilets on the property, which allegedly impacted on the calculation of the sewerage services charge.

[10] Annexure SJ15 to the founding papers is a copy of the respondents' attorneys' reply to annexure SJ14. It stated in the relevant parts that the 'minimum terms' set out in para 5 of the letter under reply were 'in principle' acceptable to the respondents. The penultimate paragraph of SJ15 went as follows:

> We have in the above regard been instructed to place on record that our clients agreed to the minimum terms set out in paragraph 5 of your email under reply on the understanding that:
>
> 1. Our client does not concede that a total amount of R1 581 442,66 is in fact due and payable to your client, but is prepared to concede that according to your client's records the amount is reflected as being due and payable by our clients to your clients; and
>
> 2. Our clients and yours will make submissions to the "independent auditing firm" who will investigate the matter both from an accounting and a legal point of view so as to decide on the amount payable by our clients to your client.

[11] An extended period of debate ensued about who should be appointed undertake the exercise of determining the dispute. It culminated in the appointment of a certain Mike Dreyer of the auditing firm C2M.

[12] The deponent to the Municipality's founding affidavit averred (in para 63 of the affidavit in the application against Castle Ultra 300 (Pty) Ltd, in case no. 9530/2020) that -

> [o]n 13 December 2018, a meeting was held with C2M pursuant whereto C2M sent a report to applicant on 15 February 2019 in regard to the indebtedness of the companies as appears from "SJ19" hereto. On these calculations the total amount due was R877 217, 39 of which R334 528,92 Had already been paid. An amnesty of R438 608,70 was claimed. (Applicant had not consented to any such amnesty). On C2M's version R104 079,78 remained unpaid after the deduction of the amnesty and payment made.'

The respondents' answer to those averments is set forth in para 51 of the answering affidavit in case no. 9530/2020. It goes as follows:

> I admit that the representatives of the parties met on the 13th of December 2018 and that C2M after an investigation of the documents placed before it by the applicant and having regard to the amnesty granted by the applicant to numerous consumers in their areas of jurisdiction, calculated that the balance owing by the respondent and **PAARL TRADING** totalled R104 079,78, which the respondent and **PAARL TRADING** were prepared to pay in instalments as per the agreement contained in annexure **"SJ14"** and in particular paragraph 5(h) of the agreement which provided for payment of the balance owing "over a period of no more than 36 months".

[13] Exchanges between the parties continued. On 19 September 2019, Dreyer addressed an email to various officials at the Drakenstein Municipality in the following terms:

> Further to my meeting with Gerhard [Meyer] yesterday and in an attempt to resolve this matter I would like to put Gerhard's case forward for a final time and offer a payment arrangement which he is able to commit to. Gerhard is also prepared to sign an acknowledgement of debt for the full outstanding amount in the event he does not stick to the suggested payment arrangement. Kindly note that this offer is based on the rand for rand write-off offered by the Drakenstein Municipality and an agreed amount due of R669 562,09 of the full outstanding debt of R1 418 375,27.
>
> Gerhard's reasoning and understanding for involving C2M in this matter was to take an objective view on the outstanding amounts due to the Drakenstein Municipality not to recalculate the accounts provided, as this would serve no point. We embarked on our calculation of the liability of the relevant entities based on our understanding of the situation. This understanding was that services were discontinued to the property, that the toilets were cut off from the sewage system and the toilets were sealed with concrete. We were also informed that properties were consolidated. however the municipal accounts were only consolidated many months later and that therefore rates and taxes were levied incorrectly.
>
> Taking the above into account we presented the municipality with our estimated amount due. Your office however could not accept our calculation as it was communicated that Gerhard did not follow the proper procedures for disconnection and therefore the amounts as they stand are payable. Despite Gerhard being of the opinion that the involvement of C2M has therefore served no point and his argument for the past 5 years has not been properly considered, in a final attempt to settle this matter he is willing to offer the following.
>
> R669 562,09 to be settled in 3 instalments
>
> | | |
> |---|---|
> | 1st installment (sic) 30th November 2019 | R180 000,00 |
> | 2nd installment 30th June 2020 | R244 781,05 |
> | 3rd installment 30th June 2020 | R244 781,05 |

[14] I think that one might reasonably deduce from the aforegoing that Mr Meyer had been willing, albeit grudgingly, to concede at the end of the exercise contemplated in the exchange of letters SJ14 and SJ15 that the respondents were indebted to the Municipality in the very finely calculated sum of sum R669 562,09. The Municipality was not willing to accept a settlement in the terms proposed and advised Mr Dreyer by email dated 4 October 2019 that the Municipality would 'continue with the legal recovery process of the outstanding amount which will most probably include liquidation of the relevant companies'.

