

SOUTH AFRICA / JUDGMENT

Smith N.O and Another v Karlo Farming (PTY) Ltd (A102/2021) [2023] ZAFSHC 8 (20 January 2023) [2023] ZAFSHC 8

COURT

Free State High Court, Bloemfontein

BEFORE

Musi, Loubser, Pohl

CASE / FILE NUMBER

A102/2021

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****FREE STATE****DIVISION, BLOEMFONTEIN****Case no: A102/2021****Reportable: YES/NO****Of Interest to other****Judges: YES/NO****Circulate****to Magistrates: YES/NO**

In the matter between:

ELRICH
RUWAYNE SMITH
N.O.
1st
Appellant
ETHNE
MARY VAN WYK
N.O.
2nd
Appellant
and
KALRO
FARMING (PTY)
LTD
Respondent

CORAM: MUSI, JP et
LOUBSER, J et
POHL, AJ
HEARD

ON: 28 NOVEMBER 2022
DELIVERED

ON: 20 JANUARY 2023

JUDGMENT

BY: MUSI, JP

- [1] This is an appeal against a judgment of a single judge of this Division. The court a quo dismissed an application for the provisional liquidation of the respondent, Kalro Farming (Pty) Ltd (Kalro). Kalro has three directors, Mr Karel Smit, his wife Mrs Roleen Smit (the Smits) and Mr Alexis Du Preez (Mr Du Preez). They each hold 33.3% shares in Kalro. During the proceedings in the court a quo and in this court, Kalro was represented by the Smits only, due to the acrimonious relationship between the directors.
- [2] The appellants are the joint liquidators of Trackstar Trading 140 (Pty) Ltd – in Liquidation (Trackstar). Mr Du Preez is also a director of Trackstar. It is common cause that Kalro purchased the farm ‘Strydfontein’ to commence its farming operations. It is also common cause that Nedbank financed the purchase of the farm. It is further common cause that Nedbank financed Kalro’s initial production costs and registered a General Covering Bond over Strydfontein and a second farm, Weltevreden. Due to Kalro’s inability to pay Nedbank, it obtained judgment against Kalro for approximately R10m and an order declaring the two farms specially executable. Nedbank also obtained a session of Kalro’s crop-income. Nedbank had not sold the farms at the time of the application.
- [3] The appellants’ claim is based on transactions between Trackstar and Kalro. They allege that there was a partnership agreement between Kalro and Trackstar, alternatively that Trackstar advanced production costs to Kalro. They allege that Kalro owes Trackstar R3 378 564.04. The appellants unsuccessfully demanded payment of the aforesaid amount from Kalro, in terms of section 345(1)(a)[1] of the Companies Act 61 of 1973 (the Act). They contended that Kalro should be deemed to be unable to pay its debts. Additionally, they pointed out that in terms of Trackstar’s financial statements for the year ending 2018, Kalro was indebted to Trackstar in the amount of R1 435 117.00. Mr Du Preez filed an affidavit wherein he confirmed Kalro’s indebtedness to Trackstar.
- [4] The Smits vehemently disputed Kalro’s indebtedness to Trackstar. They contended that the entire claim is based on false information obtained from Mr Du Preez. They submitted that the information on which the claim is based is vague and unsubstantiated because Mr Du Preez is under investigation for fraud committed in his capacity as director of Trackstar and

Kalro. They disputed the alleged partnership agreement between the two companies. They specifically pointed out that Mr Du Preez moved Kalro's bank account from Nedbank to Standard Bank ostensibly because Nedbank adopted an unfriendly approach towards agriculture or farmers. They state that Standard Bank denied them access to Kalro's bank account. They had no dealings with Mr Du Preez in connection with Strydfontein for one year prior to the provisional liquidation application being launched. They were not aware that Kalro was in the process of being deregistered by the Companies and Intellectual Property Commission (CIPC) since 2016.

- [5] The Business Rescue Practitioner who was appointed to endeavour to get Trackstar back to solvency had indicated that Kalro owed Trackstar approximately R5.2m which was later reduced to approximately R3.3m. He reduced the amount to approximately 3.3m, being the estimated value of Kalro's crops that were recoverable.
- [6] On 10 December 2019 Kalro, represented by Mr Smit and SSS Farming (Pty) Ltd (SSS), represented by Mrs Smit entered into a lease agreement, for a period of nine months. In terms of the agreement, Kalro leased, amongst others, Weltevrede farm. The rental was payable on 31 August 2020 in the bank account of the lessor, as directed by it in writing.
- [7] The court a quo exercised its discretion against the appellants. In the first place, it found that although liquidation may well be a means of ensuring the payment of a debt, it should be the last resort. Additionally, it found that it is unclear if the indebtedness is disputed but the amount of the debt and that it is due and payable, is. Furthermore, it found that the appellants failed to prove that Kalro's provisional liquidation would be to the advantage of creditors. Finally, it found that it is good practice for courts to be hesitant to grant a liquidation order on the say-so of a single creditor.
- [8] A respondent can avoid a winding-up order if it shows on a balance of probabilities that its indebtedness to the applicant is disputed on bona fide and reasonable grounds.[2] A winding-up order will not be granted where the sole or predominant motive for seeking the order is something other than the bona fide bringing about the liquidation of the company.[3] The Court has a narrow discretion to refuse a winding-up order. An appeal court will not easily interfere with the exercise of a discretion by the court a quo 'unless that court was influenced by wrong principles or a misdirection of the facts, or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles'.[4] I now turn to examine the court a quo's reasons for refusing the application.
- [9] I am not aware of any rule that states that liquidation proceedings should be used as a last resort or, for that matter, as a first choice. The general principle as stated in *Hamba Fleet* is that 'an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt'.[5] I therefore disagree with the court a quo's finding that liquidation proceedings should be utilised as a last resort.

