THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 936/2012

Reportable

In the matter between:

BOSCHPOORT ONDERNEMINGS (PTY) LTD Appellant

and

ABSA BANK LIMITED Respondent

Neutral citation: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* (936/12) [2013] ZASCA 173 (28 November 2013)

Coram: **Cachalia, Petse and Willis JJA and Swain and Meyer AJJA**

Heard: 15 November 2013

Delivered: 28 November 2013

SUMMARY: Winding-up of a company – whether Companies Act 61 of 1973 or Companies Act 71 of 2008 applicable – inability to pay its debts – liquidation ordered in terms of Companies Act 61 of 1973 – appeal dismissed.

ORDER

On appeal from: **North Gauteng High Court, Pretoria (Bertelsmann J sitting as court of first instance):**

The appeal is dismissed with costs, which costs are to include the costs of two counsel.

JUDGMENT

Willis JA (Cachalia and Petse JJA and Swain and Meyer AJJA concurring):

[1] This case is concerned with an issue which has vexed the high court in various centres around the country since the coming into operation of the Companies Act 71 of 2008 ('the new Act') on 11 May 2011: to what extent is it, in the words of counsel for the appellant, Mr Oosthuizen, 'business as usual' where an application is made for the liquidation of a company that is commercially insolvent, even though its assets may exceed its liabilities?

[2] The respondent ('the bank') applied to the high court (Bertelsmann J) for an order to wind up the appellant in terms of s 344*(f)* read with s 345 of the Companies Act 61 of 1973 ('the old Act'), alternatively in terms of s 344*(h)* of the old Act, further alternatively in terms of s 81(1)*(c)*(ii) of the new Act. The high court made an order winding up the appellant on 15 June 2012. The

high court did so on the basis that it would be 'just and equitable' to make such an order in terms of s 81(1)*(c)*(ii) of the new Act. On 20 November 2012 the high court granted leave to appeal to this court.

[3] It was not disputed that the appellant had, since 1 October 2010, been in arrears in respect of its obligations to pay the bank more than R29 million. At the time when the application was launched, the appellant had trade creditors to whom it was indebted in an amount in excess of R11 million. The appellant also owed First Rand Bank Ltd a little less than R9 million and the South African Revenue Service about R2 million.

[4] There was also no dispute that the appellant had been served with the relevant demand in terms of s 345 of the old Act and was in default in respect thereof. During the course of argument, counsel for the appellant fairly and correctly conceded that the appellant was 'commercially insolvent' in the generally accepted sense of the term.

[5] Although the appellant adverted in its answering affidavit to the possibility of bringing an application at a later stage for the commencement of business rescue proceedings in terms of the provisions of Parts A to D of chapter six (ss128 to 154) of the new Act, it did not do so. The question of the applicability of business rescue proceedings did not arise in this appeal even though the court a quo referred in passing thereto and indicated that such proceedings would be inappropriate in this case.

[6] The appellant contended in its answering affidavit as well as in argument before both the high court and this court, that it was a 'solvent company' in terms of Item 9(2) of schedule 5 of the new Act inasmuch as the value of its assets exceeded its liabilities and, therefore, could be liquidated only if it would be 'just and equitable' that it be wound up in terms of s 81(1)*(c)*(ii) of the new Act.

[7] The question of what is meant by a 'solvent company' in the new Act has loomed large in this case. Counsel for the appellant conceded, once

again fairly and correctly, that if a 'solvent company' in subitem 9(2) of schedule 5 of the new Act meant a commercially solvent company, the liquidation of the appellant would necessarily follow. He contended, however, that a 'solvent company ' meant, simply, one in which its assets exceeded its liabilities.

[8] The high court accepted that the appellant's balance sheet indeed showed that its assets exceeded its liabilities (a state of affairs which lawyers usually describe as being 'factually solvent') but found that it was nevertheless clear that the appellant was unable to pay its debts (a situation which is, by way of contrast, generally known as being 'commercially insolvent'). In the judgment of the court below the judge said: 'Accepting for purposes of this judgment that the new Companies Act, 71 of 2008 does apply, section 81 thereof must be considered'. The judge went on to find that it would be 'just and equitable' to wind up the appellant in terms of the provisions of s 81(1)*(c)*(ii) of the new Act and, accordingly, granted the order liquidating the appellant. The appellant contended that the high court erred in making this finding. It is necessary first to examine the relevant statutory provisions.

[9] Schedule 5 of the new Act deals with 'transitional arrangements'. The relevant subitems of item 9 of schedule 5 provide that:

'(1) Despite the repeal of the previous Act [i.e. the old Act], until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.' (Emphasis added.)

No date has been determined to affect the interim or transitional operation of item 9 of schedule 5. Chapter 14 of the old Act therefore continues to apply. Section 345 of the old Act falls within chapter 14 of the old Act and,

accordingly, in terms of subitem 9(1) of schedule 5 in new Act. Section 345 continues to apply with respect to the winding-up and liquidation of companies as if the old Act had not been repealed. Subitem 9(1) is nevertheless subject to subitems 9(2) and (3). Subitem 9(2) excludes, however, s 344 of the old Act from the winding-up of solvent companies. As will appear later, the inclusion of s 345 of the old Act, when it comes to the winding-up of solvent companies under subitem 9(1) but the exclusion of s 344 under subitem 9(2) is significant when it comes to determining what is meant by a 'solvent' company.

