

SOUTH AFRICA / JUDGMENT

Solotrade 1088 (Pty) Ltd v Kortec Auto (Pty) Ltd (M486/2019) [2021] ZANWHC 80 (23 November 2021) [2021] ZANWHC 80

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M486/2019

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IN THE NORTH WEST
HIGH COURT, MAFIKENG
CASE
NO: M 486/2019
In the matter

between:

SOLOTRADE
1088 (PTY) LTD
Applicant
and
KORTEC
AUTO (PTY)
LTD
Respondent
DATE
OF HEARING
:
04 NOVEMBER 2021
DATE

OF JUDGMENT
:
23 NOVEMBER 2021
FOR
THE PLAINTIFF
:
ADV. ERASMUS SC
FOR
THE DEFENDANT
:
ADV. LOUW

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 23 NOVEMBER 2021.

ORDER

Resultantly, the following order is made:

1. That the Respondent be and is hereby placed under provisional liquidation in the hands of the Master of the High Court and that a rule nisi is hereby issued, with the return date of 10 February 2022, calling upon the Respondent or any other interested party to, on such return date, advance reasons, if any, why the Respondent should not be finally liquidated.
2. That the provisional liquidation be served as follows: -
 - 2.1. On the Respondent, at its registered address;
 - 2.2. On the employees of the Respondent, if any;
 - 2.3. On the trade union of such employees, if any;
 - 2.4. On the South African Revenue Service;
 - 2.5. On the Master of the High Court;
 - 2.6. One publication in the Government Gazette;
 - 2.7. One publication in the local newspaper in the area where the respondent's registered address is.
3. That the costs of this application be costs in the liquidation.

HENDRICKS DJP

- [1] In this application the applicant prays for a final liquidation (winding-up) order against the respondent on the basis that it is unable to pay its debts as envisaged in sections 344 and 345 of the Companies Act 61 of 1973, which provisions still apply in accordance with the transitional provisions of the Companies Act 71 of 2008, and that the costs of this application be part of the costs of the liquidation. This application is opposed.
- [2] The salient facts can be succinctly summarized as follows. The respondent, a company with limited liability is inter alia in the business of supplying and repairing of water pumps. The applicant required two large submersible pumps and related fittings to be used by one of the applicant's clients. The respondent company was approached in this regard and an order was placed on 02nd December 2018. The respondent issued a tax invoice for the amount of R2 909 438.82 on the very same day. The following day, the amount was paid in full. After the passage of approximately two months, the pumps were still not delivered. As reason for the delay was proffered that there were manufacturing delays at the manufacturing company Xylem in Sweden. The excuses persisted until 06 April 2019, with the detection of a letter which the respondents' attorneys of record wrote to Xylem. It appears from this letter that the respondent only paid a deposit to Xylem and not the full purchase price. A balance of R1 613 324.94 was still outstanding. It was stated that the respondent would be unable to settle this balance upon delivery. Therefore, a proposal was made for the payment in monthly instalments of R75 000.00 per month until the balance is paid in full.
- [3] An email was also sent by the respondent to the applicant. According to this email, the remainder of the money which the applicant paid for the water pumps were used by the respondent to pay out its BEE partner's shares upon her resignation. Her shares amounted to R1.4 million. The respondent had approached Xylem to release the water pumps upon instalment payments of the balance that was due but Xylem insisted that the balance be paid in full before they would release the pumps. Since the applicant was in an embarrassed situation towards its own client who waited so long for the pumps, the applicant opted to pay the outstanding balance directly to Xylem for delivery of the water pumps. This amounted to R1 613 324.94.
- [4] At a subsequent meeting held between the parties, the respondent offered to settle this amount by paying monthly instalments of R75 000.00, which was not accepted by the applicant. The applicant then launched the present application for the winding-up of the respondent, as it is unable to pay its debts and is therefore commercially insolvent. The fact that this amount is due, owing and payable is not in dispute. This is in fact admitted and it is therefore common cause. The respondent opposes the winding-up on two fronts. First, because the application is technically flawed in that the requirements were not met and secondly, because it is not hopelessly insolvent both factually and commercially.
- [5] To deal with the technical defences raised first. There was proper service of this application on all parties who are by law enjoined to be informed of the intended application, for example the South African Revenue Service (SARS), the applicant and its employees. Furthermore, were security for costs paid albeit on the date of hearing of the application. All

the technical defences raised by the respondent should consequently come to naught, seeing that there was full compliance with all the requirements for the launching of this application. This put paid to the first defence raised in opposition of the application.