- [10] The Court a quo's finding that it is unclear if the indebtedness is disputed but that the amount of the debt and whether it is due and payable is disputed, is incorrect. At best for Kalro, the Smits did not know the nature and extent of Kalro's indebtedness to Trackstar. This is so because they were unaware of the financial affairs of Kalro because they left the financial affairs in the hands of Du Preez. They trusted him. They had no access to Kalro's bank account and were not privy to the transactions between Kalro and Trackstar. They could therefore not dispute the indebtedness, on bona fide and reasonable grounds. They had to resort to a bare denial and blanket challenge of Trackstar's financial statements. They could not produce, even after being challenged to do so, any of Kalro's financial statements. As stated earlier, Mr Du Preez confirmed Kalro's indebtedness and that the money was due and payable.
- [11] The claim was proved at the meeting of creditors and Mr Smit was questioned in connection therewith. The applicants are not required to prove the entire amount due but only the legislatively required amount of R100 or more. Trackstar's undisputed financial statements showed that Kalro owed it approximately R1. 435m. The court a quo should therefore have found that the applicants proved that Kalro owed it that amount and that it was unable to pay that debt in the ordinary course of its business. A demand was made and no payment was forthcoming. Kalro could not pay Nedbank and the applicants in the ordinary course of its business. It must be remembered that:
- ‘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 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’[6]
- [12] The applicants need not show that it would be to the advantage of the respondent's creditors if the respondent is liquidated. In Imobrite the court aptly stated that ‘the concept of concursus creditorum (which refers to the establishment of a “body of creditors” for purposes of distributing the estate among creditors) is not a prerequisite for the granting of a winding-up order but rather a consequence of the winding-up order by operation of law.’[7]
- [13] It is unfortunate that the court a quo presented no authority for its proposition that courts should be hesitant to grant a winding-up order based on the say-so of a single creditor. There is no need for any hesitation or doubt which has no factual foundation. In terms of section 346(1)(b) of the Act an application for the winding-up of a company may be made by one or more creditors. Generally, if a single creditor establishes a prima facie case for the liquidation of a company and that company is unable to discharge the onus of showing that the debt is disputed on bona fide and reasonable grounds then a winding-up order should issue.

- [14] In my view the court a quo exercised its discretion influenced by wrong principles and it reached a conclusion that could not be reached after a proper consideration of the facts and principles. It ought to have found, at the very least, that the respondent should be deemed to be unable to pay its debt. There is another reason why the court a quo should have issued a provisional liquidation order.
- [15] The directors, Mr Du Preez on the one hand and the Smits on the other, are at loggerheads. The Smits accuse Mr Du Preez of fraud regarding the respondent's assets and they have laid criminal charges against him. Mr Du Preez changed the bank account of the respondent and denied the other directors access to its bank statements and records. The respondent has not submitted its annual returns to the CIPC, for at least four years, and is in the process of being deregistered. The Smits were unaware of the deregistration process and only became aware of it during these proceedings. The three directors had not met since 2020. Mr Du Preez took decisions on behalf of the respondent without properly involving the other directors. Mr Smit represented the respondent in a lease agreement between the respondent and SSS wherein Mrs Smit represented SSS. The corporate personality of the respondent and the legal prescripts with regard thereto were completely ignored by the directors. It is therefore blindingly obvious that it would be just and equitable to liquidate the respondent.
- [16] The appeal ought to succeed. The applicants sought a provisional liquidation order in the court a quo and such order should have been issued.
- [17] The following order is granted:
1. The appeal is upheld.
 2. The order of the court a quo is set aside and replaced with the following:
 - '(a) The respondent, Kalro Framing (Pty) Ltd, is placed under a provisional order of winding-up in the hands of the Master of the Free State Division of the High Court, Bloemfontein.
 - (b) A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, on Thursday 02 March 2023, as to why:
 - (i) the respondent should not be placed under a final order of winding-up; and
 - (ii) the costs of this application should not be costs in the winding-up of the respondent.
 - (c) Service of this order shall be effected:
 - (i) by the sheriff of the high court or his lawful deputy on the registered office of the respondent;
 - (ii) on the South African Revenue Services;
 - (iii) by publication in the Government Gazette;
 - (iv) by registered post on all known creditors of the respondent with claims in excess of R25 000;

(v) on the employees of the respondent in terms of s 346A(1)(b) of the Companies Act 61 of 1973; and

(vi) on any registered trade union that the employees of the respondent may belong to.

(d) Costs to be costs in the winding-up.'

C.J. MUSI, JP

I concur.

P.J. LOUBSER, J

L. le R. POHL, AJ

Appearances:

For the Appellants:

Adv. P. Zietsman, SC

Instructed by Phatshoane Henney Inc

Bloemfontein

For the Respondent: In person

[1] '(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...'

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- [2] *Badenhorst v Nothorn Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 348B; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980B.
- [3] *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/2020 [2022] ZASCA 67 (13 May 2022) para 14 and 15.
- [4] *Agri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) para 11.
- [5] *Ibid* para 12.
- [6] *ABSA Bank LTD v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 44F.
- [7] *Imobrite supra* para 17.

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