IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 8991/19P

In the matter between:

ABSA BANK LIMITED **APPLICANT**

and

CROSSMOOR TRANSPORT (PTY) LIMITED **RESPONDENT**

SALA 45 786 (PTY) LIMITED t/a
SATLOBLOKAS **FIRST INTERVENING PARTY**

This judgment was handed down electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be 09h30 on 30 July 2020.

ORDER

The following order is made:

1. The respondent is placed under provisional liquidation.

2. A Rule Nisi is issued, calling upon all interested parties to show cause, if any, on 8 September 2020 at 09h30, or as soon thereafter as Counsel may be heard, why an order in the following terms should not be granted:

   2.1. that respondent be placed under final liquidation.

   2.2. that the costs of this application, including reserved costs, be costs in the liquidation and such costs to include the fees of Senior Counsel.

3. A copy of the provisional liquidation order be served:

   3.1. on the respondent at its registered office;

   3.2 on the South African Revenue Services;

   3.3. on all known creditors, with claims in excess of R5 000 by way of prepaid registered post;

   3.4. on the respondent's employees:

      i. by affixing a copy thereof to any notice board to which the employees have access inside the respondent's premises; and

      ii. by affixing a copy thereof to the front door of the premises from which the respondent conducts business;

   3.5 on any registered trade union that represents any of the respondent's employees;

4. A copy of this order is to be published on or before the day of 11 August 2020 once in the Government Gazette and once in a daily newspaper published in Durban and circulating in KwaZulu-Natal.

JUDGMENT

Delivered on:30 July 2020

Moodley J

[1] This is an application by ABSA Bank Limited ("the applicant") for the final winding-up of the respondent, Crossmoor Transport (Pty) Limited.

[2] The applicant seeks the winding-up order on the grounds that the respondent:

2.1 is both factually and commercially insolvent;

2.2 is unable to pay its debts within the meaning of s 344(f), read with the provisions of s 345(1)(c) of the Companies Act, 61 of 1973 ("the Act");

2.3 is deemed to be unable to pay its debts within the meaning of s 345(1) of the Act;

2.4 has committed certain acts of insolvency.

The applicant submits further that it would be just and equitable, as intended in terms s 344(h) of the Act as read with item 9 of schedule 5 of Act 71 of 2008 ("the 2008 Act") for the court to order the final winding-up of the respondent.

[3] The application is opposed by the respondent on all the aforesaid grounds. The respondent denies that it is factually and commercially insolvent and it cannot be deemed to be unable to pay its debts. It asserts that its assets, though encumbered, exceed its liabilities. It avers further that it was exposed to unforeseen circumstances which caused it to fall into arrears with its repayments. However, it has averted the adverse consequences and is now a viable trading business. It would further not be just and equitable to wind up the respondent, especially because of the consequences to its large force of employees.

Factual Matrix

[4] The events preceding the application and the course of the litigation as set out in the applicant's chronology are common cause. The main facts of relevance to this application are:

4.1 The respondent and its 'sister' company Xmoor Transport (Pty) Ltd ("Xmoor"), trading as Crossmoor Transport, jointly and severally in solidum obtained from the applicant banking facilities which were amended from time to time.

4.2 On 19 July 2018 the respondent and Xmoor renewed their banking facilities as joint borrowers with the applicant in terms of a facility letter dated 25 June 2018. The companies were represented by Alvin Naicker and Inderan Naicker, who are directors in both companies.

4.3 As security for the facilities, Xmoor and other third parties executed guarantees in favour of the applicant.

4.4 The respondent thereafter entered into instalment sale agreements with the applicant for each individual item financed.

4.5 On 15 November 2018, Tex Investments (Pty) Limited issued a liquidation application against Xmoor.

4.6 During December 2018, the respondent defaulted with repayment to the applicant and fell into arrears with its financial obligations in terms of the facility letter and instalments on the instalment sale agreements.

4.7 On 14 June 2019 a meeting was convened between the applicant's management, which included its Chief Credit Officer, Bradley Greenfield, the respondent's director, Inderan Naicker, and the finance team of the Xmoor Group, at which the unpaid debit orders and the R80 million overdraft facility with First National Bank (FNB) were discussed.

4.8 Subsequently, in consequence of the respondent's breach of its obligations to FNB, FNB called up its overdraft facility.

4.9 On 30 June 2019 the respondent paid the outstanding arrears for May and June 2019 to the applicant, but failed to provide its annual financial statements as at 28 February 2019.

4.10 On 3 July 2019 a further meeting was held between Bradley Greenfield and Inderan Naicker. The primary purpose of the meeting was to discuss the arrear instalments on the various commercial asset finance facilities, and to obtain an update on the developments at the respondent and Xmoor. Mr Naicker offered various reasons for the delay in repayments and undertook that the respondent would settle the full outstanding arrears by 31 July 2019, which it failed to do.

4.11 On 23 July 2019 Xmoor registered a general notarial bond in the amount of R52 million in favour of Engen without notifying the applicant, which became aware of the general notarial bond during August 2019.

4.12 On 15 August 2019 the applicant's attorney delivered a notice of default and demand to the applicant for, inter alia, payment of the arrears which amounted to R2 876 981.33. In response, the respondent's attorneys requested an urgent meeting with the applicant. The meeting was held on 22 August 2019.

