IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

05/02/2019 p.p

DATE SIGNATURE

CASE NO: **43275/2017**

In the winding-up application:

ABSA BANK LTD Applicant

and

RAINBOW PEPPER TRADING 16 (PTY) LTD Respondent
(Registration No: 2007/008701/07)

JUDGEMENT

MOTHIBE AJ

1. This is an application for the final winding-up of the respondent. The applicant seeks that the respondent be placed under final winding up. The applicant avers that the respondent is indebted to it in an amount of R27 271,613.40 (twenty seven million, two hundred seventy one thousand, six hundred and thirteen rand, and forty cents.

2. The applicant states that the winding-up application is predicated upon:

2.1 the fact that the respondent is unable to pay its debts within the meaning of section 344(f), read with section 345(1)(a)(ii), and as also read

with section 345(1)(c) of the Companies Act 61 of 1973 ('the Companies Act'); and

2.2 it is just and equitable that the respondent be wound-up in terms of section 344(h) of the Companies Act.

3. The respondent is both commercially and factually insolvent. This is not disputed and in fact, by all accounts, is common cause between the parties. The respondent is also deemed to be unable to pay its debts.

Background to the application

4. On the 28th January 2010, the applicant and respondent entered into a written Mortgage Loan Agreement, at Johannesburg, in the amount of a principal debt in the amount of R24 029 308.44.

5. The loan agreement was subject to the registration of a covering mortgage bond in favour of the Plaintiff(applicant) in the amount of R24 000 000.00 plus an additional amount of R4 800 000.00 to be registered over the property: ERF Number 385, Township Port Zimbali, Registration F U Province of Kwa Zulu Natal, measuring 2918 square metres, held by Deed of Transfer T38115/07

6. The defendant (respondent) was to repay the debt in 240 monthly instalments in the amount of R222 647,99 commencing on the 1st May 2010.

7. The applicant contends that the respondent is indebted to it in the sum of R27 271 631,40 arising out of a loan secured by the registration of a mortgage bond over an immovable property, Erf 385, Port Zimbali, Kwadukuza, KwaZulu Natal ("the property"

What the Court needs to decide

8. Is the applicant factually and commercially unable to pay its debts? And

9. It is just and equitable that the respondent be wound-up in terms of section 344(h) of the Companies Act.

The applicant's case

10. It is contended for the applicant that the respondent is indebted to it in the sum of R27 271 631,40 arising out of a loan secured by the registration of a mortgage bond on the 19th April 2010, over an immovable property, Erf 385, Port Zimbali, Kwadukuza, KwaZulu Natal,

11. The respondent does not dispute its indebtedness to the applicant. It neither disputes the amount owing.

12. The respondent has failed to make payments to the applicant and thereby failed to honour its obligation under the mortgage loan agreement.

13. The applicant demanded that the respondent comply with its undertaking and service the bond. Despite due and proper demand and the aforesaid debt being due, owing and payable by the respondent to the applicant, the respondent has failed and/or refused to pay make payment to the bank of the said amount, or any portion thereof.

14. In the result, on 5 March 2014, the Bank issued an action out of the Kwa-Zulu Natal Local Division in Durban under case number 2648/2014 ('the action').

15. In attempt to settle the impasse amicably between the parties, it was agreed that the action (against the respondent) and a sequestration application issued against its director and shareholder Theofanis Pouroullis would be postponed pending the sale and transfer of the property.

16. In an attempt to settle the action, the parties concluded a written agreement ('the March 2014 agreement'). The respondent partially complied with the terms March 2014 agreement by making sporadic payments between the period May and September 2014. However, and as a result of the respondent's failure to comply with the terms of the March 2014 agreement, the bank proceeded with the action, as it was entitled to do.

17. Whilst the respondent seeks to kick up as much dust as possible in its vapid answering affidavit *vis-à-vis* the power of attorney, the respondent does not deny, and neither can it, that the Bank is, at the very least, a creditor of the respondent for an admitted indebtedness, as at 15 January 2014, of R22,326,538.95 (together with interest).

18. Counsel for the applicant, Mr. Amm argued that agreement in respect of power of attorney was a payment mechanism agreement. It did not settle the debt which to date is still due and payable. He further stated that the special power of attorney did not revolve around other than the sequestration and the pending action.

The respondent's case

19. The respondent does not dispute the indebtedness to the applicant. It neither disputes the amount.

20. The respondent states in its defence that it has a valid and bona fide defence to the claim. It entered into a settlement agreement with the applicant.

21. The respondent states that "On applicant's own version, the parties agreed on the 13th November 2015, (subsequent to the conclusion of the "the March 2014 agreement", that the pending action and sequestration application would be postponed "pending the sale and transfer of the property". Pursuant to such

agreement, the aforesaid power of attorney was furnished by respondent to applicant.

22. Prior to the institution of this winding up application and on 27 June 2017, applicant sent a written letter of demand to respondent in terms of Section 345 of the Companies Act claiming payment of the amount lent and advanced in terms of the loan agreement (which it is reiterated is the subject matter of the pending action).

