



OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 3394/2014

In the matter between:

**AIR TREATMENT ENGINEERING
AND MAINTENANCE CC**

APPLICANT

And

PAC-CON PHARMACEUTICALS

RESPONDENT

JUDGMENT

Date Delivered: 25 July 2016

MASIPA J:

Introduction

[1] This is an application for the winding up of the respondent in terms of section 344(f) read with section 345(1)(a) of the Companies Act 61 of 1973 (the old Act). The application was filed on 27 March 2012. In its application papers, the applicant avers that the respondent is indebted to it in the amount of R756 430.37 for work done and materials supplied to the respondent at its special instance and request during January to July 2010.

[2] The applicant and respondent concluded a contract for the installation of air-conditioning equipment in the total amount of R2 401 240.00. The applicant contends that it was a term of the agreement that payment would be made within 30 days of invoicing. The respondent denies this and contends that periodic payments were to be made as the work progressed and final the final amount of the contract would be paid upon approval of the Department of Trade and Industry (the DTI). Payment by the DTI was to be effected once the air-conditioning units was complete.

[3] The applicant issued various invoices to the respondent to the total value of R1 689 297.89 between 15 June 2010 and 30 August 2010. An amount of R932 867.52 was paid leaving the balance of R756 430.37. The respondent disputes that the value of the completed work in R 756 430.37 as stated.

[4] The applicant avers that on 24 December 2010, it sent a letter of demand to the respondent. Pursuant to this, the respondent issued four post-dated cheques to the applicant. The first of the four cheques was presented for payment on 4 May 2010 and was dishonoured marked 'stopped'. The applicant contends that it sent another letter of demand on 12 July 2011 demanding payment of the full amount due. The respondent denies this and contends that the letter was sent to an incorrect postal address. It was sent to BDO House, 1 Ridgeside Office Park, Umhlanga, 4319 while the correct address

is P O Box 47, La Lucia, 4153. In view of this, the respondent denied that the letter served as a demand as contemplated in section 345(1)(a) of the old Act.

[5] The letter advised the respondent of the sum owing, due and payable, that if it failed to effect payment within three weeks from date of service of the letter or failed to compound the said sum to the reasonable satisfaction of the applicant it would be deemed unable to pay its debts and an application would be made to court for the respondent's winding up in terms of section 344(f) of the Act. The applicant contends that the respondent failed to pay the amount owing or to secure or compound in. The respondent deny that it failed to compound the debt subsequent to the letter and aver that payment in the amount of R50 000.00 was made. Further that a dispute arose following the compounding of the debt which led to a commercial dispute between the parties. The respondent contends that instead of the applicant suing on the amount it believes is due, it elected to pursue inappropriate liquidation proceedings.

[6] The applicant averred in its founding affidavit that security required in terms of section 346(3) of the old Act shall be filed prior to the filing of the application. Further, that it would ensure that a copy of the application papers are served with the master of the High court in terms of section 346(4) of the Old Act. It averred further that it was unable to ascertain whether any employees are members of a trade union and would ensure that a copy of the papers were served on the South African Revenue Services as required in section 346((4A)(a) of the old Act. The respondent denied any compliance with the requirements set out for a winding up application. It further stated that its defences and opposition to the application were limited to the application being based on the old Act. The respondent indicated that it no longer persisted with the issues regarding the non-compliance with the formality to the provide security.

[7] The respondent contends that the application for provisional or final liquidation falls to be dismissed as the applicant misunderstood the effect of the new Companies Act 71 of 2008 (the new Act) in respect of liquidation applications. This is because the application was premised on the following:

1. That the applicant served a demand as envisaged in section 345(1) of the old Act;
2. That the respondent is therefore deemed unable to pay its debts having failed to pay or secure or compound the debt to the reasonable satisfaction of the creditor within 3 weeks as provided for in section 345;
3. The respondent should consequently be wound up for being unable to pay its debts in accordance with section 344(f).

[8] The second point in limine was that the application failed to disclose a cause of action since the respondent was solvent and the new Act applied to liquidations of solvent companies while the old Act continued to apply to insolvent companies. The respondent met the solvency and liquidity test provided for in the new Act. In *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) the court set out the distinction between commercial insolvency and solvent company. Since the applicant relied on the provisions of section 344 and 346 of the old Act, it was required to demonstrate that the respondent was insolvent which it had not done.

