

NOTES ON LIQUIDATIONS

22 June 2017

1. The first question: is the company solvent or insolvent?
 - 1.1. If the company is solvent (meaning commercially solvent, able to pay its debts) it may only be wound-up in terms of the provisions of sections 79 to 81 of the Companies Act, 71 of 2008 ("the 2008 Act").
 - 1.2. If a company is insolvent (meaning commercially insolvent) it may be wound-up in terms of Chapter 14 of the Companies Act, 61 of 1973 ("the 1973 Act") as read with Item 9 of Schedule 5 of the 2008 Act.
 - 1.3. *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) brought an end to the debate as to the meaning of solvent in this context, commercial insolvency or factual insolvency: it is commercially insolvent.
 - 1.4. Factual solvency is not, in itself, a bar to an application to wind-up a company in terms of the 1973 Act on the ground of commercial insolvency. See par 23 to 24 of *Boschpoort*.
 - 1.5. If there is uncertainty, the winding-up can be sought based on the grounds set out in section 344 of the 1973 Act and, in the alternative, the just and equitable ground in terms of section 81 of the 2008 Act. However, the just

and equitable ground is tricky. See the categories in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W). The court makes a value judgment considering all facts.

2. Voluntary winding-up.

2.1. A solvent company may be wound-up voluntarily by way of special resolution in terms of section 80 of the 2008 Act.

2.2. An insolvent company may be wound-up by special resolution in terms of the 1973 Act. This can either be by members' voluntary winding-up in terms of section 350 of the 1973 Act or by creditors' voluntary winding-up in terms of section 351 of the 1973 Act.

3. Some advantages of voluntary winding-up.

3.1. It is simple.

3.2. It is inexpensive.

3.3. It is expedient.

3.4. The appointment of a liquidator is less complicated.

3.5. The process of winding-up by the liquidator is also simpler and quicker.

4. Some disadvantages of voluntary winding-up.

4.1. Enquiries cannot be conducted in terms of section 417 of the 1973 Act.

See *Michelin Tyre Co (SA) (Pty) Ltd v Janse van Rensburg* 2002 (5) SA 239 (SCA).

4.2. If the company is not commercially insolvent, the provisions of the Insolvency Act, 24 of 1936 ("the Insolvency Act") will not find application.

See section 339 of the 1973 Act.

4.3. Often, creditors' rights are frustrated and they have to incur costs to convert the voluntary winding-up in terms of section 346(1)(e), alternatively section 388 of the 1973 Act. See *Corigrain Trading SA v Resora (Pty) Ltd* 2004 (2) SA 348 (W) par 4.

5. Compulsory winding-up.

5.1. A solvent company may be wound-up by court order in terms of section 81 of the 2008 Act. This is limited to the circumstances set out in section 81.

5.2. An insolvent company may be wound-up by court on the grounds in section 344 of the 1973 Act as read with Item 9 of Schedule 5 of the 2008 Act.

6. Winding-up by court order in terms of section 81 of the 2008 Act.

- 6.1. This is at the instance of the company; a business rescue practitioner; a creditor; or a shareholder or the CIPC.
 - 6.2. The grounds for such an application are (a) that the business rescue proceedings have ended and it appears to the Court that it is just and equitable; or (b) that it is otherwise just and equitable for the company to be wound-up.
 - 6.3. The just and equitable ground in section 81 has the same wide scope as section 344(h) of the 1973 Act. See *Thundercats Investments 92 (Pty) Ltd & another v Nkonjane Economic Prospecting and Investment (Pty) Ltd & others* 2014 (5) SA 1 (SCA) and *Budge v Midnight Storm Investments 256 (Pty) Ltd* 2012 (2) SA 28 (GSJ).
7. The grounds in terms of section 344 of the 1973 Act:
- 7.1. There are various grounds. The most frequently used by practitioners are 344(f) and 344(h).
 - 7.2. In order for a company to be unable to pay its debts within the meaning of section 344(f), reference must be had to section 345 of the 1973 Act. The section provides for a statutory notice in terms of section 345(1)(a) resulting in a deeming inability to pay debts and section 345(1)(c) which

provides for the demonstrated inability to pay debts (this can be proved in various manners).

7.3. Subject to business rescue proceedings, it is business as usual when it comes to a decision as to whether a commercial insolvent company should be placed in liquidation. See *Boschpoort*, par 25.

7.4. *Locus standi* is to be found in section 346 of the 1973 Act. See, in particular, section 346(1)(b) of the 1973 Act. The section provides amongst others that a creditor, including a contingent or prospective creditor, may apply to court.