[10] Section 344*(f)* of the old Act provides that a company may be wound up by the court if 'the company is unable to pay its debts as described in section 345'. The relevant portions of s 345 of the old Act read as follows:

'(1) A company… 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 of money of 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; …

and the company… 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.'

[11] Part G of chapter 2 of the new Act (which, as we have already seen, excludes the application of ss 343, 344, 346, and 348 to 353 of the old Act from applications for the winding-up of 'solvent' companies), includes ss 79 to 83. Section 79 of the new Act reads as follows:

'*Part G: Winding-up of solvent companies and deregistering companies*

79 Winding-up of solvent companies

(1) A solvent company may be dissolved by –

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either –

(i) by the company; or

(ii) by the company's creditors,

as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5'. (Emphasis added.)

[12] Section 80 of the new Act relates to the voluntary winding-up of a 'solvent company'. Section 81 of the new Act relates to the winding-up, also of a 'solvent company', by a court. In terms of s 81(1)*(c)*(ii) of the new Act (upon which the court below based its decision to liquidate the appellant), a court may order the winding-up of a company where a creditor has applied for such an order on the grounds that 'it is otherwise just and equitable for the company to be wound up'.

[13] There have been discordant views on the circumstances under which a company may be wound up under the new Act, on the one hand, or the old Act on the other. It is clear, however, that ss 79 to 81of the new Act apply to the liquidation of 'solvent' companies. Section 79(3) of the new Act provides, however, that if it becomes apparent during the liquidation proceedings of a 'solvent' company, that it is or may be 'insolvent', the transitional provisions referred to in item 9 of schedule 5 of the new Act apply: the winding-up of the insolvent company may take place under the old Act.

[14] The new Act has not defined the meaning of either a 'solvent' company or its converse, an 'insolvent' company. The case turns on what is meant by the term 'a solvent company' and conversely, the meaning of a company being 'insolvent'.

[15] Counsel referred us, in particular, to two recently reported cases that deal with the issue: *Standard Bank of SA Ltd v R-Bay Logistics CC*[1] and *Firstrand Bank Ltd v Lodhi 5 Properties Investment CC* para 30.[2] We were also referred to a number of other cases also dealing with similar subject matter which have been less prominently published.[3] The interpretations placed upon the provisions by different courts have not been in harmony with one another. This is a reflection on the lack of clarity in the drafting of the provisions of the new Act relating to the liquidation of companies. An analysis of these various judgments would unduly lengthen this judgment. To the extent that they are not in conformity with the determination of what is meant by a 'solvent company' in this judgment, they cannot apply to situations that may arise in future.

[16] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, *Johnson v Hirotec (Pty) Ltd*;[4] *Ex parte De Villiers & another*

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[1] *Standard Bank of SA Ltd v R-Bay Logistics CC* 2013 (2) SA 295 (KZD).

[2] *First Rand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) para 30.

[3] *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC* 2013 (2) SA 439 (FB) para 12; *Pearl Construction (Pty) Ltd v Seabo Construction, Plumbing and Business Ventures CC* (1597/2013) [2013] ZAFSHC 168 (26 September 2013); *Firstrand Bank Ltd v Samgram Holdings (Pty) Ltd* (1117/2013) [2013] ZAKZDHC 41 (26 August 2013); *LSP Petroleum (Pty) Ltd v Kukhanya Marketing CC, Ntimane v LSP Petroleum (Pty) Ltd In re: LSP Petroleum (Pty) Ltd v Kukhanya Marketing CC* (55336/2012) [2013] ZAGPPHC 212 (17 July 2013); *Firstrand Bank Ltd v Wayrail Investments* (Pty) Ltd [2013] 2 All SA 295 (KZD); *Herman v Set-Mak Civils* 2013 (1) SA 386 (FB) para 34; *Edge Geo LLC v Geothermal Energy Systems (Pty) Ltd* (6883/12) [2012] ZAWCHC 391 (14 December 2012); *Platt v Umgamanzi Fishing (Pty) Ltd* (3936/2011) [2012] ZAECPEHC 81 (16 November 2012); *Knipe v Kameelhoek (Pty) Ltd t/a Schaapplaats 978 (Pty) Ltd* (A252/2011) [2012] ZAFSHC 160 (30 August 2012); *Business Partners Ltd v Yellow Star Properties 1061 (Pty) Ltd* (7188/2011) [2012] ZAKZDHC 96 (17 July 2012); *Firstrand Bank Ltd v Bunker Hills Investments 499 CC* (32130/11) [2012] ZAGPJHC 84 (4 May 2012).

[4] *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) para 6.

NNO: In re Carbon Developments (Pty) Ltd (in Liquidation);[5] *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*.[6] .