[15] The Municipality thereafter proceeded to address letters to the respondent companies in terms of s 345(1) of the 1973 Companies Act, in which it demanded payment from Castle Ultra 300 (Pty) Ltd in the sum of R618 383,92 and from Oude Paarl Trading (Pty) Ltd in the sum of R797 447,90. The respondents responded to the letters by contending that the matter had been settled in terms of the exchange of letters in annexures SJ14 and SJ15 to the Municipality's founding affidavit discussed above. Quite how the settlement was to work in the context apparent from the email sent by Mr Dreyer on the respondents' behalf on 19 September 2019 was not explained. The expressed willingness to settle the respondents' indebtedness in the amount of just over R669 500 was not reiterated in the reply to the section 345 letters. On the contrary, in response to the following paragraph (para 16) in the Municipality's letter of demand:

> Should you nevertheless dispute a portion of [the Municipality's] claimed amount, then kindly indicate the full extent and details of such dispute and take notice that in the event that you do not provide full particulars of the basis of your dispute for (sic) the entire outstanding amount (less R100-00), then we will nevertheless apply for relief as indicated hereunder and after lapse of the timeframe provided [i.e. the 21 day period referred to in s 345 of the 1973 Companies Act].

the respondents retorted in a letter from their attorneys, dated 14 January 2020, as follows:

> **AD PARAGRAPH 16 THEREOF**
>
> 16.1 Your client is already in possession of full details as to the disputes raised by our clients and it will serve no useful purpose to re-hash all the matters which have been raised during the "extensive engagement sessions" which have taken place between the parties.
>
> 16.2 Our clients are of the view that the terms of the "provisional agreement" are binding on all the parties thereto, this despite the fact that your client has indicated that it apparently does not regard the provisions of paragraph 5(h) of the "provisional agreement" as binding upon it.

[16] Notwithstanding the clear contextual indications from the offer of settlement communicated on their behalf by Mr Dreyer in the amount of nearly R670 000 that the respondents admitted their indebtedness to the Municipality in an amount considerably in

excess of the sum of R100 mentioned in s 345 of the Companies Act, the respondents did not make or tender payment in any amount in response to the letters, not even in the aforementioned lesser amount of just over R104 000. In the companies' answering affidavits it is admitted that the respondents are indebted to the Municipality 'in an amount still to be agreed upon between the parties'. The deponent, Mr Meyer, also averred 'I had at no stage denied that the respondent [Castle Ultra 300 (Pty) Ltd] and **PAARL TRADING** owed amounts to the [Municipality]'.

[17] In the Municipality's replying affidavit, the deponent averred in paragraphs 13 and 14:

> 13. The companies admit that they are indebted to applicant yet refuse to say what amount according to them is due and payable or owed. They say it is not the amount stated by Applicant but do not say what amount it is. This does not create a bona fide factual dispute or defence or a basis whereupon not to accept what Applicant has stated in this regard.
>
> 14. In the circumstances and as it is common cause that the companies have been indebted to applicant for a number of years which debt has not been paid, it is submitted that the companies are unable to pay their debts and fall to be wound-up.

Those averments adumbrated the essence of the argument addressed at the hearing by their counsel, Mr *LM Olivier* SC, in support of the applications.

[18] Section 345 of the 1973 Companies Act provides as follows in relevant part:

> ***When company deemed unable to pay its debts***
>
> *(1) A company or body corporate shall be deemed to be unable to pay its debts if-*
>
> *(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-*
>
> *(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or*
>
> *(ii) …,*
>
> *and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or*
>
> *(b) …; or*
>
> *(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.*

> *(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.*

There is some doubt as to whether the letters in terms of s 345 were served on the respondents strictly in accordance with the prescripts of the provision, but it is common ground that they came to the companies' notice, as is indeed apparent from their response thereto mentioned above.

[19] Malan J (as he then was) stated in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) in para 16 that 'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (*Ter Beek*'s case [*Ter Beek v United Resources CC and Ano.* 1997 (3) SA 315 (C)] supra at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.' Rogers J subsequently expressed doubt that the presumption created in terms of the provision was rebuttable, remarking that in his opinion a respondent company affected by the deeming provision that was able to show that it was in fact able to pay its debts could nevertheless prevail on the court to exercise its overriding discretion; see *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) in para 16.