[9] In terms of the new Act, the legal position is *inter alia* that a distinction is made between a solvent and an insolvent company. The old Act applies to insolvent companies while the new Act is applicable to solvent companies. It was contended that the applicant in its founding papers had not relied on or alleged that the respondent is insolvent. In fact, so argued the respondent, it is solvent and therefore any liquidation

proceedings would have to be brought under the new Act. Further that the solvency and liquidity test was set out in section 4 of the new Act and the respondent meets both the liquidity and the solvency test. The respondent contended that since there was no allegation of insolvency, it would not elaborate on it. The applicant denied this and contends that the respondent misinterpreted the relevant provisions of the old and the new Acts. It contended further that the respondent was insolvent and was aware of default judgment being granted against the respondent on 31 July 2012 which remained unpaid. It referred to other outstanding payments which the respondent failed to pay.

[10] The applicability of section 344 to solvent companies is excluded, it follows therefore that in order for the applicant to succeed in its claim, it must show that the respondent is commercially insolvent i.e. that it is in a state of illiquidity which results in its inability to pay its debts. In its founding affidavit, the applicant only stated that the respondent failed to pay its debt but did not allege that it was commercially insolvent. Mr *Topping* for the applicant argued that it must be inferred that if one has money they would pay their debts. The fact that the respondent failed to pay its debts therefore proves commercial insolvency. As part of the respondent's defence, Mr *Marais* submitted that the respondent disputed the correctness of the amount it was invoiced for on the basis that the final payment was due upon completion of the service required. Mr *Marais'* argument was therefore that in view of the dispute regarding the actual amount due, the applicant could and should refer its claim for determination by a court and that liquidation is not the proper process to follow.

[11] The respondent averred further that the applicant was not entitled on the relief sought even on the old Act. This was because the letter relied upon by the applicant as a demand and therefore its *causa* is dated 12 July 2011. Subsequent to the letter being sent, a meeting was held between the applicant's and respondent's representatives where it was agreed that the respondent would pay to the applicant monthly payments of R200 000, outstanding work on the property would be completed, the total amount due would be agreed later.

[12] The respondent contends that the applicant failed to disclose this to the court. For section 345 of the old Act to become effective, the applicant must compound a debt i.e. come to agreement with the creditor. Since this was not done, a new letter would have to be sent until this was done, the deeming provision in terms of the old Act would not apply. The applicant agreed that an agreement was concluded during January 2012. It was agreed that the entire amount would remain due, owing and payable if one instalment was not met. A single payment of R50 000 was made before the meeting. The applicant denied that the debt was ever secure or compounded to the reasonable satisfaction of the applicant. The issue of the claim being compounded was withdrawn during argument.

[13] A further point raised by the respondent was that it is the court and not the applicant that winds up a company in terms of section 344. This being so, it contended that the court should not grant the relief since the relief sought was drastic and would affect many innocent people while there are other legal means which the applicant could rely on to enforce its alleged rights. The applicant avers that the respondent in its answering affidavit admitted its indebtedness to it but contests the correctness of the amount claimed. An inference could be drawn from the respondent's failure to pay its creditors that it is commercially insolvent.

Points *In Limine*

[14] The respondent in its written and oral submissions raised several points *in limine*.

The New Evidence

[15] The first point *in limine* raised was that the applicant having failed to make out a case in its founding affidavit, sought to make out a case in its replying affidavit. Mr *Marais* argument which was correctly conceded by Mr *Topping*, it is trite that a party must make out its case in its founding affidavit. The application was exclusively based on section 344(f) of the old Act providing for the court to wind up a company if the company is unable to pay its debts as described in section 345. The introduction of the applicability of the deeming provision in Section 345(1)(b) and (c) introduced new issues in an endeavour to demonstrate commercial insolvency. Paragraphs 7(c), 7(d) and 7(e) to the applicant's replying affidavit falls to be struck off and are struck off.

The Absence of the Cause of Action

[16] The second point *in limine* was that the application failed to disclose the cause of action since the respondent was solvent and it is the new Act that applies to liquidations of solvent companies while the old Act continued to apply to insolvent companies. The respondent met the solvency and liquidity test provided for in the new Act. Since the applicant relied on the provisions of section 344 and 346 of the old Act, it was required to demonstrate that the respondent was solvent which it had not done. It was argued that the applicant relied on an incorrect cause of action and failed to present evidence.

[17] It is common cause that the application is based on the provisions of section 344(f) read with 345(1)(a) of the Companies Act 1973 (the old Act) .

[18] As submitted by the Respondent, Section 9(1) of the Companies Act, 2008, (the new Act) provides that Chapter 14 of the old Act continues to apply with respect to winding-up or liquidations of companies as if the old Act had never been repealed. Despite this provision, section 9(2) excludes the application of sections 343, 344, 346, and 348 to 353 in instances where the winding-up is for a solvent company except to the extent necessary to give effect to the provisions of Part G of Chapter 2.