4.13 The discussions at this meeting were recorded in a letter bearing the same date by the applicant's attorney, Mr Du Randt, to the respondent's attorney. He specifically recorded that the letter was without prejudice to the rights of the applicant to terminate all agreements that were in arrears, as recorded in the letter of demand dated 15 August 2019, and that the applicant reserved its rights to terminate all agreements and to exercise its rights under the individual agreements or the facility. Mr Du Randt also confirmed that the applicant afforded the respondent and Xmoor the opportunity to submit a proposal for consideration by all its creditors before 27 August 2019.

4.14 He recorded further that the respondent had not disclosed to the applicant the liquidation application by Tex Investments for R199 million and that if the Tex Investments liquidation application was not settled or withdrawn by 26 August 2019, all facilities and agreements would be cancelled by the applicant. (The liquidation application was settled and withdrawn on 10 September 2019.)

4.15 On 27 August 2019 the respondent delivered some financial statements reflecting the respondent's financial position, equities and liabilities, debtor's indebtedness, income statement, arrears and work in progress.

4.16 On 28 August 2019 the applicant delivered its letter of termination, terminating and cancelling all the facilities and instalment sale agreements, recording that the respondent and Xmoor failed to comply with the demands, alternatively, remedy the defaults as contained in the letter dated 15 August 2019. The applicant also requested delivery of all the assets and to be placed in control of the assets financed by it.

4.17 On 2 September 2019 the respondent paid to the applicant the amounts of R4 637 771 and R484 992.

4.18 On 12 September 2019 the respondent's attorney delivered a letter to the applicant's attorney addressing, inter alia, the respondent's indebtedness to its other creditors and requesting a "payment holiday".

4.19 On 1 October 2019 the applicant's attorney addressed a statutory letter of demand to the respondent in terms of s 345 of the Act read with item 9 schedule 5 of the 2008 Act, in terms whereof it demanded, inter alia, payment of the sums of R132 388 846 and R9 113 501 together with interest thereon. Another creditor, Man Financial Services SA(Pty) Ltd, also addressed a s 345 letter to the respondent on the same day.

4.20 The first s 345 letter was sent by registered mail and served by the sheriff on 4 October 2019 on the directors of the respondent at 102 Essenwood Road, Musgrave, Durban. In a letter dated 11 October 2019 the respondent's attorney recorded that the respondent had received the first s 345 letter on 10 October 2019.

4.21 On 10 October 2019 the respondent paid R5 million to the applicant and on 11 October 2019 made a further payment of R586 789.

4.22 Lawrence Graham, the applicant's Manager: Business Bank Commercial and Asset Finance Division Recoveries certified that the respondent was indebted to the applicant in the amount of R113 756 745.52 as at 8 November 2019. He also certified that Xmoor was indebted to the applicant in the amount of R8 162 969.81 as at 8 November 2019.

4.23 On 2 December 2019 the liquidation application was served by the sheriff at the respondent's registered offices and on the respondent's employees. The sheriff's return of service recorded that there were no trade unions.

4.24 In an email dated 5 December 2019 the respondent's attorney recorded that his instructions were that arrears on payments due by the respondent were:

i. Absa Bank - R19 million
ii. Standard Bank - R4,8 million
iii. Wesbank - R191 000
iv. Mercedes Benz - R21 million
v. Komatsu - R2 million
vi. Iveco - R2 million
vii. Man Truck - R91 000
viii. Other creditors - R6 million
ix. Salaries - R3,5 million

4.25 In its preliminary answering affidavit dated 9 December 2019, the respondent undertook to pay the full outstanding arrears to the applicant before the end of February 2020.

4.26 On 10 December 2019 the application served before Khuzwayo AJ who ordered that the application be adjourned to 26 February 2020, and granted both parties leave to deliver supplementary affidavits.

4.27 On 12 December 2019 the applicant's further s 345 notice ("the second s 345 notice") was emailed to the respondent's attorney, and served on the respondent by the sheriff on 17 December 2019 at its registered address viz 3 Newton Road,

Mariann Industrial Estate Pinetown and at 102 Essenwood Road, Durban on 12 December 2019, and posted on 12 December 2019 by registered post to both addresses. The second s 345 notice records that the respondent is indebted to the applicant in an amounts of R122 099 572 plus interest at 10.25% calculated from 12 December 2019 and R8 627 353.36 plus interest at 10.25% calculated from 12 December 2019.

4.28 On the same date, the applicant's attorney also requested from the respondent's attorney the identity of all trade unions representing both the respondent and Xmoor, the details of any labour brokers representing any employees and confirmation that the respondent would in terms of s 197B(2) of the Labour Relations Act 66 of 1995 notify its employees of the liquidation application enrolled on 26 February 2020. The respondent's attorney merely responded that it did not represent the employees. The applicant's attorney repeated his request on 4 February 2020.

4.29 On 26 February 2020, in terms of a consent order, a labour broker was granted leave to intervene (which I return to below) and the parties granted leave to file supplementary affidavits. The matter was then enrolled on the opposed roll for hearing on 22 May 2020.

4.30 It is common cause that the respondent remains substantially indebted to the applicant as the debt was not settled at the end of February 2020 as undertaken. Although an inspection of the assets financed by the applicant was conducted, the assets remain in the possession of the respondent and are utilised in the respondent's operations.

