IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 35314//2019

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

28 April 2020

E.M. KUBUSHI **DATE**

In the matter between:

LODEWIJK A. E. BRIET **APPLICANT**

and

BELLA VUE FARMS (PTY) LTD **RESPONDENT**

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The applicant has approached court for an order winding up the respondent on the basis that the respondent is unable to pay its debts as envisaged in section 345 (2) of the Companies Act 63 of 1973 ("the Act"). The applicant is contending for an order liquidating the respondent in terms of section 344 *(f)* of the Act.

[2] Section 344 provides for instances in which a company can be wound up. Subsection *(f)* thereof provides that a company may be wound up by the court if it is unable to pay its debts as described in Section 345. Section 345 provides that:

> ***"345. When company deemed unable to pay its debts***: –
>
> *(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 two hundred rand then due–*
>
> *(i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or*
>
> *(ii) in the case of anybody 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*
>
> *(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to*

satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

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

[3] The Act has been repealed by the Companies Act 71 of 2008 ("the New Companies Act"). However, section 345 of the Act continues to apply by virtue of the transitional provisions contained in Item 9 (1) of Schedule 5 of the New Companies Act.

[4] The respondent is opposing the application. The respondent filed its answering affidavit out of time and applied for the condonation thereof. The respondent also filed an application for leave to file a further affidavit wherein the fact that funds have been procured to pay off the debt, is dealt with. At the commencement of the hearing I was informed that both applications were not opposed and that the parties were in agreement that they be granted. I am also satisfied that a proper case has been made out in respect of each application and that both applications ought to be granted.

[5] The purpose of the further affidavit is said to be solely to place the following facts before court:

5.1 That the amount of R5 192 037 (Five Million One Hundred and Ninety Two Thousand Thirty Seven Rand) was paid into the trust account of the respondent's attorney by the respondent's shareholders, where it is currently kept; and

5.2 That the aforesaid amount constitutes the applicant's total capital claim of R3 900 000 (Three Million Nine Hundred Thousand Rand) together with

simple interest at the rate provided for in the loan agreement, up until 3 February 2020.

MATRIX

[6] The application is premised on the loan agreement entered into by the parties wherein, the applicant agreed to lend the respondent an unsecured amount of €350 000 (Three Hundred and Fifty Thousand Euro). The said amount was converted to the rand value by First National Bank to an approximate amount of R3 900 000 (Three Million Nine Hundred Thousand Rand). The loan was for financing the acquisition and operation by the respondent of a going concern located in Murray Hill, Gauteng and was payable in three equal annual instalments from 16 January 2014 until 16 January 2016.

[7] The applicant duly performed in terms of the loan agreement by advancing the amount to the respondent and the respondent drew upon the loan advanced. The applicant's allegation is that despite the obligations imposed on it by the loan agreement to make payment of the amount, together with interest, that had become due, owing and payable, the respondent failed and/or refused alternatively neglected to make such payment.

[8] The applicant, further, alleges that despite various demands by him, both verbally and in writing, the respondent persistently failed to make payment of the amount that was due and payable in terms of the loan agreement. It is the applicant's case that at the time of the launch of this application, the respondent was legally and lawfully indebted to the applicant in the amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand

Three Hundred and Eighty Eight Rand). The respondent is said, in that sense, to be a creditor of the applicant.

[9] The applicant issued a notice in accordance with the provisions of section 345 of the Act ("the section 345 notice"), in terms of which repayment of the amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand) was claimed, which notice was served on the respondent by the sheriff. According to the applicant, the respondent failed and/or refused, or alternatively neglected to pay the amount claimed. The applicant, as such, contends that the respondent is commercially and/or factually insolvent and unable to pay its creditors alternatively by its failure to comply with the section 345 notice the respondent should be regarded and/or deemed as commercially and/or factually insolvent and unable to pay its debts. It is on that basis that the applicant has launched this application for the liquidation of the respondent.

[10] It is apparent from the applicant's papers that he has complied with all the other formalities required in accordance with section 346 (4) *(a)* of the Act.

[11] The respondent is not disputing that it entered into the loan agreement with the applicant. The application is resisted on the basis that it (the respondent) is not indebted to the applicant in the amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand), or at all, on the following grounds:

11.1 The applicant's claim against the respondent has prescribed in terms of section 11 *(d)* of the Prescription Act 68 of 1996;

11.2 The applicant's claim amount is miscalculated in that the applicant claims compounded interest, which is not provided for in the loan agreement;

11.3 The commencement of the liquidation proceedings amount to an abuse of process in view of the dispute of fact that exist between the parties; and

11.4 The respondent has procured the total capital claimed together with simple interest, which amount has been paid into its attorneys' trust account and is available for payment to the applicant, and it is not unable to pay its debts as contended for by the applicant.