- [6] As to the second defence of opposition, the following. As alluded to earlier, the indebtedness to the applicant is not disputed. The circumstances surrounding the cause of the indebtedness, as unfortunate as it may be, was as a result of multiple factors. There is no need to articulate same in this judgment. Suffice to state that the explanations proffered amounts to a passionate plea that the applicant not be liquidated as it would amount “to sending it to the gallows” in these trying commercial and economic hardships. The financial position of the respondent is gradually improving and its financial hardships may well be a thing of the past in the not too distant future. Fourteen (14) employees stand to lose their jobs and would also suffer immense hardship should the respondent be liquidated (wound-up).
- [7] There are other aspects mentioned in the answering affidavit which amounts to the denial of certain allegations as well as attempts to explain same, which does not merit indebt scrutiny as it does not relate to the core of this application. This relate to inter alia to the date of delivery of the pumps, the waiting period for the pumps, whether or not it amounts to fraud or theft that the money

paid by the applicant for the pumps was not used for its intended purpose, whether or not the BEE partner resigned and were paid out her shares value in the company, ect, etc. What is indeed very important is the financial position in which the respondent finds itself.

- [8] On behalf of the respondent was filed a supplementary answering affidavit. The purpose of the filing of this affidavit is to appraise this Court of the updated financial position of the respondent since the initial opposition of its liquidation application. New and further financial information has become available which the respondent deems necessary to place before this Court which, so it is submitted, are relevant especially with regard to the exercise of this Court’s discretion whether or not to grant the relief sought. The filing of the supplementary answering affidavit was unopposed, provided that the matter was proceeding and not be postponed. Needless to say, the matter proceeded.
- [9] The following important aspects emerged from this supplementary answering affidavit. The annual financial statements for the financial year ending 2019 reveals that the respondent made a loss of just over a million rand. The annual financial statements for the financial year ending 2020 reveals that although the respondent still trade at a loss, there was a remarkable improvement from the previous financial year. This positive trend is reflected in the 2021 financial statements. The employees are paid every month. This, so it was contended, shows a remarkable improvement in the financial position of the respondent.
- [10] In reply to this, Adv. Erasmus SC on behalf of the applicant pointed out to this Court that these financial statements underscores the fact that the respondent trade at a loss. The bank statements proves that the respondent is cash trapped. So for example does the statement

for the period 27 August 2020 to 26 September 2020 shows that of the overdraft facility of R848 000.00, an amount of R801 752.90 was used (in debit) leaving a meagre amount of R46 247, 10 that is available. There is no money to pay the applicant and sight should not be lost of the fact that the amount which the respondent owes to the applicant is R 1 613 324.90 plus interest a tempore more. Furthermore, the respondent's liabilities by far exceed the assets, which proves the point that the respondent is not commercially solvent and is in fact factually insolvent. There is no available evidence that the respondent will pay its debt to the applicant imminently.

- [11] There was much debate about whether this Court should exercise its discretion in favour of the respondent and not grant the winding-up order, despite the fact that the applicant is a single petitioning creditor whose prayer for the winding-up of the company meet the requirements of the Act. The author in Henochsberg on the Companies Act 71 of 2008, Volume 2, APPI 57 states:

"Where a creditor seeks the winding-up and his application is not opposed by other creditors, the Court's discretion is very narrow; for an unpaid creditor who cannot obtain payment and who brings his claim within the Act is, as against the company, entitled ex debito justitiae to a winding-up order; he is not bound to give the company time."

- [12] Adv. Erasmus SC contended that this is in fact what is happening in this matter and the aforementioned quotation is quite apposite to the current situation. The indebtedness is admitted. The only thing that the respondent is doing is to buy time in the hope that it will somewhere in the future be in a position to pay its debt toward the applicant. The respondent is commercial insolvent because it cannot pay its debt to the applicant.

- [13] In *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) the following is stated:

"[16] 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). See, for example, Johnson v Hirotec (Pty) Ltd; Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation); Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd.

- [24] Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See *Johnson v Hirotec (Pty) Ltd*, It follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of

the old Act.

- [26] The court below therefore incorrectly decided that s 81(1)(c)(ii) of the new Act applied to the determination of whether or not to grant the order for the liquidation of the appellant. The high court did, however, correctly find that the appellant was unable to pay its debts. The high court ought to have applied s 344(f), read with s 345, of the old Act. The reason is that application had been made for the liquidation of a company which was insolvent in the generally understood sense of that term. Under the old Act, this justifies an order winding-up the appellant. The appeal must be dismissed, the high court having made the right order, albeit by wrongly deciding that s 81(1)(c)(ii) of the new Act applied to the facts of this particular case.”
- [14] Adv. Louw on behalf of the respondent referred to the judgment of Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC) at paragraphs [17] to [21]. He state that the relevant legal principles applicable to cases where there is a single petitioning creditor seeking a winding-up of a company, under circumstances where the creditor has met the requirements in terms of the 1973 Companies Act, but the application is opposed on the basis that the respondent submits that the court should nevertheless, in the exercise of its discretion, refuse to grant the order. Adv. Erasmus SC took serious issue with this submission. The judgment should not be quoted out of context. I agree. For the sake of ease of reference and completeness, the relevant paragraphs are reproduced and it read thus:

