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

Not reportable

Case no: 906/2024

In the matter between

ABSA BANK LIMITED **APPLICANT**

And

LEZMIN 2815 CC **RESPONDENT**

Neutral citation: *Absa v Lezmin 2815 CC* (906/2024) [2025] ZAFSHC 172 (11 June 2025)

Coram: **MOLITSOANE00, J**

Heard: **19 SEPTEMBER 2024**

Delivered: **11 JUNE 2024**

Summary: Liquidation – final relief sought – respondent's inability to pay debts over a period of seven years – respondent placed under final liquidation and winding up.

ORDER

1 The rule nisi is confirmed and the respondent close corporation is placed in final liquidation.

2 Applicant's costs shall be costs in the liquidation.

JUDGMENT

MOLITSOANE J

[1] The applicant brought an application for the provisional liquidation of the respondent. On 8 August 2024 Reinders J granted the provisional order of liquidation and issued a rule nisi returnable on 8 August 2024 calling upon any interested party to show cause, why the final order of winding up should not granted. Service of the provisional order was affected as required by ss 346(4) and (4A) of the Companies Act 61 of 1973. The rule nisi has since been extended on a number of occasions and for various reasons. The rule nisi now serves before me on the return day.

[2] The background facts in this case are generally common cause or are not seriously in dispute. The applicant provided finance to the respondent in the form of credit facilities over a period of time. This extension of credit was provided in the form of an overdraft facility, mortgage loans for a farm, various residential properties and approximately 10 sectional title units in Bloemfontein. The applicant alleges that the respondent is indebted to it in excess of an amount of R 25 million. According to the

applicant, the debt of R25 million accumulates interest in an amount of approximately R165 000 per month.

[3] Prior to the application for provisional liquidation being granted, the applicant entered into various payment plans with the respondent with the aim of having the respondent settle its outstanding debts according to its income within certain timelines. On 9 September 2017 the parties entered into what is called a written Repayment Agreement. In terms of this agreement, the respondent admitted its indebtedness to the applicant in the amount of R7,012,982.35 plus interest. The respondent also agreed to a payment plan. This arrangement did not work out. The parties thereafter entered into an addendum to the Repayment Agreement on 13 July 2018. The position did not improve. The respondent failed to service its debts and, according to the applicant, breached the terms of the agreement. The full amount owing in terms of the agreement remained due and payable.

[4] When the respondent failed to comply with the terms of the Repayment Agreement and its addendum, the applicant launched an application under case number 3912/2021 for the liquidation of the respondent due to its failure to satisfy its debts. The application was not heard as the parties found each other. They entered into a further settlement agreement wherein the respondent and its sureties admitted that they were indebted to the applicant and further that the liabilities of the applicant were due and payable with interest on the individual accounts of the respondent together with costs on attorney and client scale. Chesiwe J made this settlement agreement an order of court on 4 November 2021.

[5] Pursuant to the latter settlement agreement, the respondent and its sureties undertook to make payment in three installments in order to extinguish the debt. Only R3m which had already been paid when the settlement agreement was entered into, became the payment made in terms of this agreement. The respondent consented to judgment for the outstanding amount of R13,444,909.34 together with an order declaring its 10 sectional titles, farm and two residential properties specially executable in the event of failure to pay by the respondent.]

[6] The parties agreed as follows in clause 16 of this court sanctioned agreement that the '…[s]ettlement agreement shall be made an order of Court and novates and replaces the application for liquidation between the Parties. The liquidation application is settled.' (For convenience, this clause shall be referred to as 'the novation clause'.) Following the payment of R3m, there is no evidence of any further payment by the respondent, hence these proceedings.

[7] The applicant argues that the respondent is unable to pay its debts and can be considered to be commercially insolvent. This was based on their belief that it (LEZMIN) does not possess sufficient assets to satisfy its indebtedness and this position has persisted since the year 2016.It is submitted that the respondent has continued to trade whilst in a state of insolvency. Furthermore, the applicant contends that the respondent has dissipated assets to the prejudice of the applicant and other creditors and thus must be wound up to fully investigate its *de facto* financial position.

[8] On the other hand, the respondent contends that the application for liquidation is ill-founded as the matter is *res judicata*. This assertion is based on the novation clause in the settlement agreement which was made an order of court on the 4 November 2021. Plainly put, the respondent asserts that the liquidation application in case number 3912/2021 became settled in the year 2021 as per the court order dated 4 November 2024 and thus any subsequent application for liquidation is barred.