Intervening Parties

[5] It appears appropriate at this stage to record the conduct of the intervening parties in this application. Section 197B (2)(b) of the Labour Relations Act read with s 346(4)(A) of the Act provides that:

'An employer that receives an application for its winding-up or sequestration must supply a copy of the application to any consulting party contemplated in section 189(1) (in this regard a Trade Union or the Labour Broker), within two days of receipt, or if the proceedings are urgent, within 12 hours.'

[6] The sheriff's return on the liquidation application reflected that service on 2 December 2019 on the employees of the respondent was effected by service on the supervisor, Rita Pillay and that 'there are no trade unions.'

[7] On 10 December 2019 Sala 45 786 (Pty) t/a Satloblokas ("Satloblokas"), a labour broker 'deployed at the respondent', sought leave to intervene in this application, alleging that it represented 1758 contract employees of the respondent. In the founding affidavit the deponent, Simone Pillay, stated that 'Natal (should be *'National'*) Transport Movement ("NTM"), represents between 400 to 500 members, which include those persons employed by both the Respondent and the Intervening party.' She stated further that Satloblokas attorney of record met with the leadership of NTM on 6 December 2019 and was advised that NTM:

'11.1 in principal oppose the liquidation;

11.2 needed an opportunity to take formal mandate from their members; and

11.3 would attempt to meet with their legal representatives during the course of the past weekend;

11.4 were uncertain if they would have sufficient time to attend to the above and be in a position to formally intervene when the application for liquidation is heard on 10 December 2019, due to the short notice the same.'

Annexed to the affidavit of Simone Pillay was an unsigned letter from Samkeliswe Magwaza, Provincial Secretary of NTM for the KwaZulu-Natal Province, confirming the union's opposition to the liquidation application.

[8] On 10 December 2019 the liquidation and intervention applications were adjourned to 26 February 2020. On 26 February 2020, Satloblokas was granted leave to intervene in terms of an order taken by consent. However, Satloblokas took no further action in the

intervening three months between the order and the hearing of the application on 22 May 2020. At the hearing, Ms De Beer advised me that she had been instructed at 09h00 on that very morning to represent Satloblokas at the hearing and to advise the court that Satloblokas did not intend to proceed. There was no tender of an explanation or of costs or a formal application to withdraw. Ms De Beer stated that she had no further instructions whatsoever.

[9] The conduct of Satloblokas and its attorney of record smacks of disrespect for the court and judicial proceedings. The conduct of its attorney in instructing counsel on the morning of the hearing to appear in court without proper instructions is unprofessional and unbefitting an officer of the court. If it was intended that NTM would continue to represent the employees, it is inconsistent with Ms Pillay's allegation that Satloblokas represented 1758 employees, as it appears below that NTM represents only 256 employees. I have little hesitation in concluding that the application to intervene by Satloblokas was intended merely to delay the finalization of the winding-up application by the applicant, and not motivated by a genuine need to protect the employees of the respondent whom Satloblokas allegedly represented.

[10] On 21 May 2020 at approximately 13h28 an email from Attorney D Curo was delivered to me. Mr Curo advised that he had been instructed to bring an application to intervene on behalf of NTM, a union allegedly representing 256 employees of the respondent and an adjournment 'on the basis of its belated receipt of the liquidation application'. The notice of motion transmitted with the letter confirmed that NTM sought leave to intervene in the winding-up proceedings and an adjournment of the hearing on 22 May 2020. The affidavit in support of NTM's application was deposed to by Samkeliswe Magwaza, whose letter was annexed to Satloblokas application to intervene.

[11] Mr Magwaza stated under oath that the applicant had failed to serve the application papers on NTM as prescribed by s 346(4A) of the Act although it was aware that NTM was a union which represented some of the respondent's employees. Mr Magwaza did not elucidate on how he obtained a copy of the application papers, but it is clear from his references to the allegations by the applicant in its affidavits that Mr Magwaza was in possession of the application when his affidavit was drafted. He alleged further that he

had only learnt a week prior to the hearing that the application was proceeding and referred the matter to the General Secretary of NTM, who reverted to him on 20 May 2020. Given the extreme time constraints, NTM was unable to consider its position in respect of the liquidation and therefore sought an adjournment and leave to deliver an affidavit supporting or opposing the application, failing the delivery of which it would abide the decision of the court.

[12] However, at the hearing of the application on 22 May 2020, Mr *Ramdhani* who represented the applicant in these proceedings, furnished a sheriff's return of service dated 20 February 2020 which recorded that the application papers had been served on 18 February 2020 at 15h30 on NTM at its regional offices in Durban. The return further recorded that 'Given address is occupied by NTM Trade Union representing the respondent as per the administrator.' Mr Magwaza confirmed in his affidavit that this is the address at which NTM's regional office is situated.

[13] After he was provided with the return of service on NTM, Mr Curo initially attempted to persuade me of the ignorance of NTM in respect of the nature or significance of the application papers, to which I gave short shrift. There was no cogent reason to accept that the union's representatives acquired a comprehension of the papers only after they acquired knowledge of the application 'via the grapevine', given the contents of Mr Magwaza's letter in December 2019. At his request, Mr Curo was given leave to take instructions from his client. He then sought leave to withdraw the application on the instructions of NTM. I granted NTM leave to withdraw its application with no order as to costs at the instance of the applicant and respondent's legal representatives.

