

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd t/a Wesbank v Enroute Traders 30 CC (3117/2017) [2018] ZAECHGHC 2 (16 January 2018) [2018] ZAECHGHC 2

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

3117/2017

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IN THE HIGH

COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION, GRAHAMSTOWN)

CASE NO.:

3117/2017

In the matter

between:

FIRSTRAND
BANK LTD t/a WESBANK
Applicant
And
ENROUTE
TRADERS 30 CC
Respondent

JUDGMENT

BESHE J:

- [1] This is an application for the final winding-up of the respondent, a close corporation.
- [2] The grounds for the final winding-up of a close corporation are the same as those that are applicable for the winding-up of companies. An applicant for the winding-up of a close corporation must rely on the grounds set out in Section 344 and 345 of the Companies Act.[1] Section 344 provides for instances in which a company can be wound up. Sub-section

- (f) provides that a company may be wound up by the Court if it is unable to pay its debts as described in Section 345 in turn provides that:

“345. 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 as its registered office, a demand requiring the company to pay the sum due; or
 - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, 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) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
 - (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.”
- [3] This application arises as a result of the respondent being indebted to the applicant in respect of five (05) Cost of Credit Schedule Instalment Sale Agreements. These being for the procurement of vehicles and equipment. (the goods). The agreements were concluded during the period spanning from March 2015 to August 2015. The applicant elected to cancel the five (05) agreements on the 10 April 2017 due to the fact that the respondent was conducting its accounts with the applicant in an unacceptable manner and had as a result fallen into arrears. To this end the applicant attached cancellation letters in respect of each of the agreements. It is common cause that the respondent is still in possession of the goods of which the five agreements were concluded.
- [4] It is alleged by the applicant that the arrears remain outstanding and the full capital has become due and payable. Further that in the event of respondent being wound up, the liquidator will take possession of the goods and realise the value thereof for the purpose of winding-up of the respondent.
- [5] The respondent does not dispute being indebted to the applicant in the manner alleged by the applicant, or being in default of paying the amounts due to the applicant. The application is resisted on the basis that the respondent is commercially solvent and is able to meet its day to day liabilities in the ordinary course of business. Furthermore on the basis that the respondent has liquid assets or readily realizable assets available out of which proceeds it is able to pay its debts. That however, due to non-payment or delayed payment

by its clients, of invoices, it is unable to pay its debts timeously. It is contended on behalf of the respondent that it is awaiting payment of R465 606.56 from Airports Company SA, R371 000.00 from Amatola Water as well as R112 000.00 for plant hire a total of R948 606.56. To bolster these allegations the respondent attaches three annexures, two of which are payment certificates from Airports Company SA and Amatola respectively.

- [6] The respondent also alluded to the position of its twelve employees who are all breadwinners who will be adversely affected should the respondent be liquidated, in that they will lose their jobs. This was not pursued in argument with any vigour.
- [7] The issue to be decided is whether or not the respondent is able to pay its debts.
- [8] It is trite that the unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent's company / co-operation that has not paid its debt. In this regard, the following was stated in the matter of *Standard Bank of South Africa v R-Bay Logistics*[2]:

"[27] There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is 'unable to pay its debts'. Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f)."

See also *Lamprecht v Klipeiland (Pty) Ltd*[3] at paragraph [16] where the following was stated:

*"[16] I have already found that the agreement [that] was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had locus standi, that he was a creditor for a sum no less than R100 and further that it was due and payable. There is no dispute that although the section 345(1)(a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in section 345(1)(a) have been met. As stated by Malan J (as he then was) in *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) at 428B-C:*

"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 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."

It follows that the court below erred in discharging the provisional winding-up order.”

The following remarks made in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*[4] are instructive:

*“The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound 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 s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound 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)“.”

[9] As indicated in paragraph [5] above, it was contended on behalf of the respondent that the corporation is commercially solvent and is able to meet its day to day liabilities, that it has liquid assets or readily realizable assets out of the proceeds of which it is able to pay its debts. In the same vein however, the respondent concedes that it is not able to pay its debts timeously. It is evident that the agreements were cancelled in April 2017 due to the fact that respondent had fallen into payment arrears in respect of the five

(05) agreements. The present proceedings were instituted in July

2017. The opposing affidavit was deposed to in September 2017 wherein it was conceded on behalf of the respondent that it was unable to pay debts timeously. It is clear therefore that the respondent's contention that it is able to pay its debts is not supported by the evidence, which includes respondent's own admission.

[10] The applicant has, in my view, succeeded in making out a case for the winding-up of the respondent on the basis that the respondent is unable to pay its debts.

[11] Accordingly, the respondent is placed under final winding-up in the hands of the Master.

Applicant's costs to be costs in the liquidation of the respondent.

NG BESHE

JUDGE OF THE HIGH COURT

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Date Heard : 16 November 2017

Date Reserved : 16 November 2017

Date Delivered : 16 January 2018

[1] Act 61 of 1973. (The Act)

[2] 2013 (2) SA 295 at 300 – 301 paragraph [27].

[3]

[2014] JOL 32350 (SCA).

[4] 1993 (4) SA 436 at 440F.

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