[19] Section 344 of the old Act does not apply to solvent companies. In order for the applicant to succeed in its claim, it must show that the respondent is commercially insolvent i.e. that it is in a state of illiquidity which results in its inability to pay its debts. The only statement by the applicant in its founding affidavit was that the respondent failed to pay its debt. There was no allegation that it was commercially insolvent. Mr *Topping* for the applicant argued that it must be inferred that if one has money they would pay their debts and the fact that the respondent failed to pay its debts therefore proves commercial insolvency. While in the ordinary course this inference is reasonable, the respondent in its answering affidavit disputed the correctness of the amount of R756 430.37 as owing due and payable. The Respondent contended further that it was invoiced for on the basis that the final payment was due upon completion of the service required.

[20] The respondent's argument was therefore that in view of the dispute regarding the actual amount due, the applicant could and should refer its claim for determination by a court and that liquidation is not the proper process to follow. In order for the court to arrive at a conclusion that the respondent is insolvent, it must be satisfied that the applicant has proven that the respondent is unable to pay its debts. From the facts presented in this case, it cannot be concluded that the respondent is unable to pay its debts since in its opposition to the application the respondent has disputed the amount and the also placed in dispute that the amount is due and payable. As correctly argued by Mr *Marais*, liquidation proceedings are not competent to determine the amount due to the applicant. The applicant failed to make out a case of commercial insolvency as

provided for in Section 344(f) of the old Act read with Section 9(1) of the new Act. This point *in limine* therefore succeeds.

The Prescription

[21] The third point was that the application had prescribed. The submission in this regard is that the applicant became aware of the debt of 24 December 2010 and issued post-dated cheques which may have interrupted prescription until 4 September 2011. It was submitted that an email dated 30 January 2012 may have also extended the applicability of prescription further and so did the applicant's court application dated 4 May 2012. This would mean that the three year period for prescription started running on 4 May 2012 and the period has since passed.

[22] It was argued that an application for liquidation is not a legal proceeding for the enforcement of a right relating to a debt owed by the applicant as contemplated by section 6(1)(b) of the Prescription Act. In this regard, the respondent relied on *Misnun's Hailbron Roller Mills Holdings (Pty) Ltd v Nobel Street Central Investments (Pty) Ltd* 1979 (2) SA 1127 (W) and Meskin et al *Henochsburg on the Companies Act* (volume 1) at 692. In view of this, it was submitted that a sequestration application did not interrupt prescription. In *Collier v Redler and Another* 1923 AD 640 at 643 Solomon JA relying on *Gillingham v Transvaalsche Koelkamers* 1908 TS 964 stated that a suit or action is a legal proceeding where one party sues something from the other. To sue is to bring action demanding something being either for a declarator or an order that the opposing party does something or give something to the plaintiff. See also *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and others* 1976 (2) SA 856 (W) and *WP Koöperative Bpk v Louw* 1995 (4) SA 978 (C).

[23] The respondent argued that the claim has prescribed in terms of section 10 and 11 of the Prescription Act, 1969. The respondent relied on *Meskin: Insolvency Law* at 2-3, *Jhatam & Others v Jhatam* 1958 (4) SA 36 (N) and *Louw* at 986-987 to support their submission that where a claim has prescribed, sequestration proceedings must fail once prescription is successfully pleaded and that the court should refuse such application since the claim will not be proven in the sequestration. The respondent argued that the applicant no longer qualified as a creditor in terms of section 345(1)(a) of the old Act. The Respondent argued further that the court should exercise its discretion to refuse the winding up even where prescription was not raised as a defence where *prima facie* the debt has prescribed.

[24] In *Minister of Justice & Constitutional Development v Mathobela & others* (1185/05) [2007] ZANWHC 5 (25 January 2007) which was followed in *Technikon Pretoria (Now Tshwane University of Technology) v Nel NO & others* [2011] JOL 27827 (LC), the court after having regard to the provisions of section 17 of the Prescription Act, 1969, found that the requirement that a party to a suit raising prescription shall do so in the pleadings is peremptory and that this was intended by section 14 of the Prescription Act. See also *Living Hands (Pty) Ltd and Another v Ditz and others* 2013 (2) SA 368 (GSJ). It is apparent from the pleadings that this was not raised. A reading of *Henochsburg* also suggests that it is a condition precedent that the issue of prescription should be raised in the pleadings before the court can determine the application of prescription in any suit.

[25] Mr Topping correctly argued that the issue of prescription should be raised in the pleadings and that the respondent failed to do this. The contention that the claim prescribed is therefore not an issue before court. It is trite that for a court to consider prescription, it must be pleaded or raised as a defence. Prescription cannot be raised for the first time in court. While it is correct that liquidation proceedings do not interrupt prescription, the respondent failed to raise this in its pleadings. In view of this, the point in limine is dismissed.

