

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **013873/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

14/08/2024
DATE

In the matter between:

WASHIRIKI 3 OAKS (PTY) LIMITED

Applicant

and

AKANI PROPERTIES (PTY) LIMITED

Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

Wepener, J

[1] The applicant is Washirika 3 Oaks (Pty) Limited ("W3O"). It applies for the winding up of Akani Properties (Pty) Limited ("Akani") on the basis that it is unable to

pay its debts pursuant to section 344(f) as read with section 345(1)(a) and (c) of the Companies Act¹ ("Old Companies Act") which is common cause to be applicable to this matter.

[2] It is common cause that Akani failed to respond to the section 345 demand for payment and is consequently deemed to be insolvent. However, Akani sets out in detail why the delay in response to the section 345 demand should not be attributed to it, but came about as a result of certain errors. It is not in dispute that Akani disputed the debt prior to the section 345 notice. This dispute was raised both through correspondence and during personal engagements. W3O was, consequently, aware of the dispute before it sent out the section 345 notice. Akani and its attorney set out a unique confluence of events which resulted in the failure to respond to the section 345 notice. The explanation is that Akani was served with a notice on 30 May 2022 care of an administrative clerk. Akani's version is that it is not able to locate the notice which did not reach the relevant individuals for attention at the time. In addition, Akani was emailed a notice on 8 June 2022, which notice does not constitute proper service for purposes of section 345(1)(a)(i) of the Old Companies Act which requires service by leaving same at the registered office. In addition, Akani contacted its attorneys in relation to the notice received by e-mail. The attorney's team Akani contacted comprised of a Miss Eksteen, who was the primary point for the attorneys Akani's communication on a number of matters, Mr Movshovich, the lead attorney on all of the Akani matters, and Mr Rajah, a junior associate who assisted in some but not all of Akani's matters. At the time the two senior attorneys who typically dealt with matters were not in a position to immediately do so as, unbeknownst to Akani, Mr Movshovich was abroad on annual leave with limited internet connectivity and Miss Eksteen had resigned and was on annual leave as from 6 June 2022. In addition, Mr Rajah, the

¹ Act 61 of 1973: "344 A company may be wound up by the Court if –

...
(f) the company is unable to pay its debts as described in section 345. . . ."

"345(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

...
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

junior attorney, assumed bona fide but in error, that Mr Movshovich would deal with the matter with the other team members. Mr Movshovich in turn assumed that Mr Rajah would address the matter in the interim. On Mr Movshovich's return from overseas he was mired in a number of back-to-back arbitrations and due to human error and confusion, the need to respond or follow up was overlooked.

[3] I am of the view that section 345 was intended to be the basis for establishing deemed insolvency in the case of a debtor who would not respond to a demand as it lacked any defence. This plainly is not the case in this matter. Akani could respond but indeed envisaged that the formal response would be sent by the attorneys who failed to do so due to the circumstances set out above. Indeed, Akani disputed its liability prior to the notice being sent.

[4] Regardless of the merits of the matter Akani has voluntarily ring-fenced the entire amount claimed by W3O plus interest by placing in its attorney's trust account and providing for a contractual release regime should W3O prove its debt. This must be considered as a factor in a case where liquidation is sought.²

[5] In my view this conduct negates any argument as to commercial or factual insolvency of Akani. These funds have been ring-fenced for several months (close to two years) whilst Akani continued with its commercial activities. This speaks against Akani being insolvent.

[6] A court's power to grant a winding up order has been held to be a discretionary power irrespective of the ground upon which the order is sought.³ Based on both the grounds set out above, I would exercise my discretion against the granting of an order for the liquidation of Akani.

[7] However, there is another reason that strengthens this view. In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* ("*Freshvest*")⁴ it was held:

"In essence the matter serves as a stark reminder that winding up proceedings are not designed for the enforcement of a debt that the debtor company disputes on bona fide and reasonable grounds."

[8] In determining the bona fides of the dispute, I do not set out the various disputes that appear from the papers before me. What is clear is that Akani disputes that the principal agents were authorised to issue the certificates upon which W3O relies; the

² See *Performance Tyres (Pty) Ltd v HWHS Services (Pty) Limited t/a McNaughtons* [1998] JOL 4221 (SE) 10.

³ *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) at 373.

⁴ (1030/2015) [2016] ZASCA 168 para 1.

contract relied upon by W3O is denied to be the regime applicable between the parties; there are multiple instances of deficient workmanship that require remedial attention. In my view it cannot be said that the disputes are not reasonable. Applying the principles adopted by our courts in dealing with disputes of fact,⁵ I cannot but conclude that, on the respondent's version, these disputes require a full ventilation during evidence and with cross examination of witnesses.

[9] In the circumstances of this matter, I conclude that W3O has not made a case for the relief sought by it on these papers. Due to the fact that other proceedings may lead to a different result, I intend reserving the question of costs.

[10] I make the following order:

1. The application is dismissed.
2. The security undertaking dated 21 February 2023 annexed to the respondent's supplementary and further affidavit dated 29 March 2023 marked "SA4" shall, in accordance with its terms, stand as security for the Alleged Indebted Amount as that term is defined in paragraph 1.1 of that undertaking, subject to the following:
 - 2.1 paragraphs 2.1.1 and 5 thereof are deleted; and
 - 2.2 the Dispute Resolution Proceedings as defined in paragraph 2.1.2 thereof are to be instituted within 5 weeks of the date of this order. Should no such proceedings be launched within this time-period, the security undertaking will lapse and be of no further force and effect.
3. The costs of the application are reserved for determination at the dispute resolution proceedings.


Wepener J

⁵ *Plascon-Evans (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 113.

Heard: 1 August 2024

Delivered: 14 August 2024

For the Applicant:

Adv. G Herholdt

Instructed by Van Rensburg
Mabokwe Incorporated

For the Respondent:

Adv. JPV McNally SC

Instructed by Webber Wentzel