[12] The preliminary issue of factual disputes appears to be intertwined with the other defences raised by the respondent. In dealing with the said defences I will similarly be determining whether there are factual disputes which warrant either referral for trial and/or oral evidence or dismissal of the application. I deal hereunder with the grounds of opposition in turn.

PRESCRIPTION

[13] It is the respondent's case that in terms of the loan agreement the debt due to the applicant fell due, in accordance with article 6 thereof, as follows: (a) R1 300 000 (One Million Three Hundred Thousand Rand) plus interest on 16 January 2014; (b) R1 300 000 (One Million Three Hundred Thousand Rand) plus interest on 16 January 2015; and (c) R1 300 000 (One Million Three Hundred Thousand Rand) plus interest on 16 January 2016.

[14] The contention is that at the time of instituting these proceedings a period of more than three years had passed since each of the three payments fell due. The very last of the three payments fell due on 16 January 2016, and the prescription period of three years expired on 17 January 2019. No legal proceedings were instituted for the recovery of the

debt prior to 17 January 2019 in order to interrupt prescription, the applicant's claim has as such prescribed, so it is argued.

[15] The applicant, however, argues that prior to the lapse of the three year period on which the respondent relies for its argument of prescription, Mr Johan Mevesen, the deponent to the answering affidavit, on behalf of the respondent, unequivocally through numerous correspondence admitted and/or acknowledged liability and undertook to repay the amount owed in terms of the loan agreement. The admission and/or acknowledgement of liability is said to have interrupted prescription as a result of which the debt was not extinguished.

[16] In response to the applicant's submission that the prescription of the claim was interrupted by the respondent's acknowledgment of liability and undertaking to repay the loan, the respondent denies that it at any time acknowledged liability as alleged by the applicant or that prescription was interrupted by any such acknowledgement of liability.

[17] In support of its denial that it at any time acknowledged liability the respondent's proposition is that the applicant failed to make out a case in his founding papers for such acknowledgement of liability. The submission is that, these being motion proceedings, firstly, the bald allegations of fact in regard to the numerous acknowledgment of liability made by the applicant in his founding affidavit without attaching any proof of such facts, should not be accepted as evidence by the court; secondly, the evidence of the respondent's acknowledgment of liability as contained in the correspondence attached to the replying affidavit should be ignored by the court as the applicant ought to have dealt with such evidence in the founding affidavit and not in the replying affidavit.

[18] A further submission is that the contents of the letter of the purported acknowledgment of liability attached to the founding affidavit, which according to the respondent is the only evidence referred to in the applicant's founding papers, cannot, in any way, be interpreted as an unconditional acknowledgment of liability nor can it be used as evidence since it postdates the date of prescription.

[19] Section 14 of the Prescription Act provides that:

> *"(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.*
>
> *(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due."*

[20] Therefore, to interrupt prescription, an acknowledgement of liability by the debtor must amount to an admission that the debt is in existence and that she/he (the debtor) is liable therefor.[1] This is what the applicant contends has happened, an allegation which is disputed by the respondent.

[21] The respondent does not, per se, deny that there was correspondence sent by it to the applicant acknowledging liability and promising to pay, as alleged in the replying affidavit. The gravamen of the respondent's complaint is that the applicant should have dealt with the said acknowledgement of liability and attached the relevant correspondence in the founding papers; and having not done so, the argument is that the court should disregard such correspondence. However, it is my view that the applicant's argument that it

[1] See Agnew v Union and South West Africa Insurance Co Ltd 1977 (1) SA 632A and Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N) at 317H.

was not incumbent on him to make out a case of prescription in the founding papers, is correct. The applicant's claim against the respondent is that the respondent should be wound up on the ground that it is insolvent and unable to pay its debts. This is the case which the applicant was expected to make out in the founding papers. This the applicant did – it is common cause.

[22] It is quite clear from the reading of the founding affidavit that the applicant was aware that given the dates when the repayments of the loan became due, the last being January 2016, more than three years had passed. The applicant, thus, stated in the founding affidavit that the respondent has on more than one occasion admitted liability and undertaken from time to time to repay the amount owed. He, in that vein, attached the last correspondence from the respondent wherein the respondent is alleged to have admitted liability and undertaken to pay. Specifically, the applicant alleges in the founding affidavit that due to the numerous acknowledgment of liability the debt has not been extinguished by prescription as the running of prescription was interrupted from time to time by the express or tacit acknowledgement of liability by the respondent. It is in answer to these allegations that the respondent raised the defence of prescription and challenged the applicant to produce proof of the alleged interruptions which the applicant provides in the replying affidavit.

