



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 2459/2024

In the matter between

SP IMPACT (PTY) LTD

(Registration no: 2018/392779/07)

and

ENM TRADING CC

(Registration no: 2002/086504/23)

APPLICANT

RESPONDENT

Coram: MHLAMBI, J

Heard: 22 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 09h30 on 29 August 2024.

JUDGMENT

- [1] The applicant seeks an order in which the respondent is placed under final winding up in the hands of the Master of the High Court, and the costs of this application be in the winding up of the respondent. The applicant contended that the respondent had been hopelessly insolvent for some time.

- [2] The primary grounds for the winding up are that the respondent is unable to pay its debts. Alternatively, the respondent is deemed unable to pay its debts and is therefore commercially insolvent as provided for in section 69 (1)(a) of the Closed Corporation Act read with the provisions of the Company's Act 61 of 1973 and the Company's Act 71 of 2008. The respondent opposes the application on the grounds that it would not be just and equitable to grant the application as it is not insolvent.
- [3] It is common cause that the respondent and the applicant entered into a written loan agreement on 19 May 2022, in terms of which the applicant advanced R3 500 000 to the respondent, repayable by 31 August 2022. The respondent failed to repay the loan as agreed. On 1 September 2022, the respondent still owed the applicant R2 070 840.37.
- [4] On 31 May 2023, A default judgment was granted against the respondent in which the respondent was ordered to pay the applicant R2 496 259.12, together with interest and costs. The respondent failed to pay the judgment debt. The respondent undertook to pay the judgment debt through 8 monthly instalments commencing on 13 November 2023, the final instalment of R196 259.12 payable on 30 June 2024. The respondent only made three payments of R220 000 on 13 November 2023 and 27 March 2024. The applicant contended that the respondent neither disputed that the applicant caused to be delivered to its registered address on 8 April 2024, a section 69(1)(a) notice as provided for in the Close Corporation Act, nor the respondent's failure to pay, secure or compound for its debt thereafter.
- [5] The respondent contended that it was not commercially insolvent or susceptible to liquidation. It was in a stable and growing financial state. It undertook to pay its debt to the applicant. It was trading and able to meet its financial obligations and/or to pay its debt. It proposed a future payment method to the applicant, but the latter failed to respond. Its financial projections proved that it was indeed commercially solvent, and audited financial predictions were produced by financial experts and/or qualified accountants.
- [6] Its version was that, at the time of the assessment, the projections showed that it might have a turnover of R14 736 644 by the end of 2024. Moreover, the accountant concluded that a joint venture was expected to pay the respondent R10 000 000.00 by the end of this year. Therefore, its cash flow was evidence enough to show that it was solvent and able to meet its financial obligations.

- [7] Relying on *Scania Finance Southern Africa Pty Ltd v Thomi Gee Road Carriers CC; Absa Bank Limited v Fernofire Bethlehem CC*,¹ the respondent submitted that an applicant could no longer rely solely on a debtor's failure to respond to a section 69² demand for the winding up of the close corporation as that section was no longer held to be a deeming section. It was contended that the applicant failed to prove that it was just and equitable for the respondent to be wound up for being commercially insolvent. A close corporation that is trading and able to meet its financial obligations cannot be liquidated. Such liquidation can only take place in exceptional circumstances.
- [8] The respondent referred to the dictum in *Herman and another v Set-Mak Civils*,³ that the just and equitable ground would have to be construed more widely to cater for a situation where a close corporation or a company, even if it cannot be proved to be factually insolvent, continues to trade in dire financial circumstances and/or with total disregard to the rights and claims of its creditors and/or is shown to be unable to pay its debts in certain circumstances.
- [9] However, it was stated in the same case that: "*it might have been argued with success that the respondent's inability to settle its debts, which I indicated earlier is not the case in casu, should be taken into consideration to prove that it is just and equitable to be wound up. If such a finding could be made, a winding-up order might have been issued even if it was found that the respondent is solvent. However, no acceptable evidence is available to make such a finding in casu. The applicants have not made out a case for winding-up based on the ground of just and equitable or any other ground.*"
- [10] The applicant referred to the words of Innes CJ in *De Waard v Andrew and Thienhaus, Limited* 1907 T.S. 727 that "*the best proof of solvency is that a man should pay his debts; and therefore, I always examine in a critical spirit the case of a man who does not pay what he owes.*" *An unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. The common cause facts, it was contended, proved that the applicant was a creditor of the respondent and the judgment debt was due and payable.*¹ I agree.

¹ [2016] JOL 35385 (FB).

² Close Corporations Act.

³ [2013] JOL 31053 (FB) para 14.

- [11] I agree with the applicants' contentions that, despite the respondents' allegations that it was not insolvent, it failed to honor its undertaking to liquidate the judgment debt through monthly instalments. Its allegations relating to the R130 000.00 monthly payments did not assist its cause, as the repayment terms required several larger monthly payments, as proposed by the respondent. It failed to prove that it could pay the total judgment.
- [12] Regarding the respondent's commercial future, its averments were purely speculative and not substantiated by any facts. The respondent failed to provide its current financial statements or balance sheet. The supposed growth of its business was not underpinned by factual or proper financial documentation or evidence. The application must, therefore, succeed.
- [13] As a result, the following order issues:

Order:

1. The respondent is placed under final winding up by the Master of the High Court.
2. The costs of this application will be costs in the winding up of the respondent.



 MHLAMBI, J

Appearances

For the Applicant:	Adv B Van der Merwe
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For the Respondent:	Adv A Mabentsela
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