“[17] The extent of this discretion was the subject of some debate. Mr van Coller referred to the traditional view that where a company is unable to pay a creditor’s claim the latter is ex debito justitiae entitled to a winding-up order and that the court’s discretion to refuse is narrow (Rosenbach & Co (Pty) Ltd v Singh’s Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F; Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F; Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at 440-441). Although the ex debito justitiae maxim has been repeated in recent cases, there are other decisions holding that the legislative policies underlying the new Act require the discretion to be viewed more broadly in favour of saving ailing companies (see Absa Bank Ltd v Newcity Group (Pty) Ltd & Other Cases [2013] 3 All SA 146 (GSJ) paras 29-33; Dippenaar NO & Others v Business Venture Investments No 134 (Pty) Ltd [2014] 2 All SA 162 (WCC) paras 45-46). Where there are competing applications for liquidation and business rescue, the policy considerations underlying the business rescue procedure must inevitably derogate from the traditional approach. The two cases just mentioned extended this approach to circumstances where, although there were not competing business rescue applications, there was evidence that the companies could be saved by transactions of which particulars were furnished.

- [18] I doubt that the ex debito justitiae maxim has ever been, or justified, an inflexible limitation on the court’s discretion. In one of the leading English cases on the discretion to refuse a winding-up, Re Southard & Co Ltd [1979] 3 All ER (CA), Buckley LJ said that, where a judicial discretion is concerned, it is mistaken to attempt to lay down rules for its exercise and that no judge can fetter any other judge in the manner of its exercise or lay down rules binding on others in the exercise of the discretion (562b-c). The ex debito justitiae maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a

liquidation order, the court may not on a whim decline to grant the order (and see Blackman *op cit* Vol 3 at 14-91). To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'. There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld.

- [19] One clear example, which is sometimes said to be outside the scope of the maxim altogether, is where the contest is not just between the petitioning creditor and the respondent company but involves a difference of opinion among the creditors themselves (in England see for example Southard *supra* at 562c-d and *Re Demaglass Holdings Ltd*
- [2001] 2 BCLC 633 at 638c-640b; in this country, see *SAA Distributors (Pty) Ltd v Sport en Spel* (Edms) Bpk 1973 (3) SA 371 (C) at 373B-H; Meskin Henochsberg on the Companies Act Vol 1 p 699-700). In *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd & Another* [2012] ZAWCHC 13 Binns-Ward J, while repeating this proposition, suggested that the court would attach more weight to the views of external creditors than insiders. A similar view prevails in England (*Demaglass supra* at 639e-f).
- [20] It is readily understandable that the *ex debito justitiae* maxim is not applied where creditors have competing views. In the case of sequestration, the petitioning creditor must establish *inter alia* that sequestration will be to the advantage of creditors. Where the petitioning creditor has established this requirement together with the other requirements for a sequestration order, the scope for the residual discretion would understandably be limited (cf *Firststrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) para 27). In the case of liquidation, by contrast, the petitioning creditor need not establish that liquidation will be to the advantage of creditors. If other creditors, despite having had an opportunity to oppose, do not do so, one can understand why the court might ordinarily view its discretion as limited in much the same way as it is in sequestration proceedings. However, if one or more creditors oppose the liquidation, a narrow approach to the court's discretion is inappropriate. The court's discretion allows it to take into account the interests of creditors as a whole and what would be to their best advantage, though naturally the court is not bound to refuse a liquidation merely because the majority of creditors by number or value oppose it. And of course the court must consider not merely that the majority of creditors opposes the winding-up but also the reasons for the opposition.
- [21] Another circumstance which, in my view, would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by s 345(1)(a), the evidence shows that the company is not in fact commercially insolvent. It may also be relevant in this regard that the company's failure to pay is attributable to a genuine dispute concerning the claim, even if the court in the event considers the grounds of dispute are ill-founded.

(emphasis added)

[15] The applicant prays for a final order for winding-up. This Court has a discretion whether or not to grant a final or provisional liquidation order. This application is based on a single petitioning creditor's prayer for the winding-up of the respondent. On the respondents' version, the applicant is not the only creditor that it has. There are other creditors and also employees, whose interests this Court must take into consideration. Therefore, I am of the view that a provisional order for liquidation (winding-up) should be granted.

Order

[16] Resultantly, the following order is made:

1. That the Respondent be and is hereby placed under provisional liquidation in the hands of the Master of the High Court and that a rule nisi is hereby issued, with the return date of 10 February 2022, calling upon the Respondent or any other interested party to, on such return date, advance reasons, if any, why the Respondent should not be finally liquidated.
2. That the provisional liquidation be served as follows: -
 - 2.1. On the Respondent, at its registered address;
 - 2.2. On the employees of the Respondent, if any;
 - 2.3. On the trade union of such employees, if any;
 - 2.4. On the South African Revenue Service;
 - 2.5. On the Master of the High Court;
 - 2.6. One publication in the Government Gazette;
 - 2.7. One publication in the local newspaper in the area where the respondent's registered address is.
3. That the costs of this application be costs in the liquidation.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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