[9] On the second issue, the respondent asserted in its answering affidavit that, although it has not disputed its indebtedness to the applicant, the amounts due and payable are not a correct reflection of its debts which are due and payable.

[10] This was said on the premise that the applicant had alienated most of its immovable properties to service its debt and has to date, not disclosed the proceeds of the sales were and how that would have, affected its numerous liabilities with the applicant in terms of debt paid off and its impact on the actual debt that is outstanding.

[11] Lastly, they indicated that at the time of filing the answering affidavit, the

financial statements ending February 2024 annexed thereto showed that they were in a state of liquidity and in fact, had secured further work in the construction industry amounting to an amount just over R 44m. They were thus firm in their view that they had shown bona fide and reasonable grounds to avert the application as liquidation proceedings were not to be utilized for the enforcement of disputed debts.

[12] The issues for determination are:

(a) Is the applicant precluded, based on *res judicata,* to have the respondent finally wound up;

(b) The dispute about the amounts owing to the applicant;

(c) The liquidity of the respondent.

[13] It is perhaps prudent to deal first with the defence of *res judicata* raised by the respondent. According to the respondent, the applicant instituted liquidation proceedings against it under case number 3612/2021 of this court. These proceedings culminated in the parties entering into a settlement agreement which was later made an order of court. The respondent contends that the settlement in the manner set out above, brought an end to the *lis* between the parties. For this reason, so the argument proceeds, the applicant cannot bring the same application between the same parties for the same relief which arises from a finalized litigation between the same parties. The respondent contends that 'indebtedness' constitutes the *lis* between it and the applicant and thus the defence of *res judicata* finds application.

[14] On the other hand, the applicant submits that liquidation proceeding's true purpose is the bringing about of a *concursus creditorum* for the benefit of the creditors and it triggers the coming into force of the law relating to insolvency. The applicant thus argue, that winding up proceedings are not akin to execution or proceedings for the recovery of a debt.

[14] The Constitutional Court in *Molaudzi v S*[1] said that '[*r*]*es judicata* is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. Classen defines *res judicata* as "[a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."' (Footnotes omitted).

[15] I agree with the contention of the applicant that the process of winding up an entity has as its true purpose, the bringing about of a *concursus creditorum*. While 'indebtedness' features centrally to the recovery or execution of a debt and in the winding up of a debt, the end result sought to be achieved is different. In the recovery stage the end result sought to be achieved is the execution and right to enforce payment. In the winding up proceedings, the main purpose is to find out whether the entity is insolvent and falls to be wound up. Even if the court finds that the entity falls to be wound up, the court does not make a call that a creditor is entitled to a payment.

[16] In my view, reliance by the respondent on the novation clause to the effect that the liquidation between the parties had been settled is misplaced. The reason I say so is because the true intention of the parties as can be gleaned from their agreement was to come to an agreement as to how the respondent would repay its admitted debts with the applicant. This, in my view did not preclude the applicant, in case of non-compliance with the agreement, to seek alternative means to ensure that its debt is paid. Settlement of the liquidation proceedings on both the textual and purposive interpretation clearly show that the settlement was aimed at the proceedings in case number 3612/2021. Had the applicant sought to revive those proceedings, assuming that it could be done, then in that case, it could properly be met with the defence of *res judicata.* The opposition on the basis of *res judicata* stands to be dismissed.

[17] The two remaining defences raised by the respondent can conveniently be disposed off together. The respondent opposes the application on the basis that: (1) the

[1] *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC) para 14.

monies owed to the applicant in view of the alleged failure of the applicant to account to the respondent on the proceeds of the sales in execution, brings about a dispute as to the quantification of the amount due to the applicant;(2) the liquidity of the respondent.

[18] Section 344 and 345 of the Companies Act 61 of 1973 sets out the grounds the applicant may rely upon for the winding-up of a close corporation. The grounds for the winding up of a close corporation, and the parties who may apply for its winding up, mirror those for solvent and insolvent companies.'[2]

[19] In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd*[3] the Supreme Court of Appeal stated the following:

'The guidelines laid down in *Kalil* as to how factual disputes regarding the respondent's indebtedness in an application such as the present should be approached, were stated thus by Brand J in *Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783H-I:

"With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."'