23. On 24 July 2017, respondent's attorney sent a letter to applicant's attorney[1] stating as follows:

> *"2. Your letter of demand to our client dated 27 June 2017 in terms of section 345 of the Old Companies Act, has been referred to us for attention and reply.*
>
> *3. Prior to dealing with your aforesaid letter, we record that:*
>
> *3.1 You instituted action against our client in the Kwa-Zulu Natal Division, in March 2014 under case number 2648/14. That action has not yet been brought to trial.*
>
> *3.2 The aforesaid action was settled in November 2015 in terms whereof, your client would market the immovable property owned by our client in Zimbali for the purchase price of R30 000 000,00 subject to your client having the right to accept offers from R25 000 000,00 upwards.*
>
> *3.3 On 2 November 2015, your Ms Wright sent an email to our client represented by Theo Pouroullis (and copied to your Tejal Harri) stating as follows:*
>
> *"Our client will agree to postpone the application sine die,*

All actions will be postponed pending the successful sale and transfer, whereafter hopefully all claims will be paid".

3.4 On 13 June 2017, your Tejal Harri sent an email to our client represented by Mr Pouroullis stating as follows:

Analysis of the issues

24. I will now proceed to determine the facts on the basis as set out above. It is common cause that the parties entered into a mortgage loan agreement ('the loan agreement') and a consequent mortgage bond registered in favour of the bank as security for the loan in respect of the purchase of an immovable property situated in the Zimbali Coastal Resort and Estate.

25. The respondent has failed to service the bond in terms of the mortgage loan agreement. It is unable to pay its debts within the meaning of section 344(f), read with section 345(1)(a)(ii), and as also read with section 345(1)(c) of the Companies Act 61 of 1973 ('the Companies Act').

26. The respondent does not dispute indebtedness to the applicant, nor the amount. Whilst the respondent seeks to state a defence in its answering affidavit *vis-à-vis* the power of attorney, the respondent does not deny, and neither can it, that the applicant is, at the very least, a creditor of the respondent for an admitted indebtedness, as at 15 January 2014, of R22,326,538.95 (together with interest) which amount is now R27 271,613.40.

27. Despite applicant's attempts to sell the property, (as detailed in the founding affidavit), the Bank is unable to obtain the reserve price. The applicant attempts and its inability, over a period of 18 months, to sell the

property are not seriously placed in dispute.

28. 18 months is a long time, to sell the property, in view of the mounting debt. Interest continues to accrue on the debt and the applicant's security diminishes in value.

It is also not feasible for the Bank to rent out the property. Respondent also does not seriously dispute this.

29. The applicant has unsuccessfully attempted to sell the property for R25, 000,000.00 since November 2015. In its attempts to do so, the applicant enlisted the services of two estate agents who marketed the property extensively. Only two offers were made to purchase the property; the highest of which was for R20, 000,000.00. A realistic market and reasonable valuation of the property (when compared to sales in the same street as the property) is in the region of R20,000,000.00 and R25,000,000.00, at the highest end of the market.

30. The respondent rejected both offers on the basis that the respondent's claims that they were too low. Applicant's attempts to sell the property at the reserve price of R25 million were unsuccessful, that the current market value of the property is between R20 million and R25 million.

31. It is noteworthy that the market value of the property is likely to remain the same, if not decrease, in the next 5 years, should certain remedial and maintenance work not be carried out on the property. What happens to the debt and the matter in the process?

32. If applicant were to rent the property out, it would only receive a monthly rental of approximately R75 000 to R80 000 and that applicant has elected not to

rent the property out and cannot reasonably be expected to do so.

33. The POA was a restrictive mandate. It enjoined applicant to a reserve price. It also mandated the applicant to sell at R30 000 000 or minimum R25 000 000. Should the applicant not sell within the prescribed amount, it would have been in breach of the mandate.

34. The respondent does not deal with the above issues in its Answering affidavit. Counsel for the respondent, Mr. Kaplan did not deal with the issues either, in his argument.

35. The respondent also ignores that even should the property be sold for R25 million, a surplus of R2, 271,613.40 indebtedness remains. The respondent does not address the shortfall post the sale, should there be a successful sale of the property.

36. There has been no movement in paying part or all of the debt. The intermittent payments, non-payment, and insistence that there prove, has been a settlement of this dispute is untenable. The above facts simply suggest that the respondent unable to pay and settle its indebtedness. The respondent does not suggest otherwise.

37. It is pertinent from Naidu's information, and in light of current market trends, it is evident that the property market for the property is unlikely to change in the foreseeable future. The respondent has not challenged the evidence in the applicant's founding affidavit.

38. The crux of the respondent's challenge and defence is that the action has been settled in the November 2015 settlement agreement. Respondent's Mr. Kaplan avers that applicant is bound by the aforesaid agreement and cannot simply ignore same as it does and proceed to wind up respondent on the original cause of action. Indeed, paragraph 5 of the power of attorney envisages that in

the event of the applicant being unable to sell the property, then it is authorised to enter into a lease or leases and to offset the rentals against amounts owing to applicant.

