REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 5630/2017

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 17/04/18 SIGNATURE:

In the matter between:

ASA METALS (PTY) LTD **APPLICANT**

AND

VARDOCAP (PTY) LTD **RESPONDENT**

JUDGMENT

KGANYAGO J

[1] The applicant has brought an application seeking an order to wind up the respondent in terms of section 346 read with section 344(f) and section 345 of the Companies Act 71 of 1973 ("the old Act"). The basis of the applicant's application is that the respondent is unable to pay its debts. The respondent is opposing the applicant's application.

[2] According to the applicant, on the 9th December 2016, the parties concluded a partly written and partly oral agreement in terms of which the applicant sold to the respondent sasol green pitch coke and that the purchase price due and payable by the respondent amounted to R849 244-94. The respondent has failed and/or refused to pay the outstanding amount.

[3] On the 30th of May 2017 the applicant's attorney addressed a letter to the respondent in terms of section 345(1) (a) of the old Act demanding payment of the full amount within 21 calendar days of receipt of the said letter. According to the applicant, the period of 21 calendar days has lapsed without the respondent paying the full amount or a portion of it. Based on that, the applicant is of the view that the respondent is unable to pay its debt as contemplated in section 345(1) of the old Act.

[4] The respondent has filed its answering affidavit. In its answering affidavit the respondent alleges that the applicant's liquidation application constitute an abuse of Court processes. The respondent states that the applicant is fully aware of the fact that the goods underlying the dispute were materially defective and have caused the respondent significant damage. The respondent further alleges that on the 30th June 2017 through its attorneys it wrote a letter to the applicant tendering the return of the defective product.

[5] The respondent contends that it has replied to the applicant's section 345 notice, and in its reply it has vehemently contested the validity of the applicant's claim. The respondent denies that it is insolvent and/or commercially insolvent. The respondent contends that the reason for not paying the applicant's invoice is not due to its inability to pay but as a result of the dispute which it is having with the applicant. The respondent further alleges that it is having a counter-claim in the excess of the applicant's claim. The respondent further alleges that it is having a significant positive net asset of value that significantly exceeds its liabilities. The applicant did not file a replying affidavit to the respondent's answering affidavit

[6] The applicant is relying on its section 345 letter as the basis of alleging that the respondent is unable to pay its debt. The question which this Court must determine is whether the respondent is unable to pay its debts and also whether the respondent's denial of the applicant's claim is based on *bona fide* grounds.

[7] Part G of Chapter 2 of the Companies Act 71 of 2008 ("the new Companies Act") and chapter XIV of the old Act regulates the winding up of a company, read with the applicable laws relating to insolvency. The old Act continues to apply by virtue of the provisions of item 9 of Schedule 5 notwithstanding its repeal which was with effect from 1st May 2008. The provisions of the chapter XIV of the old Act will continue to apply until the Minister, by notice in the Government Gazette determine a date on which it shall cease to have effect. However, in terms of item 9(2) of Schedule 5 , ss 343, 344, 346 and 348 to 353 of the old Act does not apply to the winding up of an solvent company except to the extent necessary to give effect to the provisions of Part G of Chapter 2 of the new Act. The winding up of solvent companies is dealt with in ss 79 to 81 of the new Act.

[8] In this case the application has been initiated in terms of section 344(f) and 345 of the old Act. In terms of the old Act, a company is deemed unable to pay its debts if a creditor to whom the company is indebted in the sum of money of not less than one hundred rand then due has served the company with a letter demanding payment of the amount due, and the company has for three weeks neglected to pay the sum, or to make a reasonable arrangement to the satisfaction of the creditor. The company will also be deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that it is unable to pay its debts.

[9] It is settled law that our law recognizes two forms of insolvency, and that is factual insolvency, where a company's liabilities exceed its assets, and commercial insolvency, a state illiquidity where a company is unable to pay its debts even though its assets may exceed its liabilities (See **Ex Parte de Villiers & Another NNO: In Re Carbon Developments 1993 (3) SA 493 (A) and Johnson v Hirotect (PTY) Ltd 2000 (4) SA 930 (SCA)).**

[10] In **Standard Bank of SA v R-Bay Logistics 2013 (2) SA 295 (KZD)** at para 24 the Court said:

> *"Nothing in the new Companies Act has changed any of the provisions of ch 14 of the old Companies Act. Accordingly, for the purpose of winding up an insolvent company, s344 thereof must still regulate the basis upon which it can be wound up. Of particular relevance in this case is s 344(f) which requires an applicant to prove that the respondent company is unable to pay its debts, as contemplated in s 345 of the Companies Act."*

[11] The applicant's application is based on its section 345 notice which was sent to the respondent. The applicant contends that the respondent has failed to comply with the demand as stated in its section 345 notice and has also failed to respond to that letter. The respondent contends that it did respond to the applicant's section 345 notice, and in its reply it has vehemently contested the validity of the applicant's claim.