[23] The respondent, as the debtor of the applicant, confirmed its indebtedness to the applicant by concluding a settlement agreement which was made an order of the court. This agreement, preceded two other agreements which the respondent unequivocally admitted its indebtedness to the applicant. The essence of the agreements were not only to admit the indebtedness but also to arrange how payment of the monies owed to the applicant was to be affected. The agreements were geared at making new payment agreements following various breaches of the payment plans by the respondent.

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[2] A Smith *et al Hockly's Law of Insolvency*, *Winding Up and Business Rescue* 10 ed (2022).
[3] *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* [2016] ZASCA 168.

[24] Section 345(1)*(c)* of the Companies Act provides that '[a] company shall be deemed to be unable to pay its debt if it is proved to the satisfaction of the court that the company is unable to pay its debt.' The conclusion of these agreements unequivocally establishes the indebtedness of the respond to the applicant. The respondent also confirmed its indebtedness to the applicant by agreeing to have their agreement made an order of the court.

[25] What the respondent has apparently raised as a factual dispute regarding its indebtedness is, in my view, not what was intended by the Supreme Court of Appeal. In *Freshvest* referred to above, it appears to me that the dispute relates to a complete dispute concerning the indebtedness. The indebtedness in the case before me relates to the amount the respondent says was not taken into account in calculating what is owed to the applicant. I fail to comprehend how this would assist the respondent. It is contended that the applicant has over a period of 7 years failed to satisfy the debt of the applicant despite various indulgences afforded to it. The respondent in my view, does not dispute that it is indebted to the applicant. What it disputes is the quantification of the amount owing to the applicant. According to the respondent, the amount claimed by the applicant is not a true reflection of the debt owed. The respondent seems to hold that this contention would be a bar to this court to grant a final winding-up order.

[27] Section 68 of the Close Corporations Act 69 of 1984 (the Act) contains certain deeming provisions relating to circumstances under which a close corporation shall be deemed to be unable to pay its debts. In this case, the applicant delivered demands on respondent on 18 January 2022 and 13 October 2023 calling upon the respondent to pay its debts and also informing it that liquidation proceedings would be initiated. That notwithstanding, the debt remains unpaid.

[28] The respondent did not raise the issue of the quantification of the amount due or call upon the applicant to account for the amounts pertaining to the sales in execution after the sales. The gripe of the respondent is that an amount of R7 322 862 million was not accounted for in the calculation of the amount owing. Even if I were to accept this, the fact that the amount was not included does not detract from the fact that the said

amount, if deducted from the R25m will still leave a substantial difference of millions owing to the applicant. That difference, would still entitle the applicant to seek the winding up of the respondent on the basis that it is unable to pay its debt. Over and above this, the gripe of the respondent ought to have been addressed when a reply to the respondent's notice in terms of rule 35(14) was received. In the said reply, the applicant dealt fully with the proceeds surrounding the execution sales. The respondent did not query the reply and what they contained or sought to prove. This defence cannot succeed and stand to be rejected.

[29] The respondent contends that it is liquid, as it has now been awarded a tender to build a school and the value of the project is R44 716 686. It is alleged that it put a security in the amount of R1 049 602.70. It is not apparent from the record where this amount of security comes from. The respondent further attached certain unaudited financial statement in order to evince its liquidity. Apart from the statements being unaudited, they are not accompanied by the affidavit of a person who compiled and prepared them. They therefore constitute inadmissible hearsay by a third party and stand to be ignored. In any case the respondent has not even paid the amount it believes it owes the applicant.

[30] I am satisfied that the respondent is factually insolvent as it is unable to pay its debt. Even if it could be said that my finding is not correct on this aspect, I am of the view that a case has been made out that the respondent is commercially insolvent?

[31] I hold the view that it will be just and equitable as contemplated in s 344*(h)* of the Companies Act that the respondent should be placed under final liquidation. The applicant, as a successful litigant is entitled to its costs. I accordingly make this order:

ORDER

1 The rule nisi is confirmed and the respondent close corporation is placed in final liquidation.

2 Applicant’s costs shall be costs in the liquidation.

P.E. MOLITSOANE J

Appearances

For the Applicant:	S Tsangarakis
Instructed by:	C/O Symington De Kok
	Bloemfontein
For the Respondent:	S Ngombane
Instructed by:	Thebe Attorneys
	Bloemfontein.