[23] It is trite that prescription is a defence and in motion proceedings, should be raised by the respondent in the answering affidavit. In this instance, the respondent raised such defence in the answering affidavit and also challenged the allegation by the applicant that it had on various occasions acknowledged liability and promised to pay. It is my view that, because the said defence as well as the challenge of the acknowledgment of liability were

raised in the answering affidavit the applicant was entitled to deal with them in the replying affidavit.

[24] In responding to the respondent's defence of prescription and challenge that it admitted liability on more than one occasion, the applicant was, thus, entitled to furnish the further correspondence relating to the other occasions when liability was admitted, as he did in the replying affidavit. The correspondence is self-explanatory and does not require that I deal therewith herein. Besides, the correspondence is not contested by the respondent. The correspondence clearly shows that the respondent admitted and/or acknowledged liability. Consequently, it is my ruling that the period of prescription was interrupted by the acknowledgement of liability and promises to pay by the respondent.

[25] The letter of acknowledgment of liability that is referred to in the applicant's founding affidavit when singularly considered may be construed as having been made post the prescription date. The contents thereof may also not easily be construed as constituting an acknowledgement of liability. However, when read together with the other letters of acknowledgment of liability referred to in the replying affidavit, it is evident that it was written against the backdrop of the other letters where the respondent has clearly acknowledged liability. Therefore, it cannot be said that the acknowledgement of liability was made post the prescription date or that the contents of the said letter cannot be interpreted as an unconditional acknowledgement of liability.

[26] I hold, therefore, that the applicant's claim has not prescribed due to the fact that the period of prescription was interrupted from time to time by the express or tacit numerous acknowledgements of liability made by the respondent.

[27] As *per* the conclusion I come to on this aspect I hold that there are no factual disputes in this regard.

MISCALCULATION OF THE CLAIM AMOUNT

[28] The applicant's claim against the respondent is for an amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand) which is comprised of the capital amount of R3 900 000 (Three Million Nine Hundred Thousand Rand) plus interest in the amount of R3 270 388 (Three Million Two Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand).

[29] The respondent is resisting paying the amount of interest claimed by the applicant on the ground that the interest amount has been miscalculated, in that, compound interest was used in the calculation instead of simple interest as provided for in the loan agreement. Thus, the respondent tenders in the supplementary affidavit, to pay the capital amount together with simple interest.

[30] The question on this aspect is whether in terms of the loan agreement the applicant is entitled to compound or simple interest.

[31] Article 5 of the loan agreement deals with interest, sub-article 5 thereof provides that –

> *'Any interest and instalment or, the principal amount, declared due based on this agreement, which is not at the effective disposal of the Lender on the due date shall itself bear net interest from the date when it should have been paid until the date it is actually paid at an annual rate which is South African prime +3 (three) percentage points on the outstanding amount. Such interest shall be calculated in the*

same manner as interest according to Article 5.1[2] *and shall accrue and be payable on the Lender's demand.'*

[32] In my opinion, the article entitles the applicant to compound interest. The article simply states that where interest that has become due has not been paid on the due date it will attract interest on itself.

[33] In my understanding, the argument of the respondent is not that the loan agreement does not provide for compound interest. What the respondent is contending for is that the compound interest is a penalty that must be 'declared due' by the court before it can become due and payable. Therefore, since the applicant has not approached the court for such declaration, he is not entitled to claim that interest.

[34] To my mind, the respondent misconstrues article 5.5 (that provides that the interest must be declared due) in contending that the interest is required to be declared due by a court.

[35] As already stated earlier in this judgment, the loan agreement provides that once an amount, whether the capital or the interest, is not paid on the due date stipulated in the loan agreement, it attracts interest. It means that the interest that was due on the capital amount and was not paid when it became due will attract interest, as such, there will be interest payable on that interest – hence the compounded interest claimed by the applicant. It is clear from the loan agreement when the amounts owed became due and payable.[3] It is common cause that none of these amounts were paid. Therefore, in terms of the loan

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[2] **'Article 5 Interest**

1. The Borrowed shall pay net interest on the principal amount as defined in Article 1 to the Lender at a rate according to Article 5.2 on the aggregate amount of the loan outstanding, calculated on the basis of a 365 – day year composed of 12 months.
2. The interest rate shall ***be fixed as 7, 5% p.a (seven and half) for the whole duration of the loan***.'