[14] The blatant dishonesty of Mr Magwaza's allegations in his affidavit undermined the bona fides of his expressed intention to intervene in these proceedings to protect the interest of the employees represented by NTM. I also note that no resolution by NTM authorizing Mr Magwaza to depose to the affidavit or a confirmatory affidavit by its General Secretary was annexed to the notice of motion, to indicate that Mr Magwaza was in fact authorised by NTM to intervene in the matter or to instruct Mr Curo or to act 'urgently' to protect the interests of its members in the employ of the respondent. I gained

the distinct impression that this attempted intervention was contrived and strategically timed to delay the finalisation of the winding-up application yet again.

[15] In the premises, any further action by Satloblokas and NTM in relation to the liquidation of the respondent should be viewed with extreme circumspection.

The Companies Act 61 of 1973

[16] The provisions of the Act relevant to this application are:

'**344. Circumstances in which company may be wound up by Court**. — A company may be wound up by the Court if—

...

(f) the company is unable to pay its debts as described in section 345;

(g) ...

(h) it appears to the Court that it is just and equitable that the company should be wound up.

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 one hundred rand then due—

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) ...

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*) ...

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

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.'

Deemed Act of Insolvency

[17] Relying on the provisions of s 345(1)(a) of the Act, the applicant submits that the respondent should be deemed to be unable to pay its debts as it failed to pay, secure or compound the sum due and owing to the reasonable satisfaction of the applicant within the stipulated time after the service of the s 345 notice. Mr *Ramdhani* submitted that although the first s 345 notice was not served at the respondent's registered address, it was common cause that it was received by the respondent on 10 October 2019. He argued that as the respondent was aware of the demand and both the respondent and its attorney failed to respond to the demand within a reasonable time, in terms of the provisions of s 345(1)(a) the respondent is deemed unable to pay its debts. In advancing the argument that the intention of the legislature is to ensure that the demand is received by the company, Mr *Ramdhani* relied on the following excerpt from *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd:*[1]

'The learned editors of *Henochsberg's work* go on to say (*loc cit*) that it may be argued that the intention of the Legislature is, in substance, only to ensure that the demand be received by the company. The answer to that may be that, where an applicant seeks to rely on the inability of a company to pay its debts by showing that a demand was received by the company, and the company failed to respond to that demand within a reasonable time, then, *prima facie*, the case could be brought under the provisions of para *(c)* of s 345 (1).'

[18] However it has, in my view, been properly contended in response by Mr *Harrison*, who appeared for the respondent, that the significant comments of the court in *BP & JM Investments* follow on the excerpt relied on by Mr *Ramdhani:*[2]

'But, to avail himself of the benefit of the deeming provisions contained in para *(a)* (i) of s 345 (1), an applicant must at the least comply with the requirements stated by the Legislature therein. There is no justifiable basis evident to me for substituting for the words "by leaving the same at its registered office", some other words such as "by delivering it to the company" '

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[1] *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) at 486H-487A.
[2] *BP & JM Investments* at 487A-B.

Further, the court did not decide the issue of substantial compliance in that case because there was no proof that the respondent received the demand.

[19] I am therefore persuaded that Mr *Harrison* has correctly contended that as the applicant only served the s 345 notice on the respondent's registered address on 19 December 2019, the deeming provision would only arise three weeks thereafter. The application was however issued prior to that date on 29 November 2019. Mr *Harrison* also relied on the authority of *Chiliza v Govender*,[3] where the Supreme Court of Appeal, referring to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] held that a court should not disregard the clear language used in a statute and where a provision of a statute is couched in peremptory language or terms, it must ensure compliance therewith. Although in *Chiliza* the court considered s 9(4A) and s 11(2A) of the Insolvency Act 24 of 1936 and specifically the use of the word 'service' as opposed to 'furnish', the principle applied is apposite to s 345(1)(a). Section 345(1)(a) stipulates that the demand must be served on the registered address of the company and the respondent be permitted three weeks to comply. The consequences following on the failure to comply are serious, hence the peremptory language and the necessity of enforcing the provision as it is read.

[20] In the course of his argument on the s 345 demand, Mr *Harrison* also referred to s 348 of the Act which provides as follows:

'A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.'

However, his reliance on s 348 to argue that the s 345 notice was not properly served as it was presented after the winding-up was deemed to commence, is misconceived. In *Kalil v Decotex (Pty) Ltd & another*[5] Corbett JA stated in respect of s 348 as follows:

'Clearly the effect of the section is to antedate, by means of a deeming provision, the commencement of a winding-up by the Court to the time of the presentation of the application for winding-up. And, in my opinion, the time from which the commencement of winding-up was intended to be antedated by this deeming provision was the date of the grant of the winding-up

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[3] *Chiliza v Govender* 2016 (4) SA 397 (SCA) paras 8-10.
[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[5] *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 961I-962A.

order. It seems implicit in this that the Legislature regarded a winding-up as ordinarily commencing with the order for winding-up.'

Therefore, the mere presentation of the application to the Registrar of this court, or as more commonly termed, the issuing of the application, does not invoke the deeming provision in s 348, as there is as yet no order for winding-up.

[21] Nevertheless, as is apparent from the chronology and facts, neither the service of the first s 345 notice prior to the issuing of the application papers nor the subsequent service on the registered address of the respondent on 17 December 2019, constitutes compliance with the Act for the purposes of this application, and the respondent cannot be deemed to be insolvent in terms of s 345(1)(a) of the Act.

Is the respondent actually and commercially insolvent and unable to pay its debts?

