IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No:15231/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Applicant

versus

GREEN WILLOWS PROPERTIES 153 (PTY) LTD Respondent

JUDGMENT: 4 DECEMBER 2012

Mansingh, AJ

[1] This is an application for the provisional liquidation of the respondent.

[2] The application does not fall to be decided essentially on the respondent's version. **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 620 (A) 643H-I**. Instead, applicant is only required to make out a *prima facie* case. **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) 978D-979C**.

THE APPLICANT'S CLAIMS:

[3] The applicant's claims are:

3.1. **Overdraft Agreement**-it is common cause that the parties concluded a written overdraft agreement in June 2010, for R2 million as finance working capital and the agreement expired on 30 April 2011. All amounts are due and payable and as at 3 May 2012, the overdraft debt was R1 895 616, 52.

3.2. **Loan agreement**-it is common cause that between October 2007 and 30 May 2011, the parties concluded and amended a series of written finance loan agreements, the final one was a short-term finance loan for R65 340 000, 00. The agreement expired on 30 November 2011. All amounts are due and payable and as at 2 May 2012, the outstanding balance was R69 098 778, 88.

3.3. **Respondent's Suretyship**- on 5 February 2008, the applicant and 324 Church Street Investments CC ("Church Street") concluded a written loan agreement which was amended from time to time, ("the Church Street agreement"). A material term was that all amounts owing had to be repaid by no later than 30 November 2011. During February 2008, the respondent bound itself as surety in respect of the amounts owed by the applicant to Church Street ("the suretyship"). Church Street failed to repay the amounts owing to the applicant in terms of the Church Street agreement. As surety, the respondent is liable for that debt. As at May 2012, that debt amounted to R5 999 864, 45. None of this is in dispute.

THE RESPONDENT'S DEFENCES:

[4] The Respondent's defences are:

4.1. That the applicant "promised" to advance development funding to it. This leg fails. The loan agreement contains a non-variation clause.

No written amendment in this respect was effected to the agreement. Further, respondent failed to allege when, where and between whom it was so agreed and whether such person had the requisite authority. This defence is not borne out by the terms of the agreement, not the objective facts.

4.2. That the property values are far greater than alleged by the applicant and if given time to find a purchaser it will settle applicant's claim. Francis Edward Gormley, ("Gormley"), the director and 90 percent shareholder of the respondent, a chartered account and property developer, placed the valuation of the properties at between R60 and R70 million in the sequestration application by Irish Bank Resolution Corporation Ltd for Gormley's sequestration (case no. 6747/2012) and now alleges on behalf of the respondent that they are actually worth R113 500, 00. This valuation of R113 500, 00 is rejected. First, it is in direct contradiction to what Gormley said under oath in the sequestration application and no explanation is forthcoming to explain the discrepancy. Secondly, the date of the new valuations pre-dates the sequestration application by six months. It thus appears that two different valuations are being advanced to suit the respondent particular circumstances. In the absence of Gormley explaining away the inconsistencies (which he has not), there is nothing to refer to cross-examination, and the court is in a position to able to

arrive at a determination of the matter on the papers as they stand. **Platinum Holdings (Pty) Ltd & 3 Others v Victoria & Alfred Waterfront (Pty) Ltd & Another 2004 (JOL) 12746 (SCA) para [14] and [15]**. Thirdly, on the respondent's own version, the value of the properties lie in their development potential, and not their value as they currently stand. Accordingly, on the basis of Gormley's affidavit in the sequestration application, the fair value of the respondent's properties is between R60 and R70 million (namely half of the 2010 valuation placed on it by the respondent).

Gormley stated under oath in the above sequestration case that, the respondent trades at a loss, is indebted to the applicant for more than R68 million and the loan has not been called up, at a sale in liquidation the respondent's assets will not realise anything close to its liabilities which are approximately R100 million, the respondent's shareholders have tried to dispose of its properties but have not had any offers and the valuation of R123 million in the respondent's financial statements related to better times, and its properties may now be worth close to half of that.

4.3. Plea for Time-Respondent seeks time to sell the properties on its own rather than by a liquidator.

It is trite that a creditor who cannot obtain payment of his debt is entitled to a winding-up order, and is not bound to give time to the debtor. **Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597G**. Where a respondent does not have assets that can be readily sold in a reasonable time to pay a large debt without closure of the business, then the respondent is commercially insolvent and should be wound up. **Irvin & Johnson Ltd v Oelofse Fisheries Ltd 1954 (1) SA 231 (E) at 238B and 239A.**

Many indulgences were afforded to the respondent including the restructuring of its loans from as early as May 2011 after it had defaulted. The defaults were then referred to the applicant's Business Support Recovery Unit in May 2011 and a period of about seventeen months had elapsed without the respondent being able to secure a purchaser for the properties in order to pay its debts. Also, on the valuation of between R60 and R70 million, even if all the properties are sold, it will not raise enough to pay even the applicant's claim.

Further the respondent's assertion of a joint venture development is completely unfounded.

