

SOUTH AFRICA / JUDGMENT

Hoer Volkskool Heildelberg v Safta Properties (Pty) Ltd (80658/2016) [2017] ZAGPPHC 555 (17 August 2017) [2017] ZAGPPHC 555

COURT

North Gauteng High Court, Pretoria

BEFORE

J.J.C. Swanepoel

CASE / FILE NUMBER

80658/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 80658/2016

DATE: 17/08/2017
In

the matter between: HOER
VOLKSKOOL
HEIDELBERG
Applicant
and
SAFTA
PROPERTIES (PTY)
LTD
Respondent

JUDGMENT

SWANEPOEL AJ:

1. Applicant, a public school in terms of the Schools Act of 1996, seeks a final order winding up the Respondent,

pursuant to an urgent provisional liquidation order granted by Fabricius

J on 18 October 2016.

2. It is common cause that Respondent conducted the business of a flight training academy, and that on 19 April 2010 it entered into a written lease agreement with Applicant in terms of which it rented a portion of the Applicant's hostel, in order to house flight students whilst they were undergoing training. It also housed a flight simulator, and lecture facilities at the hostel.
3. The terms of the agreement that are material to this matter, were firstly, that Respondent would pay rental to Applicant for the use of the facilities based upon the number of students housed there, and secondly, it would pay Applicant for the electricity used by it.
4. It is further common cause that since June 2016, Respondent has paid no rental. During 2015 a dispute arose between Respondent and the Lesedi Local Municipality (LLM) regarding the extent of Respondent's electrical usage. A new electrical meter was installed that initially showed a decline in the electrical usage, but later it emerged that the decline was due to seasonal changes, and that the measured usage was correct. Nonetheless, Respondent still disputes how much is owed by it to Applicant, and by extension, to LLM.
5. What is not in dispute is that a substantial sum is owed to Applicant in respect of electricity, and as I have pointed out, rental has not been paid since June 2016. On 19 September 2016 this Court granted an urgent order against Respondent in terms of which Applicant was allowed to terminate the electricity supply to the part of the hostel which the Respondent occupied. Respondent's counsel submitted that the result of the disconnection was that Respondent was effectively unable to continue with its business activities.
6. Applicant's case is that it is clear that Respondent cannot pay its debts.

It is common cause that shortly after the disconnection order was obtained, Respondent closed its offices, and advised its students

that its bank account had been frozen due to suspected money laundering activities. Respondent advised its students that it could

not keep students on campus, and accumulate expenses, whilst it was not generating income through its flying activities.

7. Evidently, Respondent has not reopened its doors and has not resumed training. At least one of its students is out of pocket by over R 100 000.00 in training fees. A further allegation made by Applicant is that Respondent has been evicted from the hangars where it previously housed its aeroplanes, and that the Heidelberg Aviation Association is owed some R 64 000.00 in hanger rentals. Respondent's answer to this allegation is that another company owned its aircraft, but it is not disputed that that company has been evicted from the hangars.
8. The result is that a picture emerges of a Respondent that is unable to continue to trade. It does not have flight training facilities, or access thereto, with which to trade. It has no bank account and no students. Judgment was also granted against

Respondent on 30 November 2016, in the South Gauteng High Court under case number 2016/38260, for payment of R 775 146.23, plus interest and costs.

9. Respondent's admits that it owes Applicant rent and for some of the electricity. However, it decided to withhold payment from Applicant in order to force Applicant to engage with LLM regarding the electricity account. Respondent alleges that there is a dispute of fact that cannot be resolved on the papers. The dispute of fact allegedly relates solely to the quantum of Respondent's indebtedness to Applicant. Mr. Viviers, on behalf of Respondent, conceded that although only the extent of the Respondent's

indebtedness in respect of electricity was in dispute, it is not disputed that substantial amounts are owed in respect of electricity

and rental.

10. In my view there is no real dispute of fact. Respondent is without doubt indebted to Applicant in a substantial amount, which has been due for some time.
11. The law regarding winding up of a company by a Court, is regulated by Chapter XIV of the Companies Act, Act 61 of 1973 (the Act}, which has survived the new Companies Act, 2008, by virtue of the provisions of Item 9 of Schedule 5 of the latter.
12. Section 344 (f) of the Act provides:
"A company may be wound up by the Court if-
(f) the company is unable to pay its debts as described in section 345;
13. Section 345 sets out when a company is deemed not to be able 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) 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."
14. In terms of section 346 (1) (b) of the Act, an application for the winding up of a company may be brought by a creditor.
15. There is no doubt that Respondent is unable to pay its debts as they become due. In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others*[1] Berman J made the following remark with which I respectfully align myself:

"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 a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realizable 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?"

16. It is common cause that before it stopped trading, Respondent negotiated with LLM with a view not only to ascertain its exact

indebtedness, but also to try and reach agreement regarding a payment plan. Clearly Respondent was, even before its electricity supply was terminated, unable to meet its debts as they fell due.

17. In Respondent's current circumstances there is no doubt that Respondent is unable to pay its debts.
18. In my view, Applicant has proved that Respondent should be wound up in terms of section 344 (f) of the Act.
19. In the result I make the following order:

19.1 Respondent is hereby placed under final winding up.

J.J.C. SWANEPOEL

Acting Judge of the High Court

[1] 1993(4) SA436 (CPD) at440 F

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