[22] The applicant bears the onus to prove on a balance of probabilities that the respondent is unable to pay its debts and actually and commercially insolvent. An applicant for a provisional order of liquidation need only make out a prima facie case. Whether the evidence adduced by the applicant constitutes a prima facie case is generally determined according to the principle set out by Corbett JA in *Kalil v Decotex (Pty) Ltd*[6] as follows:

'Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the *onus* lies, having to establish a *prima facie* case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence.'

[23] Therefore the case is decided on the probabilities as they appear from the papers. However, if the applicant seeks a final order of winding-up, then it has to prove its case

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[6] *Kalil v Decotex* at 976H-I.

on evidence which must be assessed in the usual manner in motion proceedings for final relief. In *Paarwater v South Sahara Investments (Pty) Ltd*[7] the court held that:

'...the degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere *prima facie* case need be established whereas the court, before it will grant a final order, must be satisfied on a balance of probabilities that such a case has been made out by the applicant seeking confirmation of the provisional order.'

[24] The principle applies in this matter although no provisional order has been issued. Therefore, a more stringent assessment of the evidence is required and the *Plascon-Evans* evidentiary rule must be applied in opposed proceedings for a final order. The rule as stated by Corbett JA[8] is:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.' (references omitted)

[25] A company's inability to pay its debts may be proved in any manner. To sustain its averment that the respondent is unable to pay its debts as envisaged in s 344(f) and s 345(1) of the Act, the applicant furnished in its founding affidavit details of the

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[7] *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 3.
[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

indebtedness of the respondent to it and other creditors. Although the respondent had settled the amount outstanding on its overdraft facility, the outstanding amounts owing on the equipment financed by the applicant were R132 388 846 by Crossmoor and R9 113 501 by Xmoor and the arrears on those balances were R6 075 888.69 and R510 214 respectively.[9] The applicant confirmed that it had cancelled the agreements and claimed repossession of the assets but the respondent has failed to return the assets which are located throughout the country. In its supplementary founding affidavit, deposed to on 21 February 2020, the applicant confirmed that the only payment effected since October 2019 by the respondent to it was R1,5 million during the week of 10 February 2020, and the respondent remained substantially indebted to it.

[26] The applicant has also emphasised that the respondent is substantially indebted to various other financial service providers, as is evident in the respondent's financial statements, and that the respondent has admitted that it is indebted to its creditors in an aggregate amount of R1 443 967 530.44.[10] The respondent's current liabilities, which were due and payable and which the respondent was unable to pay, was the amount of R928 000 000.[11] In addition it is common cause that the respondent had severe cashflow constraints and negotiated payment moratoriums with all the major banks in January 2019 and October 2019. The applicant therefore submitted that this was an admission by the respondent that it was de facto unable to pay its debts as and when they fell due.

[27] In paragraph 33 of its answering affidavit, the respondent admitted that annexures "FA3–FA6" to the applicant's founding affidavit correctly recorded the instalment sale agreements between the applicant, the respondent and Xmoor, but alleged further that there are one or two disputes in respect of the figures reflected on annexures "FA5" and "FA6", which is the reconciliation of the amounts outstanding by the respondent and Xmoor. However, it furnished no details of the 'minor arithmetic' required to rectify the figures, and admitted in paragraph 34 that the respondent failed to pay some of the instalments which were due. In paragraph 35 the respondent did not dispute that it had defaulted by failing to pay R2 876 981.33, but disputed 'the exact figures' of the amounts

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[9] Per annexures "FA5" and "FA6".
[10] Paragraph 75 of the application and annexures "FA23.1-FA23.5", "FA25" and "FA26".
[11] Paragraphs 96 of the application and annexure "FA25.2.

set out in annexures "FA8-10". However, it again furnished no details of its dispute except to state that the discrepancy is of 'an accounting/arithmetical nature'.

[28] In his letter dated 15 August 2019 Mr Du Randt recorded the following obligations of the respondent to the applicant:

i. Overdraft facility: R1 353 264.07 plus interest .

ii. Per Schedule A: Arrear amount of R2 876 981.33 in respect of 56 instalment sale agreements; total amount due R42 895 910.06.

iii. Per Schedule B: full outstanding balance due in respect of 108 instalment sale agreements - R96 984 155.15.

[25] In his letter dated 28 August 2019 Mr Du Randt recorded that during the meeting held on 22 August 2019:

'4.1 Crossmoor and Xmoor admitted their default and arrears as set out in our letter of the 15th of August 2019;

4.2 Admitted their inability to make payment of their current creditors to date;'.

[29] Consequently, on 28 August 2019 the applicant lawfully cancelled the agreements with the respondent because of the respondent's admitted and repeated default with payments. The respondent has not disputed that at the meetings held in June and August 2019 it made submissions regarding the delay in repayments and that it had undertaken to settle all the arrears by 31 July 2019. The explanation it tendered is that the sale of the mine from which it expected a cash inflow and the kidnapping of the administrator of the respondent made it impossible to meet the deadline of 31 July 2019. But the respondent also made further undertakings to the applicant which it did not meet.

[30] The respondent made payments of approximately R11,7 million in September and October 2019[12] and R1.5 million in February 2020 and settled the overdraft facility. Nevertheless, it is evident from a comparison of the balances recorded in August 2019 and the balances recorded in the applicant's founding affidavit and confirmed in its

[12] Supplementary answering affidavit at 523 para 13.2.

supplementary affidavit, that the respondent remains in substantial indebtedness to the applicant. Nor has it met its undertakings made at the meeting with the applicant in August 2019 and in its answering affidavits.