7.5. For section 345(1)(a), the debt of R200,00 has to be due.

7.6. Our law has recognized two forms of insolvency (factual insolvency and commercial insolvency) for decades.

7.7. Commercial insolvency will justify an order for liquidation. Factual insolvency is a factor to be considered. See *Boschpoort*, par 16 to 24.

8. The discretion of the court.

8.1. In terms of section 347 of the 1973 Act, the court may grant or dismiss an application or adjourn the hearing, conditionally or unconditionally, or make an interim order, or any other order it may deem just.

8.2. Where an applicant is an unpaid creditor, the discretion is narrow. The only exception appears to be when a counter application or separate application is brought for business rescue. See *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24 at par 12.

8.3. The existence of a counterclaim does not, of itself, enable a respondent successfully to resist an application for its winding-up. See the *Afgri* judgment and *Gap Merchant Recycling CC v Goal Reach Trading 55 CC* 2016(1) SA 261 (WCC) at par 31 to 33.

9. Close corporations.

9.1. In term of section 66 of the Close Corporations Act 69 of 1984, the provisions of Item 9 of Schedule 5 of the 2008 Act apply to the liquidation of close corporations.

9.2. In terms of section 67, the provisions of Part G of Chapter 2 of the 2008 apply to solvent corporations.

9.3. Section 69 contains a statutory provision similar to section 345 of the 1973 Act. The provision can be used to determine whether the corporation is solvent.

10. Statutory provisions.

- 10.1. Section 346(4A) of the 1973 Act requires an applicant to furnish a copy of the application to registered trade unions, employees, SARS, and to the respondent company. It also requires an affidavit by the person who furnished a copy setting out compliance.
- 10.2. Section 346A of the 1973 Act requires service of a winding-up order on every trade union, employees, SARS, and the company.
- 10.3. A bond of security has to be obtained which is not older than 10 days prior to the date of the notice of motion.
- 10.4. The SCA has held that these sections do not provide a technical defence to the employer to avoid or postpone the evil hour when a winding-up or sequestration order is made. See *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA) at par 8. In the same judgment, it was held that the purpose of the section is to bring the application to the attention of the employees and that courts hearing such applications will regulate their own procedures and can even be approached to give directions. See *EB Steam*, par 23.
- 10.5. The emphasis must be on achieving the statutory purpose insofar as reasonably possible.

10.6. Also have regard to the more recent judgments of the Constitutional Court and the SCA. See *Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) and *Chiliza v Govender* 2016 (4) SA 397 (SCA). Both are sequestration matters but are helpful in liquidations; the provisions being very similar.

11. Necessary allegations in founding affidavit.

11.1. *Locus standi*.

11.2. Ground for liquidation.

11.3. Jurisdiction of the court.

11.4. Factual foundation.

11.5. Compliance with the statutory provisions. This includes whether the respondent company has employees and how the applicant will ensure compliance. Also, remember the certificate of security.

11.6. Reference to a service affidavit is not necessary, however advisable.

12. Opposition to liquidation applications.

- 12.1. *Locus standi*. In respect of a creditor, look at the so-called Badenhorst rule. If the debt is *bona fide* disputed on reasonable grounds, the court would ordinarily dismiss the application. See the *Gap Merchant* judgment and the judgments referred to therein.
- 12.2. Payment of the claimed debt can be made. Payment to an attorney's trust account would ordinarily not suffice if it is conditional. See *Body Corporate of Fish Eagle v Group 12 Investments (Pty) Ltd* 2003 (5) SA 414 (W) at p429 – 430.
- 12.3. If the application is brought in terms of Section 344(f), the solvency of the company can be proved. This is ordinarily done by way of financial statements.
- 12.4. Courts will refuse an application which constitutes an abuse of process. See *Orestisolve (Pty) Ltd t/a Esso Investments v NDFD Investment Holdings (Pty) Ltd & another* 2015 (4) SA 449 (WCC) at par 8.
- 12.5. The court's discretion, although it is narrow where a creditor is unpaid. See the *Afgri* judgment.

13. Provisional/final order:

- 13.1. The practice requires that a final order be sought.
- 13.2. Most courts grant provisional orders first, requiring reasons to be advanced why final orders should not be made on the return day.
- 13.3. At the stage of provisional winding-up, only a *prima facie* case has to be made out.
- 13.4. At the stage of final winding-up, the applicant must make out a case on probabilities. The *Plascon-Evans* rule finds application.
- 13.5. Costs need not be ordered, it follows as a matter of law.
- 13.6. Costs of opposition should be excluded unless the opposition has contributed to the adjudication of the application.

Johan Smit

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