

SOUTH AFRICA / JUDGMENT

Rooplal N.O v Rezevation 4-2

Communication CC (1659/2021; 1661/2021)

[2024] ZALMPTHC 21 (23 February 2024)

[2024] ZALMPTHC 21

COURT

Limpopo High Court, Thohoyandou

BEFORE

IM Khosa

CASE / FILE NUMBER

1659/2021; 1661/2021

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HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NO: 1659/2021

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

In the matter between ANOOSHKUMAR ROOPLAL N.O APPLICANT And REZEvation 4-2 COMMUNICATION CC REG.NO:2008[...] RESPONDENT CASE NO: 1661/2021 In the matter between ANOOSHKUMAR ROOPLAL N.O APPLICANT And SCORPION BUSINESS SOLUTIONS (PTY) LTD REG.NO:2015[...] RESPONDENT

JUDGMENT

IM KHOSA AJ

Introduction

- [1] These are applications for the final winding-up of the Respondents; Rezevation 4-2 Communication CC (Rezevation) and Scorpion Business Solutions (Pty) Ltd (Scorpion) on the basis that the Respondents are unable to pay their debts. The winding up is sought in terms of Section 344(f) read with Section 345(1) (a) and Section 345(1)(c) of the Companies Act 61 of 1973 read with item 9 of schedule 5 of the Companies Act, 71 of 2008.
- [2] The Applicant further seeks the winding up of the Respondents on the just and equitable basis in terms of section 81(1) (d) of the Companies Act, 71 of 2008. The two applications were consolidated to be heard together.[1] The Respondents oppose the applications.

Factual background

- [3] Rezevation and Scorpion held classic business accounts with account numbers 0[...] and 1[...] with VBS Mutual Bank (VBS) respectively. During December 2016, the Respondents, represented by Lutendo Ernest Sibiya (Sibiya), applied for overdraft facilities with VBS. MS Maposa, representing VBS, approved their applications.
- [4] Subsequent the approval of the applications, the Respondents entered into overdraft facility agreements with VBS. Rezevation and Scorpion were granted an overdraft limit of R 3 000 000.00 and R 2 000 000.00 respectively.
- [5] On 13 November 2018, VBS was placed under liquidation and is duly represented in these proceedings by the Applicant who has been appointed as VBS' Liquidator.
- [6] Sibiya is the sole member of the Respondents and the deponent to the opposing affidavits in these proceedings.
- [7] As of 08 June 2019, Rezevation and Scorpion accounts had overdrawn balances of R 6 199 887.26 and R 6 435 079.08 on their classic business accounts respectively. The last payment made into the Respondents' accounts was R 2000.00 each[2].
- [8] Letters of demand in terms of Section 345[3] were delivered to the Respondents' registered address by the Sheriff[4]. A period of 21 days has lapsed since demand and the Respondents have failed to pay or to secure or compound for the debts due to VBS.

Condonation

- [9] The Applicant's replying affidavits were filed out of time and the Applicant seeks condonation. The applications for condonation are not opposed.
- [10] It is trite law that condonation is an indulgence to be granted to a litigant upon exercise of judicial discretion. The Applicant's basis for seeking condonation is that the Applicant's mother passed away and the deponent was grieving and thus away from work. The Deponent attended to the replying affidavits immediately on his return to work.

- [11] The replying affidavits are two months late. The Respondents had granted the Applicant indulgence for the late filing of the replying affidavit[5]. In the circumstances, the Respondents are not prejudiced.
- [12] The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. The degree of lateness is not excessive and the Applicant have provided a plausible explanation for the delay. I am satisfied that it is in the interest of justice to grant condonation.

Non-compliance with Rule 41A

- [13] The Respondents raised a point in limine of non-compliance with Rule 41A of the Uniform rules of court and seek dismissal of the applications. In reply, the Applicant aver that the Rule 41A notices were served on the Respondents and as proof thereof, provides copies of the returns of service.
- [14] The Respondents bear the onus of proving the point in limine. The Sheriff's return of service is prima facie proof of service[6]. In my view, the Respondents' point in limine is unsustainable.

Issues

- [15] The issue is whether the Respondents are liable to be wound up on the basis that they are unable to pay their debts and whether it is just and equitable that the Respondents be wound up.

Law

- [16] Section 344 of the Companies Act provides the circumstances in which a company may be wound up by the Court. Subsection (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 of the Companies Act, which in turn provides:

'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
- (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.'

- [17] In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*[7], the court stated the following about the difference between factual insolvency and commercial insolvency.

'For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities)....

That the company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time."

[18] The following was stated in the matter of Standard Bank of South Africa v R-Bay Logistics[8]:

"... 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..."

[19] The following remarks made in Absa Bank Ltd v Rhebokskloof (Pty) Ltd[9] are instructive:

"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."

[20] 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.

Application

[21] 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.

[22] Section 344 of the Companies Act is the source of authority that vests a court with the power to liquidate a company in certain circumstances. Sub-section 344 (1) read with section 345 (1) (a)(i) of the Companies Act provides that a company may be wound-up by a court if it is unable to pay its debts and that the company will be deemed to be unable to pay its debts if a creditor who is owed not less than R100 serves on the company a demand requiring the company to pay the sum due and the company fails to comply.