No case was made out as well on the papers that a liquidator will in all likelihood obtain less than if the respondent sells the properties.

No case was made out that respondent is entitled to more time to sell the properties on the basis that the sureties will be prejudiced also no surety intervened on that basis. Respondents's reliance on **Bock & Others v Duburoro Investments (Pty) Ltd 2003 (4) ALL SA 103 (SCA)** is misplaced as the case does not deal with grounds of liquidation and is also distinguishable on the facts. The respondent might have had a defence, if the application was launched by the applicant *qua* member and the respondent made out a case that the applicant was acting unreasonably as contemplated in s 347(2) of the Companies Act 61 of 1973. However, in this case, the applicant is a creditor owed more than R70 million which remains unpaid. Section 347(2) above is not applicable. Respondent's reliance on **ABSA Bank v Davidson 2000 (1) SA 1117 (SCA)** that a surety will be prejudiced is misplaced. **ABSA Bank,** *supra,* made clear that a surety can only be released if prejudice *"is the result of a breach of some or other legal duty or obligation",* the prime sources of which are the principle agreement and deed of suretyship. In our law, the ability of a creditor to apply for a winding- up of a company does not constitute a breach of a legal duty or obligations, whether arising

from the principal agreement of deed or deed of suretyship or not. It is a stator right to which the creditor is lawfully entitled.

4.4. Respondent claims it can not be deemed unable to pay its debts: It is common cause that on or about 28 March 2012, the applicant delivered statutory demands to the respondent in terms of s354(1)(a) of the Companies Act 61 of 1973 for repayment of the loan agreement and suretyship debt. Respondent admits that the debt remains unpaid and it has been unable to compound them to the satisfaction of the respondent.

Respondent's security though is insufficient based on Gormley's confession on the diminished value and the independent valuation conducted in June 2011 of approximately R70 million. Further, respondent failed to secure the whole debt within the 21 day period. Accordingly, the respondent is deemed unable to pay its debts.

4.5. Respondent has suplus income-respondent's allegation that it has surplus income sufficient to cover its operational costs and property costs in full is not supported by any evidence and is in stark contrast to the financial statements which record revenue streams in the region of R2 million for 2010 and 2011, much lower than the R6 million in interest which respondent is oblidged to pay the applicant each year.

4.6. That amounts that it owes to related companies are not due and payable and therefore cannot be taken into account. However, section 345(2) of the Companies Act provides that a Court must take into account contingent and prospective liabilities (such as the Eurocape Group Treasury Loan) when determining whether a company is unable to pay its debts.

4.7. Creditor's Entitlement to a Winding-Up Order:

Respondent relied on the case of **ABSA Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another [2012] ZAGPJHC 144**, Sutherland J pointed out that, *"where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order"*. At para [31], Sutherland J held, *"In plain terms, it seems now to be incorrect to speak of an 'entitlement' to a winding up order simply because the applicant is an unpaid creditor. The rights of creditors no longer have pride of place and been levelled with those of shareholder's, employees, and with the public interest too.. The norm that infuses the law about the governance of companies after the advent of the Companies Act, 2008, means that the age of creditor supremacy is over."*

Respondent implored the court to exercise its discretion under s 347 of the Companies Act, read with the Companies Act, 2008, "*to make any interim order or any other order it may deem just...*" rather than to allow applicant to insist "*on a manner of execution that is disproportionate and manifestly unfair to the respondent, given the fact that the sale in execution of the immovable property by the respondent will achieve the applicant's stated objective of simply wishing to get the monies owed to it by the respondent, but will be considerably cheaper, more expedient and equitable. (than a liquidation)*"

The argument that creditors no longer have pride of place is of no assistance to the respondent because not only is the phrase broad and undefined, but nowhere is it recorded that it impinges on a creditor's statutory right to apply for the winding-up of a company, nor does the respondent qualify as a shareholder, employee or member of the public. Instead, it is the respondent who admits that it owes more than R70 million to the applicant.

Further, respondent relied on **Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC),** Mokgoro J held, *"it must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution*

process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided." Respondent submitted that judicial oversight in execution of debt is required to determine whether a creditor has the right to deny a debtor the right to insist on *"more proportionate means to attain the same end."*

This is a red-herring. The **Jafta** case is distinguishable on the facts. Further, respondent's claims that a sale by the respondents will yield more and cost less than the *"costly and time consuming machinery of liquidation"* were unsubstantiated. The proportionality test is not applicable to this matter. The applicant can obtain no relief other than a provisional liquidation order.

4.8. Liquidation will preclude the shareholders from recovering subordinated loans as well as eliminating a tax benefit that would flow from the sale of the immovable property. No facts were advanced in the papers to substantiate what these submissions relate to. The only subordinated loans are in favour of related companies and therefore do not vest in the respondent. Further, the related companies in the Euro Cape Group will have no difficulty proving claims against the respondent if any free residue remains.