[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets.[7] Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7*(l)* thereof.

[18] In view of the long established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company, it must be presumed that the legislature was aware of this fact. The principle that Parliament is presumed to be acquainted with the interpretation of earlier legislation by the court, applies where there has been a settled and well-recognised judicial interpretation before the relevant legislation was passed.[8]

[19] It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend

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[5] *Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A) at 502C-D.
[6] *Rosenberg & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 596F-597H.
[7] See, for example, the observation of the court in *Firstrand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) para 34.
[8] See, for example, *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732A-B; *Commissioner for Inland Revenue Estate v Hulett* 1990 (2) SA 786 (A) at 798B-C and *Krause v Commissioner for Inland Revenue* 1929 AD 286 at 297.

to alter the law as it had previously stood.[9] Accordingly, it must be presumed that the legislature deliberately refrained from defining 'solvency'. It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect. The meaning of those terms must be one that leads to a sensible and business-like result. See *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[10]

[20] I referred earlier to the fact that s 345 of the old Act was retained in terms of subitem 9(1) of schedule 5 of the new Act. Subitem 9(2) provides that s 344 of the old Act shall not apply to the liquidation of 'solvent' companies, 'except to the extent that it is necessary to give full effect to the provisions of Part G of Chapter 2'. Part G of chapter two of the new Act, more particularly ss 79 to 81 thereof, relate to the winding-up of solvent companies. As we have seen, s 344(*f)* and s 345 of the old Act are fastened together by the clasp in s 344(*f)* that refers to a company being unable to pay its debts 'as described in s345'. The seeming anomaly may be resolved if one recognises that s 345 was retained in subitem 9(1) to enable a determination to be made in terms of s 79(3) of the new Act that a company 'is or may be insolvent' – even though the application was made in terms of either s 80 or 81 for its winding-up as a so-called 'solvent' company. The deeming provisions concerning the inability to pay its debts, contained in s 345 of the old Act may be used to establish the insolvency of a company. In this regard, I agree with King AJ in *Standard Bank of SA Ltd v R-Bay Logistics CC*.[11]

[21] This conclusion is significant in determining what is meant by a 'solvent company'. The retention by the legislature in the context of a winding-up of a solvent company in the new Act, of the deeming provisions as to when a

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[9] See, for example, *Ex parte Davidson* 1981 (3) SA 575 (D &CLD) at 577H; *Ex parte Aufrichtig* 1979 (4) SA 426 (N) at 429B-C; *Realisation Company v Commissioner of Taxes* 1951 (1) SA 177 (SR) at 184G-H; *In re Budgett; Cooper v Adams* (1894) 2 Ch 557 at 561.
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[11] *Standard Bank of SA Ltd v R-Bay Logistics CC* (supra) para 29.

company is unable to pay its debts as contained in s 345 of the old Act, is a clear indication of what is meant by an insolvent company in the new Act. It can only mean a company that is commercially insolvent. It therefore follows that a solvent company must be the converse, namely a company that is commercially solvent.

[22] Consequently, in order for a solvent company to be wound-up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the old Act, as is provided for in subitem 9(i) of schedule 5 of the new Act.

[23] The confusion which has arisen as to when a company may be wound-up in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense.

[24] Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See *Johnson v Hirotec (Pty) Ltd*.[12] It follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act.

[25] Subject to the consideration of business rescue proceedings in terms of Parts A to D of chapter six of the new Act, it is indeed 'business as usual'

[12] *Johnson v Hirotec (Pty) Ltd* (*supra*) para 6.

when it comes to a decision as to whether a commercially insolvent company should be placed in liquidation. In terms of s 131(6) of the new Act, an application for business rescue proceedings to commence has the effect of suspending an application for the liquidation of a company. The subsection provides that the suspension of the liquidation proceedings against a company operates until the court has adjudicated upon that business rescue application or the business rescue proceedings have come to an end.

[26] The court below therefore incorrectly decided that s 81(1)*(c)*(ii) of the new Act applied to the determination of whether or not to grant the order for the liquidation of the appellant. The high court did, however, correctly find that the appellant was unable to pay its debts. The high court ought to have applied s 344*(f),* read with s 345, of the old Act. The reason is that application had been made for the liquidation of a company which was insolvent in the generally understood sense of that term. Under the old Act, this justifies an order winding-up the appellant. The appeal must be dismissed, the high court having made the right order, albeit by wrongly deciding that s 81(1)*(c)*(ii) of the new Act applied to the facts of this particular case.

[27] The importance of this case has justified the costs of two counsel.

[28] The following order is made:

> The appeal is dismissed with costs, which costs are to include the costs of two counsel.

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N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	H F Oosthuizen Instructed by: Froneman Roux & Streicher, Centurion c/o Honey Attorneys, Bloemfontein
For the Respondent:	J G Bergenthuin SC (with him, A C Botha and B Bergenthuin) Instructed by: Van Zyl Le Roux Incorporated, Pretoria c/o Phatshoane Henney, Bloemfontein