[12] The respondent has attached to its answering affidavit a copy of a letter dated 30th June 2017 which it alleges that it is a reply to the applicant's section 345(1) notice. In that letter the respondent denies being indebted to the applicant for any amount of whatever nature. In that letter the respondent specifically state the reasons for disputing

the applicant's claim. The respondent also warn the applicant that any application for their liquidation will be *mala fide* and will be opposed and it will seek a punitive cost order against the applicant. The respondent further advises the applicant that should they wish to institute legal action against them they are invited to serve summons and that it will file a counter-claim against the applicant's claim.

[13] Despite being warned not to proceed by way of motion proceedings, the applicant proceeded to issue its notice of motion on the 17th August 2017. On receipt of the respondent's answering affidavit the applicant did not file its replying affidavit. The respondent's reply to the applicant's section 345 notice clearly raises a real, genuine and *bona fide* dispute of fact.

[14] In **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)** at para 26 Harms DP said:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established*

> *under the Plascon Evans rule that where in motion proceedings dispute of fact arise on then affidavit, a final order can be granted only if the facts arrived in the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondents written version consists of bad or untrustworthy denials, raises fictitious disputes of fact, is probably implausible, farfetched or clearly untenable that the court is justified in rejecting them entirely on the papers.*

[15] Since the applicant has failed to file its replying affidavit, the version of the respondent remains uncontroverted. At the time when the applicant issued its notice of motion it was aware or ought to have foreseen that a dispute of fact will arise based on the reply it received from the respondent. In that letter the respondent has advised the applicant to proceed by way of action, but it has deliberately ignored that advice. It is clear that this matter will not be determined on papers only based on the real, genuine and *bona fide* dispute of fact raised by the respondent. In my view, the respondent's denial of the applicant's claim is based on *bona fide* grounds. On that point alone the applicant's application stands to fail.

[16] I now turn to the issue of costs. A costs order on attorney and client scale is an extraordinary one which should not be easily resorted to, and can only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of the party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expenses caused to it by the litigation. As such, the order should not be granted lightly, as Courts look upon such orders with disfavour and are loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such a party may have. (See **SS v VVS [2018] ZACC 5 (1st March 2018)**.

[16] On receipt of the respondent's reply to its section 345 notice, it was clear to the applicant that a dispute of fact is going to arise which could not be resolved on papers. The respondent also gave the applicant a friendly advice that should it decides to institute legal proceedings against it, it must proceed by way of action. This was simply to inform the applicant that motion proceedings will not be able to resolve this matter as a dispute of fact will definitely arise. The respondent went further to warn the applicant that should it proceed with its liquidation application that application will be *mala*

fide, and it will oppose it and ask for a punitive cost order. The applicant has ignored all these warnings.

[18] It is clear that the applicant wanted to take a shortcut by using the liquidation application as debt collecting tool which might scare the respondent to pay immediately. It knew that should it proceed by way of action, that litigation will probably take some time before the matter is finalized. However, in motion proceedings it will be much quicker. This type of litigation should be stopped in its infancy before it develops into practice. This in my view is a clear abuse of Court processes and this is the kind of matter where a punitive order of costs would be justified.

[19] In the result I make the following order:

19.1) The applicant's application is dismissed

19.2) The applicant is to pay the respondent's costs on an attorney and client scale.

MF KGANYAGO

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, LIMPOPO DIVISION

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

1. FOR THE APPLICANT	:	M Bresler
2. INSTRUCTED BY	:	Hogan Lovells inc
3. FOR THE RESPONDENT	:	WJ Roos
4. INSTRUCTED BY	:	Herman Potgieter Attorneys
5. DATE OF ARGUMENT	:	13 March 2018
6. DATE OF JUDGMENT	:	18/04/18