[20] It is not necessary in this matter to plump for either of these contrasting interpretations of the provision. It seems to me that the end result would generally be the same whichever of the two approaches was adopted. The respondents have neither rebutted the presumption, nor shown why the court's discretion should be exercised in their favour.

[21] In an evident endeavour to influence the court against putting the companies into provisional liquidation, the respondents' counsel handed in some correspondence at the commencement of the hearing that showed that the respondents had offered to pay the sum of R105 000 to the Municipality in order to see off the winding-up applications. The Municipality's counsel did not object to the court receiving the correspondence put in from the bar by the companies' counsel.

[22] In an email letter to the Municipality's attorneys, dated 25 January 2021, the respondents' attorneys referred to the winding-up applications and said:

> We refer to the above matters which are again on the court roll for hearing tomorrow and believe that the prospects of a judge being allocated to deal with the matters are remote.
>
> Substantial costs have already been incurred in the above matters and will no doubt be incurred in future, should the matters again be postponed and under the circumstances and without any admission of liability by our clients, or any concession of the merits of the liquidation applications, we have instructions to offer the amount of R105 000, which we hold in trust, in full and final settlement of all the matters in dispute between the parties, both in the Magistrates' Court and in the High Court.
>
> The above offer is open for acceptance until the close of business on Friday 29th January 2021, failing which acceptance the offer is to be regarded as having been withdrawn and no longer open for acceptance.
>
> Kindly acknowledge receipt.
>
> Yours faithfully
>
> [signed]
>
> PS you will recall that an amount of R104 079,78 was previously suggested by our expert witnesses in settlement, hence the amount of R105 000 being offered in settlement above.

[23] Having not received a favourable response from the Municipality, the respondents renewed the offer, this time 'with prejudice', in an email letter from their attorneys to the Municipality's attorneys, dated 5 February 2021. The renewed offer was stated to be open for acceptance until close of business on the date that it was made.

[24] The respondents' counsel explained that the correspondence was being handed in to show that the companies were in point of fact able to pay their debts.

[25] In my judgment, the respondents' tender is not good enough. It brings to mind the closing remarks of Malan J made in comparable circumstances in his judgment in *Fish Eagle* supra, in para 18: '*The respondent has not discharged the onus resting on it. The amount due, owing and payable by the respondent is in excess of the R100 provided for in terms of s 345(1)(a) of the Companies Act 61 of 1973. The respondent has neglected to pay, to secure or to compound for that sum to the reasonable satisfaction of the applicant, as contemplated by s 345(1) of the Companies Act. The only defence relied on by the respondent is that the debt is disputed. The respondent has not shown that it is both factually and commercially solvent. On the respondent's own version there is a debt payable but it has made only a*

conditional tender of payment and has not paid the amount it says is owing. This is not good enough'.

[26] In my judgment the respondents have not shown that the companies are able to pay their debts. On the contrary, it appears from the papers on a balance of probabilities that they are indebted to the Municipality in a sum considerably greater than R104 079,78. Mr Meyer has been dogged in his resistance to the local authority's claims against the companies and I consider it extremely unlikely in the circumstances that an offer of settlement would have been made to the Municipality in the sum of nearly R670 000 if there had been any belief on his part that the local authority's claim in at least that amount had not been substantiated. It is striking that the respondents have not taken the court (and the Municipality) into their confidence by setting forth in detail the basis upon which they have conceded a limited liability to the Municipality. They should have been able to state the amounts in which they admitted liability to the local authority and set out how such amounts were determined, and they should have paid the admitted amounts unconditionally. Furthermore, the indications that the companies would need to settle the determined amounts of their indebtedness in instalments over an extended period of time is suggestive of their inability to pay the debts as and when they were due. It has not been explained why deferred payment terms should be necessary or appropriate. Municipalities are obliged by legislation to recover rates either monthly or annually[1] and members of local communities have the duty to pay *promptly* service fees, rates on property and other taxes, levies and duties imposed by the municipality.[2] These shortcomings in the respondents' answers to the applications suggest that the Municipality's claims are not bona fide disputed, at least not to their full extent. The answers also fall short of affording any basis upon which the court's discretion might be judicially exercised in the respondents' favour.

[27] In the result, provisional winding-up orders, returnable on 15 April 2021, will issue in respect of each of the respondent companies in accordance with the draft orders handed up by the Municipality's counsel, which I have signed and marked 'X'.

A.G. BINNS-WARD

Judge of the High Court

[1] Section 26 of the Local Government: Municipal Property Rates Act 6 of 2004.
[2] Section 5(2)(b) of the Local Government: Municipal Systems Act 32 of 2000.