[23] The Respondents admit applying for overdraft on their existing business accounts with VBS[10]. Further, the Respondents do not dispute the conclusion of the overdraft agreements[11]. The Respondents' defence is that the approval of the applications was not communicated to them and that the Respondents

applied for an overdraft of R 1 000 000.00 each[12].

- [24] Clause 3 of the business overdraft facility application forms expressly reflect that the Respondents applied for overdrafts of R 3000 000.00 and R 2 000 000.00 respectively. The applications are duly signed by Sibiya on the same page that depicts the overdraft amount applied for. The Respondents' contention is inconsistent with the credit applications admitted by the Respondents and is far-fetched.
- [25] The Respondents breached the terms of the overdraft agreements by exceeding the credit limit and failing to make payment of the amount drawn in excess of the credit limit. Despite demand, the Respondents have failed to pay the monies due to VBS bank.
- [26] The Respondents deny liability to VBS on the basis that the transactions were made by Maposa without the knowledge and consent of the Respondents and the Respondents did not benefit from the transactions.
- [27] Sibiya had internet banking access to Rezevation bank account[13]. The bank statement of Rezevation reflect 16 electronic fund transfers spanning over the period of 30 December 2016 until October 2017 and those transactions are not disputed[14].
- [28] The bank statement of Scorpion reflects that during November 2016 and December 2016, payments were made to Coxwell, Steyn, Vise and Naude Inc towards purchase of immovable property which is registered in the names of Sibiya. Sibiya admits signing the transfer documents and avers that it was at the behest of Maposa.
- [29] Two deposits of R 3 500 with reference 75 President Street appears on Scorpoin's bank statement. The reference on the said payments matches the address of the immovable property registered in the names of Sibiya, which property was purchased during October 2016.
- [30] Sibiya admits leasing the property to maintiain the property and service its utility account[15]. This admission evidences that Sibiya was alive to the tansactions on the accounts and was in charge of the immovable property. In the circumstances, the Respondent's version that he only signed the transfer papers on the behest of Maposa and did not transact on the Respondents' accounts is unsustainable.
- [31] It is not necessary to prove actual insolvency for the purposes of section 344 (f) of the Companies Act. In *Standard Bank of South Africa v R-Bay Logistics CC*[16], the court held that "if there was evidence that the respondent's company is commercially insolvent (i.e 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".
- [32] It follows that the exercise of a discretion in favour of not granting a liquidation order in circumstances where a company is commercially insolvent must be based on a solid factual foundation. This matters present none.

[33] In the circumstances, I am satisfied that the Applicant has succeeded in making out a case for the winding-up of the Respondents on the basis that the Respondents are unable to pay their debts. Consequently, I need not consider the issue of whether it just and equitable for the Respondents be wound up.

Costs

[34] The Applicant prays that the costs of the Applications be costs in the winding up of the Respondents. In the light of the nature of these applications, this is the appropriate costs order.

[35] I therefore make the following order:-

[35.1] Condonation for late filing of the Applicant's replying affidavits is granted.

[35.2] The points in limine of non-compliance with Rule 41A is dismissed.

[35.3] Rezevation 4-2 Communication CC, Reg.No:2008[...], is placed under final winding-up in the hands of the Master of the High Court of South Africa.

[35.4] Scorpion Business Solutions (Pty) Ltd, Reg.No:2015[...] is placed under final winding-up in the hands of the Master of the High Court of South Africa.

[35.5] The Applicant's costs are to be costs in the liquidation of Rezevation 4-2 Communication CC and Scorpion Business Solutions (Pty) Ltd.

IM KHOSA

ACTING JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES FOR THE APPLICANT Adv KD ILES INSTRUCTED BY Werkmans Attorneys FOR THE RESPONDENTS Adv T Mulaudzi INSTRUCTED BY Corrie Nel & Kie Attorneys DATE OF HEARING 02 November 2023

JUDGMENT

23 February 2024

JUDGEMENT

DATE

: Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 23 February 2024.

[1] On 31 May 2023, per order of Tshidada J

[2] Annexures FA5 - Founding affidavits

[3] section 345 of the Companies Act 61 of 1973

- [4] Annexures FA10 - Founding affidavits
- [5] Annexure RA2 of the Replying affidavits
- [6] Deputy Sheriff for Witwatersrand District v Harry Goldberg and Others 1905 TS 680, see also Pienaar v TLB Transport CC (10521/2017)
- [2018] ZAGPJHC 128 (10 May 2018) at para 4
- [7] 2014
- (2) SA 518 (SCA) para 16 - 17
- [8] 2013
- (2) SA 295 at 300 – 301 at para 27
- [9] 1993
- (4) SA 436 at 440F
- [10] Para 6.20 of the opposing affidavits
- [11] Para 30 of the opposing affidavit
- [12] Para 6.2 – 6.23 of the Opposing affidavits
- [13] Annexure FA7- Rezevation Founding affidavit
- [14] Para 27: Rezevation Opposing affidavit
- [15] Para 6.11 : Scorpion Opposing affidavit
- [16] Note 8 above
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Prepared on 9 October 2026 · Esheria