[31] In paragraph 24 of the answering affidavit in response to the allegation by the applicant that the respondent is unable to pay its debts as envisaged in s 344(f) and s 345(1) of the Act, the deponent Mr Naicker stated:

'I deny the contents of this paragraph and advise that the difficulties which the Respondent is placed is simply a question of time and if the Applicant is simply patient, particularly as it has adequate security, it will be paid all amounts which are due to it, such amounts, it being envisaged, will be paid before the end of February 2020.'

It is common cause that the undertaking was not met when the application was heard on 22 May 2020. Therefore, despite the time that the respondent requested being exceeded by nearly three months, the respondent has been unable to settle its indebtedness to the applicant.

[32] There can therefore be little doubt that the applicant has established the respondent's indebtedness. In *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd*[13] Willis JA reiterated the principle stated by Corbett JA in *Kalil v Decotex*:[14]

'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 respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a 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.'

[33] In this matter, the respondent does not dispute its indebtedness. It merely alleges a few incorrect calculations. If there were in fact material discrepancies in the figures relied upon by the applicant which enabled the respondent to dispute its indebtedness on bona fide and reasonable grounds, the specifics of the discrepancies would undoubtedly

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[13] *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017).
[14] *Kalil v Decotex* at 980B-C.

have been set out by the respondent, as the problem with the reading of the financial statements was. Mr *Harrison* clarified how the figure of R 1 443 967 530.44 alleged to be the total liabilities of the respondent is incorrect because the owner's equity and liabilities have been conflated and the figure for current liabilities of R515 652 536.85 has been counted twice, because the subset of figures for the current liabilities have been added to the total, resulting in double accounting. A perusal of the relevant figures indicate that his contention is well made.

[34] However, these financial statements were provided by the respondent in August 2019. The discrepancy is of little value now. The respondent alleged that it was unable to furnish its annual financial statements to the applicant before 30 June 2019 mainly because of the kidnapping of a family member that was 'integrally involved in the administration of the Respondent'.[15] The respondent also acknowledged that facts of this matter have frequently changed since its inception. Nevertheless, although it has protested that it has made payments to the applicant and several other creditors and that its assets and equity exceed its liabilities, and that despite its previous financial woes, it is now operating a viable and profitable business, the respondent has failed to provide updated financial statements to sustain its allegations. The situation with the family member involved in the administration of the business no longer exists and is therefore not a bar to the preparation of current financial statements. Updated current financial statements would sustain the respondent's defence to this application, and demonstrate that it is not insolvent, that its assets exceed its liabilities and it has a cashflow which will enable it to meet its operating expenses and other payments as and when they fall due. I am also mindful that in his affidavit in the abortive application to intervene, Mr Magwaza stated:[16]

'The first inkling we had of any financial difficulties the Respondent might have been experiencing was in around December 2019 when our members' salary payments were delayed by the Respondent and they were paid in tranches. We were informed by the Respondent that this was because First National Bank had terminated their overdraft facility.'

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[15] Respondent's answering affidavit at 425 para 35.3.3.
[16] Mr Magwaza's affidavit para 11.5.

[35] In my view the fact that the respondent's debt to the applicant remains due and owing and that there is no acceptable evidence to the contrary, is sufficient to conclude not only that that the respondent is unable to pay its debts but that it is also factually and commercially insolvent. The respondent protests that it is not factually or commercially insolvent as it has substantial assets and equity which exceed its liabilities. But 'if the assets of a company do exceed the liabilities, mere illiquidity, capable of being overcome within a reasonable time, should be a trump card to resist liquidation.'[17] I am unable to find such trump card in the hand of the respondent. In fact in its answering affidavit the respondent alleges that the applicant is 'confusing financial statements prepared for the purposes of taxation with those of the actual financial position'[18] and tenders several times to make 'the full financials and documents available' to correct the applicant's submissions on the only financial statements it has furnished. Yet it has failed to do so, even by the date of the hearing of the application.

[36] In *Firstrand Bank Ltd v Evans*[19] Wallis J stated:

'...particularly at the level of a provisional order of sequestration, if the debtor is to persuade the court to exercise its discretion in his or her favour, they must place evidence before the court that clearly establishes that their debts will be paid if a sequestration order is not granted. If that contention is based on a claim that the debtor is in fact solvent, then that should be shown by acceptable evidence. In this regard the oft-quoted words of Innes CJ in *De Waard v Andrew & Thienhaus Ltd* are pertinent:

> "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is

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[17] *Henochsberg on the Companies Act 71 of 2008* vol 2 service issue 16 at APPI-55.
[18] Respondent's answering affidavit at 447 para 78.
[19] *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) para 33.

> that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

In this case Mr Evans concedes that he fell upon hard times financially and, whilst he claims that his circumstances have improved somewhat in consequence of the sale of the sectional title unit in Umhlanga, he does not make out any strong case that he is financially sound and capable of discharging his debts in the ordinary course. A person who claims that they are solvent, and for that reason should not be sequestrated, should be able to establish this by way of acceptable evidence.' (footnote omitted)

[37] Similarly, the respondent has in my view not provided any such acceptable evidence that it is solvent. Mere allegations are insufficient. Like the respondent in *Firstrand Bank Ltd v Evans,* the respondent alleges that its financial circumstances have improved, and yet it has failed to meet its undertakings to settle its indebtedness not merely within a reasonable time, but at all. Further it is important to draw a distinction between a company which can realise its assets and still carry on its business and a company which if its assets are realised, would result in the company not being able to carry out its business. Inasmuch as the respondent submitted that it has realisable assets, and also that the applicant may sell such assets, it has itself made no attempt to do so. It has also confirmed that it cannot operate its business if it returns the assets financed by the applicant, although the applicant has terminated all its sale agreements with the respondent.