THE LAW:

[5] In the recent unreported judgment of **Scania Finance Southern Africa (Pty) Ltd / Thomie-Gee Road Carriers CC, case no. 958/2012 Free State High Court,** Snellenburg AJ after a consideration of the recent authorities held that in terms of s 9 of Schedule 5 of Companies Act 71 of 2008, a creditor may approach a court for the liquidation of a company or close corporation on the ground of its inability to pay its debts in terms of s 344(f). He held further that s 345 (and s 69 of the Close Corporations Act) is still a deeming provision. Such an applicant need not prove that the respondent company is insolvent in order to rely on Chapter XIV of the previous Act.

[6] In **Scania Finance para [12] & [13]**, supra the court disagreed with the finding in **HBT Construction & Plant Hire CC v Uniplant Hire CC 2012 (5) SA 197 (FB)**. The court held that it was incorrect to require a creditor to prove insolvency before being able to rely on Chapter XIV of the previous Companies Act. The court held that ss 3449(f) and 345 of the previous Act still applies to companies and if a company is to be wound up due to an inability to pay its debts, ss 344 (f) and 345 can still be used. The court held further that what the legislature has in effect brought about, by the repeal of s 68 and the amendment of s 66 of the Close Corporations Act is that the grounds of winding-up 'insolvent' close corporations by order of court are now the same as the grounds for winding-up of 'insolvent' companies and if the application for winding-up is made on the basis of s344(f) the applicant may rely on the deeming provisions of s 345

of the old Act. Regarding close corporations, the same ground will be used, to wit, s 344(f) read with s 69 of the Close Corporations Act.

[7] The court held that the onus of proving solvency rested on the respondent and the respondent would have to satisfy the requirements of s 4(1) of the 2008 Act, i.e. the debtor would have to satisfy the solvency test. See also, **Body Corporate for Fish Eagle v Group Twelve Investments 2003 (5) SA 414 (WLD) at 428(J).**

[8] The solvency test in section 4(1) of the 2008 Act requires *inter alia* that:

8.1. that the assets of the company, fairly valued, equal or exceed the liabilities of the company as fairly valued; and

8.2. that the company will be able to pay its debts as when they become due in the ordinary course of business. (**Scania Finance** *supra* at para [14])

[9] In **Scania Finance**, *supra* at para [19] and [20] the court referred with approval to two unreported judgments, **First Rand Bank Ltd v Lodhi Properties Investmments CC and Others** (case no. 38326/2011, NGHC) and **First Rand Bank Ltd v Bunker Hills Investments 499 CC** (case no. 32130/2011, SGHC) in which the courts held that the legislature did not in the 2008 Act intend to do away with a liquidation on the grounds of commercial insolvency.

[10] Respondent referred to the case of **ABSA Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd & Another [2012] ZAGPJHC 144.** This case merely deals with the Court's discretion. The Court did not find that the proof of factual insolvency is a pre-requisite which has to be satisfied before a creditor can apply for the winding-up of the company on the basis that it is unable to pay its debts. Furthermore, this case dealt with business rescue as an alternative to liquidation.

THE RESPONDENT'S INABILITY TO PAY ITS DEBTS:

[11] The respondent does not trade and therefore has no source of income. The amount owing is substantial and nothing has been put forward indicating any hope of possible payment.

[12] The mere selling of its assets to meet its debts is indicative of financial difficulty and an acknowledgement that liquidation must ensue. **Metso ND Engineering (Edms) Bpk v Specsolprojects CC [2006] JOL 17452 (T) at para 19.**

[13] A proper case was made out for the provisional winding-up of the respondent as contemplated in s 344(f) read with s 345(1)(c) of the old Companies Act.

[14] In the matter at hand, the respondent is unable to pay its debts, is commercially insolvent and respondent is not solvent as it does not satisfy the solvency test.

JUST AND EQUITABLE:

[15] Furthermore, it is just and equitable that the respondent be liquidated. **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W); Cuninghame v First Ready Developments 249 2010 (5) 325 (SCA) at para [14]** and **Scania Finance para [23].**

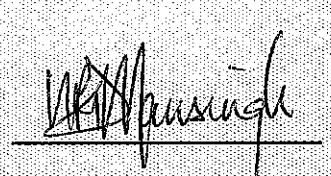
[16] The just and equitable test is satisfied as respondent's substratum has disappeared. Applicant has established that the realisation of the company's object has become objectively impossible. **Taylor v Welcom Theatres (Pty) Ltd 1954 (3) SA 339 (0) at 350.** This is determined independently of the wishes or intentions of the members or directors-in this case, Gormley. **Re Kitson & Co Ltd 1946 [1] ALL ER 435 (CA) at 439.** On the respondent's own version, the only way it can settle the applicant's claim is if it sells its properties. This request by necessary implication confirms that the substratum has disappeared because if all the properties are sold, the respondent cannot develop them and it would objectively be impossible for it to achieve the objectives for which it was incorporated.

[17] I find that it would be just and equitable to wind-up the respondent in terms of s 344(h) of the Companies Act.

[18] In the circumstances, the applicant has established a *prima facie* case for the liquidation of the respondent.

THE ORDER:

The respondent is placed under provisional liquidation.



URD MANSINGH, AJ