39. He further argued that the case made out by Applicant that because it has not achieved the minimum sale price, it is simply entitled to ignore the agreement, does not bear scrutiny. Applicant tries to fit a square pig in a round hole.

40. In terms of the Badenhorst rule a court will refuse an application for the winding up of a company of the company *bona fide* disputes the applicant's claim on reasonable grounds. The object of the Badenhorst rule is to prevent the abuse of the liquidation process for the enforcement of debts and it is now treated as an independent rule not requiring proof of actual abusive process.

See: **Badenhorst v Northern Construction Enterprises (Pty) Limited 1956 (2) SA 346 (T)**
Kalil v Decotex (Pty) Limited and Another 1988 (1) SA 943(A) at 980 (B)
Trinity Asset Management v Grindstone 2018(1) SA 94 at paras 92 to 93
Exploitatie – en Beleggings – maatschappij Argonauten 11 BV and A nother v Honig 2012 (1) SA 247 (SCA) ([2012] S All SA 22; [2011] ZASCA 182) (Honig) paras 11-12
See **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Limited and Another 2015(4) SA 449 (WCC) (Orestisolve) para 12**

41. Applicant's counsel argued that the settlement agreement was not in full and final settlement. The agreement was merely a payment mechanism that has failed. Once it failed, applicant is entitled to the liquidation.

42. On the other hand counsel for the respondent stated that when you settle the action, you settle the claim. This contention cannot hold water in the present case. The property was neither sold nor rented. The respondent's debt remains and is increasing substantially.

43. This contention, moreover the reliance on the applicant's purported breach of the March 2014 agreement, simply cannot be upheld as a defence to the relief sought in light of the provisions of paragraph 4.5 thereof which states provides:

'The parties further agree that should the defendant fail to fulfil any one or more of its obligations in terms hereof the plaintiff will be entitled, or may elect, to take judgment not in terms of this Agreement but in terms of the plaintiff's cause of action as set out in the Summons.'

44. Applicant correctly submitted therefore that the March 2014 agreement does not novate the original cause of action set out in the summons in the action.

45. The respondent failed to pay the debt or to secure or compound it, its inability to pay its debts is further evident from the fact that it failed to adhere to the March 2014 agreement by failing to effect the monthly payments as provided for therein. This is uncontested and further evidence of the respondent's inability to pay its debts.

46. The "just and equitable" ground for winding-up' should not only be based on facts, but the broad conclusion of law, justice and equity. just and equitable ground in section 81 (1)(d) of the Companies Act should not be interpreted restrictively

47. Section 81 (1)(d) of the Companies Act is not confined to cases analogous to the grounds mentioned in other parts of the section. The submission further is that there is no general rule as to the nature of the circumstances that have to be present, or a fixed category of circumstances which provide the basis for just and equitable winding-up. The ordinary categories identified would include the following: (1) the disappearance of the companies' substratum; (2) illegality of the objects of the company and fraud in connection therewith; (3) a deadlock in the management of the company's affairs; (4) grounds analogous to those for the dissolution of a partnership; and (5) oppression

See: **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) ("Rand Air")**

48. Taking into account a conspectus of factors and events in the present matter, it is clear that what is contended for the respondent would leave this matter unresolved for long time to come.

49. The respondent cannot use the agreement as a defence or basis of a bona fide dispute on a reasonable ground. It is clear the sale or rental of the property did not occur. It is neither the fault of the applicant nor for lack of trying on the part of the applicant. It is not like the applicant wants to abandon the agreement as the respondent alleges.

50. There is no dispute about the indebtedness, the amount, the breach, the settlement agreement, the breach of the settlement agreement, and the reserve price. The debt remains in place and the respondent cannot settle the debt in part or the whole of it.

51. I am not persuaded that the settlement agreement was in full and final settlement. The respondent cannot unjustly hold applicant to the agreement that was dependent on sale that did not occur. It is just and equitable that the respondent be wound-up in terms of section 344(h) of the Companies Act.

ORDER

Having read the documents filed of record, heard counsel, and having considered the matter, I make the following order:

1. The Respondent be, and is hereby placed under final winding up;

2. The costs of this application are in the winding-up.

R. S. MOTHIBE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Case Number: 43275/2017

HEARD ON: 07 May 2018

Date Judgement handed down:.....

FOR THE APPLICANT: Adv. G. W. AMM

INSTRUCTED BY: Lowndes Dlamini Attorneys

Tel. 2711) 292 5777

Ref. Ms. A Wright/T. Harri/MAT 12697

Email: daniella@lowndes.co.za

FOR THE RESPONDENT: Adv. J.L. KAPLAN

INSTRUCTED BY: Hirshowitz Flionis Attorneys

Tel. 2711) 880 3300

Ref. Mr. Flionis/ddj/R442/14

Email alex@hfattornys.co.za