REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3605/2018

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

DATE 28/01/20 SIGNATURE:

In the matter between:

DIESEL DIRECT (PTY) LTD T/A XFUELS **APPLICANT**

AND

EXCODOR 37 CC T/A TOTAL VAALWATER **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] On the 22nd December 2017 the applicant represented by Mr. Barend Jacobus Strydom and the respondent represented by Mr Delmar Nortje entered into an alleged written acknowledgement of debt (AOD) for the amount of R208 215-

97. It was a material term of the alleged AOD that a minimum payment of R20 000-00 per month was to be discussed and agreed upon on the 15th January 2018.

[2] During February 2018 there was a WhatsApp communication between the applicant and respondent wherein the respondent promised to pay end of February. The respondent did not pay as promised and on the 20th April 2018 the applicant send a notice in terms of section 345(1) (a) of the **Companies Act**[1](Old Act). In terms of the notice, the respondent was given 21 days within which to pay the full outstanding amount failing which an application for it to be liquidated will be instituted.

[3] The respondent failed to comply with the demand, and that resulted in the applicant instituting an application against the respondent seeking an order that the respondent be finally wound up and placed in the hands of the Master. In the alternative the applicant is seeking an order that the respondent be provisionally wound up. The applicant's application is based on the alleged AOD and section 345(1) letter.

[4] The respondent is opposing the applicant's application. The respondent has raised a point *in limine* stating that the application was brought in bad faith as the AOD is fatally flawed and was attained under circumstances of undue pressure during an unlawful act of spoliation, and therefore did not reflect the true intentions of the respondent. However, the respondent did not pursue this point *in limine* and opted to argue it together with the merits of the application.

[1] Act 61 0f 1973

[5] With regard to the merits, the respondent in its answering affidavit has stated that there was no valid AOD that existed. According to the respondent, Mr Nortje was pressurised to sign the AOD and when he signed it, he intended to bind himself in his personal capacity for a debt of the third party. That explains why he has inserted his identity number and his physical address is noted as the *domicilium* of the debtor.

[6] The respondent in his answering affidavit has further stated that the purported AOD was intended to be subject to a suspensive condition as payment was still to be discussed and agreed upon. According to the respondent the suspensive condition has not been fulfilled. The respondent has also stated that the purported AOD was not signed.

[7] The respondent has stated that the applicant is abusing court processes by instituting a liquidation application instead of issuing summons against it. According to the respondent, it is quite capable of paying its creditors and its assets exceed its liabilities.

[8] It is settled law that a company is deemed to be unable to pay its debt if a creditor to whom the company is indebted in the sum of money of not less than one hundred rand 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 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. In a final winding-up application, the onus is on the applicant to prove grounds upon which it relies on. It is also trite that the onus is on the applicant to establish a liquidated claim is sequestration proceedings.

[9] In the case at hand the applicant is relying on the AOD and its section 345 letter as the basis of alleging that the respondent is unable to pay its debt. The circumstances under which the AOD was allegedly signed, was that the applicant has provided petroleum products to the respondent for its service station at Total Vaalwater to the value of R208 215-97. The respondent in its answering affidavit is not disputing that. The respondent is however raising technical issues alleging that the AOD is totally flawed and attained under circumstances of undue pressure; that the purported AOD was not signed; that the purported AOD was subject to a suspensive condition that was not fulfilled; and that the understanding of Mr Nortje at the time of signing of AOD was that he intended to bind himself in his personal capacity for a debt of a third party.

[10] The clause of the AOD in relation to the payment of the debt state that minimum payment of R20 000-00 per month to be discussed and agreed on 15th January 2018. What it entails is that on 15th January 2018 the parties will discuss and agree on a minimum payment of R 20 000-00 per month. It was not yet certain whether the respondent will be required to pay R20 000.00 or more per month. In my view this was indeed a suspensive condition. The applicant will only be entitled to enforce the AOD once the suspensive condition has been complied with. The respondent dispute that the suspensive condition has been complied with.

[11] In **G45 v Zandspruit Cash & Carry** [2]Fourie AJA said:

[2] 2017 (2) SA 24 (SCA) at para 12

"To determine whether or not the respondent's delictual claims are time-barred, it is necessary to interpret the agreements and in particular clause 9.9 thereof. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA) ([2015] ZASCA 111)** para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties -this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, ie the factual matrix or context, including any relevant subsequent conduct of the parties."

[12] Even though there is a suspensive condition in relation to monthly payments of R20 000.00 per month, it is not clear from the papers whether on the 15th January 2018 or any subsequent date, the parties have discussed and agreed on minimum monthly payments by the respondent. However, this uncertainty has been cleared by the WhatsApp communication between the applicant and respondent. On the 7th February 2018 at 9h17 the applicant has sent a WhatsApp message to the respondent enquiring about payment. The respondent responded to that message at 9h50 stating that they have talked and that payment will be made the end of February. The conduct of the parties after the 15th January 2018 shows that the suspensive condition has been complied with, and the agreement was that the respondent will start paying the end of February 2018. The applicant was therefore entitled to enforce the AOD due to non-compliance of its terms by the respondent.