The Compounding

[26] The fourth point raised by the respondent is that section 345(1)(a) allows a creditor to apply for a winding up order only after three weeks following a demand, if the company neglects to pay the sum or secures or compounds it to the reasonable satisfaction of the debtor. The phrase 'compound to it' being defined as concluding an agreement in terms of which the claim is to be discharged. (*Henochoberg* at 709 and *Ottawa Rhodesia (Pty) Ltd v Burger* 1975 (1) SA 462 (R).) It submitted that compounding occurred on 1 November 2011 following from which payment in the amount of R50 000. It can be inferred from a reading of the applicant's papers that the agreement was concluded on 20 January 2012 with certain conditions not complied with by the respondent. It was agreed that the entire debt would remain owing due and payable if one instalment was not paid. The respondent withdrew the compounding point *in limine*.

The Stale Proceedings

[27] The fifth point *in limine* was that the application was more than three years old having been issued on 29 March 2012. The founding affidavit explained the facts prior to 26 March 2012. The last affidavit in the matter was filed on 12 February 2012. As the application related to status, the applicant should not be allowed to rely on facts that are more than three years old. This is because commercial solvency is in nature not static. The initial facts relied on may have changed. The determination of a winding up order requires a consideration of the company's financial status at the relevant time.

[28] Liquidation applications are in their nature urgent. In view of the nature of the application and the fact that it is based on the company's financial position at the

relevant time, it is essential that these proceedings are dealt with and finalised within a reasonable time. This is because of the frequency within which a company's financial position changes. Any delay in instance where a company is insolvent may be to the detriment of creditors. In some instances, a company which was insolvent may have become solvent at the time when the application is dealt with. In view of this, the court must be loath to deal with and grant order in liquidation applications that have not been dealt with and finalised within a reasonable period.

[29] There are several formalities which are to be met when bringing a liquidation application. Amongst others is that employees of the company must be served with the application papers. Where an application is only heard three years after it was filed, it is highly probable that the company would have changed or replaced some of its employees. The effect is that some of the new employees would not be aware of the application and could be prejudiced by any liquidation court order granted. The requirement that employees be served was intended to protect the interest of employees as provided for in Section 197 of the Labour Relations Act 66 of 1995, as amended.

[30] I therefore agree with the respondent that the applicant should not be allowed to rely on facts that are more than three years old and find that this application is stale. This point *in limine* is therefore upheld.

The Exceptio

[31] The sixth point was that of *exceptio*. In this regard, it was argued that it would be inappropriate to grant an order for winding up where there is a risk that the winding up proceedings are commenced to enforce payment of a disputed debt. The respondent submitted that on the applicant's version, the project was incomplete. The respondent's

defence is that in terms of the agreement, the final contract price was to be effected once the commissioning of the air conditioning units was complete. Progress payments had to be equal to the value of the work completed and that the work completed did not result to the amount claimed. The claim was therefore *bona fide* disputed, and in such instances, the court should dismiss the application. See *Exploitatie-en Beleggingsmaatschppij Argonauten 11 BV and another v Honig* 2012 (1) SA 247 (SCA).

[32] As *Henochsberg* states at page 694(1), winding up proceedings must not be used a means to enforce payment of a debt which is *bona fide* disputed. (See: *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348). In *Mann and another v Goldstein and another* [1968] 2 All ER 769 (Ch) the court held that even if it appears that a complaint is unable to pay its debts, a winding up application must fail where the debt is disputed. In this regard the respondent's point *in limine* is upheld.

The Formalities

[33] The seventh point *in limine* related to the formalities in respect of a winding up application. The Respondent submitted that security must be given before the application is served and filed and a certificate must accompany the application. Secondly that service on South African Revenue Service is peremptory. Also, it is peremptory that service be effected on employees of the company. The applicant undertook to file security prior to the hearing of the application but failed to demonstrate whether this has been done. The applicant undertook to serve a copy of the application papers on SARS and the company employees but failed to file proof of compliance except for old service on employees. Counsel advised that this point was not persisted with. I will therefore not consider this point.

[34] The basis upon which the respondent succeeds was raised in its answering affidavit. Despite this, the applicant persisted with its application causing the respondent to incur unnecessary costs. I see no reason why I should deviate from the norm that costs follow the result.

[35] In the result, the following order is made:

1. The respondent's points *in limine* raised and pursued in argument are upheld.
2. The applicant's application is refused.
3. The applicant is to pay the respondent's costs including costs for senior Counsel.

MASIPA J

APPEARANCES:

For the Applicant:

Adv. I Topping SC

Instructed by:

Livingston Leandy Incorporated

For the Respondent:

Adv. J *Marais* SC

Instructed by:

Johan Oberholzer & Co

Matter heard on:

12 February 2016

Judgment delivered on:

25 July 2016