[3] See paragraph 13 of this judgment.

agreement the interest that has not been paid started attracting interest from the due date. In the circumstances, it was not necessary for the applicant to approach court to have the interest payable on the interest that was not paid on the due date, declared due. Consequently, I have to hold that the applicant is entitled to claim compound interest.

[36] As *per* the conclusion I come to on this aspect I would also hold that there are no factual disputes in this regard. Nevertheless, the respondent's proposition is that the applicant has in argument conceded a factual dispute on this aspect. According to the respondent the conceded dispute is whether the applicant is entitled to compound interest or simple interest.

[37] The existence of a dispute of fact in the papers on motion proceedings does not mean that the said application cannot be heard. The approach of the court hearing such a matter should be whether such an application cannot properly be decided on affidavit or on the papers as they stand.

[38] In my opinion, this application can be properly decided on the papers as they stand despite the dispute that is said to exist on this aspect. The parties are agreed that article 5.5 of the loan agreement is applicable and that it provides for compound interest. The parties are, however, at odds as to whether a court must declare such interest due or not. This, as such calls for the interpretation of the clause.

[39] Interpretation, as has been held, is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.[4] As a result, this matter can be decided on the papers as they stand.

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[4] See KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399 (SCA) at para 65.

INSOLVENCY

[40] On the question of whether the respondent is either factually or commercially insolvent, the respondent submits that it has procured an amount of R5 192 037 (Five Million One Hundred and Ninety Two Thousand Thirty Seven Rand) from its shareholders which is held on its attorneys trust banking account. According to the respondent, the funds are available for payment to the applicant. The contention, therefore, is that the respondent is able to pay its debt and as such, not insolvent, as suggested by the applicant.

[41] I do not think it is necessary to delve into the origins of the funds. The fact is the respondent has indicated that he is able to pay the applicant's claim and the money is available and can be paid outright.

[42] I am of the view that the respondent has been able to show that he is able to pay its debt and that it should, in the interest of justice, be granted an opportunity to pay off the amount to the applicant. The amount deposited with its attorney's trust account is not the full amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand) as I have found to be due and payable. The respondent has explained why only the amount of R5 192 037 (Five Million One Hundred and Ninety Two Thousand Thirty Seven Rand) was deposited. The explanation is satisfactory.

CONCLUSION

[43] It is my conclusion that the respondent had been successful in opposing this matter. However, the applicant has been substantially successful in that he has been able to show that the claim has not prescribed and that the amount that is due and payable is

R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Eight Rand) and not R5 192 037 (Five Million One Hundred and Ninety Two Thousand Thirty Seven Rand), as suggested by the respondent. In the circumstances, the applicant is entitled to the costs of the application.

[44] I am, however, of the view that even though the respondent has been successful, the application should not be dismissed but be postponed *sine die* pending payment by the respondent to the applicant of the amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Rand) together with any interest that might be due and payable.

[45] The said amount must be paid to the applicant within thirty (30) days of the date of this order failing which the applicant, if he so wishes, must approach court on the same papers filed herein, for a final winding up order against the respondent.

ORDER

[46] AS A RESULT, I MAKE THE FOLLOWING ORDER

1. Condonation for the late filing of the answering affidavit is granted.

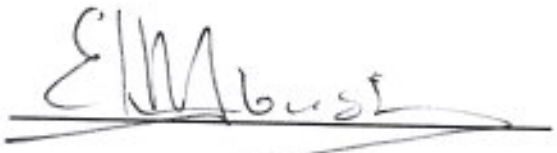
2. Leave is granted to the respondent to file a further affidavit.

3. The winding up application is postponed *sine die*.

4. The respondent is ordered to pay to the applicant an amount of R7 170 388 (Seven Million One Hundred and Seventy Thousand Three Hundred and Eighty Rand) together with any further interest that is due and payable.

5. The said amount should be paid within thirty (30) days of the date of this order failing which the applicant may, if he so desires, approach court on the same papers filed herein, for a final winding up order against the respondent.

6. The respondent is ordered to pay the costs of this application.



E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv. C. M. Rip.
Applicant's Attorneys	: Snyman De Jager Attorneys.
Respondent's Counsel	: Adv. A. J. Wessels.
Respondent's Attorneys	: Grosskopf Attorneys.
Date of hearing	: 06 February 2020.
Date of judgment	: 28 April 2020