[38] It is also of relevance that on 4 February 2020 Mr Du Randt wrote to the respondent's attorney, Mr S Naidoo, recording that the 66 assets that were made available for inspection:

> 'are in a very bad state of un-roadworthiness and disassembled. It is not due to wear and tear but simply to a lack of maintenance and most of the assets inspected are unusable according to our client's reports they received.'

Mr Du Randt recorded that Mercedes and Wesbank, both large financiers of assets, had informed him personally that they too had 'similar problems to inspect, locate and ascertain the values of their assets'. The respondent was therefore put on terms to make the remaining assets available for inspection. At the hearing it was confirmed that the

other assets had been inspected. However, what is significant is that if the respondent is failing to maintain the assets they will all fall into disrepair and thereby stall the business operations of the respondent. Alternatively, if the assets are maintained, the cost of the maintenance will add significantly to the respondent's operating costs, thereby eroding its income further by increasing its expenditure. The sale and/or depreciation of assets will inevitably impact upon the actual solvency of the respondent and an increase in its operating costs will impact adversely on funds available to pay its creditors viz commercial insolvency.

[39] In denying that it is commercially insolvent, the respondent seems to have conflated actual insolvency which involves a comparative assessment of the value of a company's assets and its liabilities, and commercial insolvency, which assesses a company's cash flow. Commercial insolvency recognises that if the company does not have sufficient cash resources to pay its current expenses as and when they fall due, the company is commercially insolvent, whether it is actually insolvent or not.[20] The respondent has made no material submissions in respect of its commercial insolvency. Even during its meetings with the applicant's representatives it has made undertakings predicated on transactions which would ease the constraints of its cash flow, such as a new contract or the sale of the Future Coal Mine, none of which materialised.

[40] I am mindful that the ability to pay its debts does not mean that the respondent itself must pay its debts. If it can raise finance from an exterior source or from friendly creditors to pay its debts it is not commercially insolvent.[21] It is apparent, from the undisputed facts on the papers, that the respondent has in fact sourced funds from financial institutions other than the applicant over a period of time However, those source of funds no longer appear to be available, as may be inferred from the actions instituted by several other creditors against the respondent. The applicant has furnished a s 345 demand dated 1 October 2019 from MAN Financial Services SA (Pty) Ltd to the respondent which reflects that the respondent is indebted in the amount of R8 141 540.37 and the arrear amount being R1 398 503.95. The respondent dismisses this demand as

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[20] *Ex Parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) SA 493 (A) at 502; *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) at 933-934.
[21] *Henochsberg* note 17 at APPI-56.

it was served on the wrong address and states that because MAN Financial Services is a separate entity the applicant cannot rely on this debt to support its application. It is also relevant to note that on 5 December 2019, the respondent's attorney confirmed the amounts that were in arrears with the various creditors of the respondent.[22] Although the respondent protests that the applicant should not stretch its focus beyond the respondent's indebtedness to itself, under s 345(2) of the Act the court may take contingent and prospective liabilities into account when determining whether the respondent is unable to pay its debts. It is therefore necessary for the court to have a holistic view of the respondent's financial state, including the number of creditors with payments in arrears as admitted by the respondent.

[41] The applicant has furnished sufficient undisputed documentation to enable me to conclude that the respondent is actually and commercially insolvent, and unable to pay its debts. However it is not necessary for an applicant who proceeds for the winding up of a company in terms of s 344(f) to show that the company is actually insolvent. Evidence of a failure of a respondent company to pay on demand a debt which is due for payment is regarded as a cogent prima facie proof of an inability by the company to pay its debts. Even if it is subsequently found that the respondent is actually solvent, commercial insolvency is sufficiently established to find that the applicant is entitled to a winding-up order. I am comforted by the following excerpt from *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & others*:[23]

'The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold

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[22] See para 4.24. supra.
[23] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C) at 440F-H; *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597H

that the company is unable to pay its debts within the meaning of s 345(1)*(c)* as read with s 344*(f)* of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

[42] There is consequently no need to consider whether the applicant has proved that there are just and equitable grounds for the winding-up of the respondent.[24] Finally, the court must exercise its discretion in determining whether the winding-up should be granted and whether the order should be a provisional order or a final order, as sought by the applicant. As stated in *Henochsberg*: [25]

'The court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which the order is sought...The discretion must be exercised on judicial grounds... and in its exercise the Court should have regard to the grounds and reasons for the proposed winding-up...

The Act itself places certain restrictions upon the exercise of the Court's discretion to grant a winding-up order.' (references omitted)

Under s 347 of the Act the: [26]

'Court has a discretion whether or not to grant a winding-up order even if the ground on which the application is brought is established and irrespective of the nature of such ground; but all the provisions of the section are partially regulator of the manner of the exercise of the discretion.'