[13] There respondent does not dispute that it has failed to effect payment as per the terms of the AOD. That resulted in the applicant sending a section 345

notice to the respondent. The respondent still did not comply with the notice. In **Body Corporate of Fish Eagle v Group Twelve Investment**[3] Malan J said:

"Section 345 (1) and 344(f) of the Companies Act intended that an unconditional payment must be made by a company in order to avoid liquidation..."

[14] By demanding payment, the applicant was informing the respondent that the debt has become due and payable. The respondent was given 21 days to settle the whole outstanding amount. The outstanding amount was more than one hundred rand. The respondent was given three weeks within which to settle the debt. The respondent has failed to unconditionally settle the debt or to make reasonable payment arrangements to the satisfactory of the applicant. After the lapse of three weeks the respondent was therefore deemed to be unable to pay its debts.

[15] The respondent in its answering affidavit has raised issues that might seem to raise a dispute of fact. In **Kalil v Decotex (Pty) Ltd and Another**[4] Corbett JA said:

"In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the applicant shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the court will refuse the winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds. "

---

[3] 2003 (5) SA 414 (W) at 427A

[4] 1988 (1) SA 943 (A) at para 980 B-C

[16] Since the respondent has been deemed unable to pay its debts for its failure to comply with the applicant's section 345 notice, for it to avoid liquidation, it has to show on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. The respondent has denied being indebted to the applicant and has also stated that it is quite capable of paying its creditors and that its assets exceed its liabilities. The respondent has further stated that the applicant should have proceeded by way of action against it instead of motion proceedings. What the respondent is basically saying is that there is a material dispute of fact which will not be resolved on the papers as they stand.

[17] In **National Director of Public Prosecutions v Zuma**[5] Harms DJ 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 disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. "

[18] The respondent has merely made a bare denial of the applicant's debt despite being a signatory to the AOD. The respondent has just made a bald statement

---

[5] 2009 (2) SA 277 (SCA) at para 26

that it is capable of paying its creditors and that its assets exceed its liabilities without substantiating that contention. With these bare denials and bald statement it becomes difficult for the court to find that the respondent has satisfied the test of establishing a real, genuine and *bona fide* dispute of fact. I therefore, cannot find in favour of the respondent that a real, genuine and *bona fide* dispute of fact exist.

[19] The first part of the AOD reads as follows:

> "I, D Nortje
>
> Identity number: 700115205081(Married In/Out of community of property) Or in my capacity as duly authorised representative of Total Vaalwater CC/ PTY LTD Registration number: 12/2013/0516) (Herein called the Debtor)
>
> acknowledge the debtor to be truly and lawfully indebted to Diesel Direct Pty Ltd Registration number: 2015/362176/07 t/a X-Fuels (herein called the creditor) for the sum of R 208 215-97 being in respect of supply of petroleum products."

[20] On the space where the debtor was supposed to sign, Mr Nortje did not sign. However, Mr Nortje has initialled each and every page including the last page where the debtor did not sign and has also put his full names on the space provided for on the last page. The respondent has issues with these defects and submit that the AOD was therefore not proper and that Mr Nortje was under the impression that he was personally acknowledging the debt due by the respondent.

[21] In my view, the respondent is opportunistic with its contention. The AOD identifies the debtor as Total Vaalwater and also state its registration. Therefore, failure by the applicant to delete "married IN/OUT of community of property" was a minor omission which is not that material. Also, failure by Mr Nortje to sign where the debtor was supposed to sign will not on its own invalidate the AOD since he had put his full names and also initiated the very

same page. Further, his promise in the WhatsApp message of the 7th February to pay the by the end of February shows that he had no qualms with the AOD and considered the respondent bound by it. When Mr Nortje was concluding the AOD, he did so in a representative capacity of Total Vaalwater which is the respondent.

[22] The amount on the AOD is easily identified and the respondent does not dispute that it is the amount that led to the conclusion of the AOD on the 22nd December 2017. The court is therefore satisfied that the applicant has established a liquidated claim against the respondent. The respondent has failed on a balance of probabilities that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds.

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

23.1. The respondent Excodor 37 CC T/A Total Vaalwater is finally wound-up and placed in the hands of the Master.

23.2. The costs of the application are to be costs in the winding-up.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : ADV JP MORTON

INSTRUCTED BY : THOMAS GROBLER ATTORNEYS

COUNSEL FOR RESPONDENT : MR RHEEDER

INSTRUCTED BY : MURPHY KWAPE MARITZ ATTORNEYS

DATE OF HEARING : 04 DECEMBER 2019

DATE OF JUDGEMENT : 28th January 2020