[43] Mr *Harrison* submitted that in exercise of its discretion the court should take particular consideration of the fact that by issuing the liquidation application and taking a bond of security, the applicant caused FNB to freeze the respondent's bank account in November 2019. FNB proceeded with the cession of debtors in order to freeze and discharge the overdraft in circumstances where but for the calling up of the overdraft, the respondent would have been in a position to effect payment of and deal comprehensively with the applicant's claims. He contended that the applicant should not be permitted to benefit from a situation which it created.[27]

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[24] *ABSA Bank v Best Minerals 146 Ltd* 2014 JDR 2736(GJ) at para 21
[25] *Henochsberg* note 17 at APPI-45.
[26] *Henochsberg on the Companies Act 71 of 2008* vol 2 service issue 15 at APPI-89.
[27] *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 141B-C.

[44] However I am inclined to find more persuasive the argument of Mr *Ramdhani* advanced on the authority of *Macru Farming CC v Standard Bank of South Africa Ltd.*[28] The Court faced with a claim by the appellant that the respondent had been improperly induced to bring the winding-up application, stated :

'[7] ... the appellant now relies on the following "facts" to support its contention that the respondent obtained the winding-up order improperly:

> 7.1. The appellant's former attorney disclosed privileged information to a liquidator as a result of which rumours regarding the appellant's financial affairs circulated, causing the respondent to call up the overdraft facility;
>
> ...

[8] With regard to the first complaint, there is no suggestion on the papers that the respondent procured any information from the errant attorney. Once it is accepted that the appellant had indeed exceeded its overdraft facility with the respondent on more than on occasion, and this is not disputed, the respondent was entitled to call it up. The fact that there may have been "rumours" circulating regarding the appellant's parlous financial situation does not detract from this entitlement.'

[45] It is clear from the common cause facts that the respondent suffered financial constraints long before November 2019. It may therefore be accepted that not only were all its creditors aware of its default in payments, but were also entitled to pursue the recourses available to each of them independent of any legal action taken by any other creditor. Furthermore, the directors of the respondent, as experienced businessmen, must have appreciated the adverse legal consequences that would follow on their failure to maintain the financial obligations of the respondent. They were not coerced into any of the business transactions. While relying on large overdraft facilities to run the respondent's business operations, they must have appreciated the concomitant risks of conducting business in the ailing national commercial and economic environment. The economy of this country has been on a downward trend for some time, causing businesses to struggle in order to remain viable and operational. The Covid-19 pandemic

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[28] *Macru Farming CC v Standard Bank of South Africa Ltd* (64/2007) [2008] ZASCA 20 (27 March 2008).

and the national lockdown which commenced in March 2020 only exacerbated the situation. Nevertheless the directors of the respondent voluntarily assumed the risk of operating their commercial enterprises with funds acquired through wide-spread access to credit. The respondent must bear the consequences and not shift blame on its creditors. I am therefore not persuaded that there is any merit in the 'chicken and the egg defence' raised by the respondent.

[46] Nevertheless, I am inclined to exercise my discretion to the extent of granting a provisional order of liquidation, and not a final order. In my view in the proper exercise of its discretion, a court should also consider other parties who will be impacted by a winding-up of a company. I endorse the comments in *ABSA Bank Ltd v Newcity Group (Pty) Ltd*:[29]

'In plain terms, it is 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 have been levelled with those of shareholders, 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 the creditor supremacy is over...'

The 'norm' referred to should apply to liquidations irrespective of the fact that the Act still applies to the liquidation of companies.

[47] Despite the criticisms levelled at those who represented the employees of the respondent in the aborted intervention applications, the rights of the employees are significant. The respondent has a substantial number of employees nationally who should not suffer the consequences of the conduct of those who represented them. Further the status of the assets which the respondent refers to resist the allegation of actual insolvency may be ascertained by the provisional liquidators. In the premises I am satisfied that the granting of a provisional order is appropriate.

Order

1. The respondent is placed under provisional liquidation.

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[29] *ABSA Bank Ltd v Newcity Group (Pty) Ltd* [2013] 3 ALL SA 146 (GSJ) para 31.

2. A Rule Nisi is issued, calling upon all interested parties to show cause, if any, on 8 September 2020 at 09h30, or as soon thereafter as Counsel may be heard, why an order in the following terms should not be granted:

   2.1. that respondent be placed under final liquidation.

   2.2. that the costs of this application, including reserved costs, be costs in the liquidation and such costs to include the fees of Senior Counsel.

3. A copy of the provisional liquidation order be served:

   3.1. on the respondent at its registered office;

   3.2 on the South African Revenue Services;

   3.3. on all known creditors, with claims in excess of R5 000 by way of prepaid registered post;

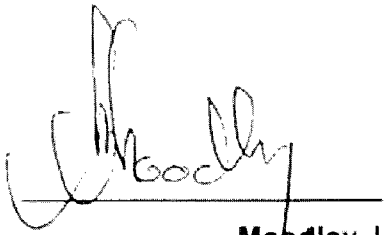
   3.4. on the respondent's employees:

      i. by affixing a copy thereof to any notice board to which the employees have access inside the respondent's premises; and

      ii. by affixing a copy thereof to the front door of the premises from which the respondent conducts business;

   3.5 on any registered trade union that represents any of the respondent's employees;

4. A copy of this order is to be published on or before the day of 11 August 2020 once in the Government Gazette and once in a daily newspaper published in Durban and circulating in KwaZulu-Natal.



Moodley J

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Date of hearing : **22 May 2020**

Date of judgment : **30 July 2020**

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