



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

NO

| | | |
|-----|------------------------------|----|
| (1) | REPORTABLE: | NO |
| (2) | OF INTEREST TO OTHER JUDGES: | |
| (3) | REVISED: | |

Date: Signature: 11/1/2023 [Signature]

CASE NO: 2021/55922

In the matter between:

AFRICAN UNITY LIFE LIMITED

Applicant

and

PROSPER FUNERAL SOLUTIONS (PTY) LIMITED

Respondent

Coram:

Heard on: 8 November 2022

Digitally submitted by uploading on Caselines and emailing to the parties

Delivered: 14 January 2023

JUDGMENT

TERNENT, AJ:

- [1] This is an application for the provisional winding-up of the respondent, launched on 29 November 2021. At the outset, I was informed that the respondent was not pursuing its *in limine* point that the resolution by the applicant authorising the deponent to the founding affidavit, its Chief Compliance Officer, to act on its behalf and to take any steps that were necessary against the respondent was not signed and hence, ineffective. The applicant, in any event, cured this error by filing a signed resolution to its replying affidavit which rendered the point moot.
- [2] Prior to dealing with the merits of the application, the respondent sought condonation for the late filing of its answering affidavit. The respondent delivered a notice of intention to oppose the application on 17 January 2022 and in accordance with the Rules of Court should have delivered its answering affidavit by 7 February 2022. It failed to do so. It was only delivered on 7 April 2022, some nine weeks out of time. The applicant delivered its replying affidavit and opposed the application for condonation.
- [3] In a nutshell it argued that as there was no *bona fide* defence to the application, in the face of an admitted indebtedness, there is no basis for condonation to be granted.
- [4] Rule 27 of the High Court Rules makes provision for the Court to condone any non-compliance with the Rules albeit that the Court also has an inherent power to regulate its own process which has been enshrined in the Constitution. It is correct that in considering the application for condonation a Court must consider:
- 4.1 whether or not a reasonable explanation has been given for the delay;

- 4.2 whether the application is *bona fide* and not made simply to delay the opposing party's claim;
- 4.3 there has not been a reckless or intentional disregard of the Rules of Court;
- 4.4 the applicant's application is not ill-founded; and
- 4.5 any prejudice to the opposite party can be compensated by an appropriate order as to costs.¹

[5] Furthermore, however, in the constitutional democracy, in the matter of ***Ferris v Firststrand Bank Ltd***² the Constitutional Court has found that in determining an application for condonation it may be granted where it is in the interests of justice for the application to be granted. Needless to say in exercising its discretion, a Court must still consider the factors of *bona fide* defence and the other factors as mentioned above.

[6] The applicant's counsel referred me to the decision of ***Ardnamurchan Estates (Pty) Ltd v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd*** 2020 JDR 2564 (ECG). This case dealt with an application for condonation but in circumstances where the answering affidavit had been filed without a formal application for condonation being made. The applicant had filed a replying affidavit and had not brought an application under Rule 30 that the filing of the answering papers, without an application for condonation, was an irregular step. Kroon J held that it was not prudent for him to *mero motu* raise the issue of condonation if it had not been dealt with by the parties particularly because there may be, as he said, "*good reasons for the delay which the parties do not wish to*

¹ ***Smith v Brummer*** 1954 (3) SA 3520 at 358 (A)

² 2014 (3) SA 39 (CC) at 43G-44A

disclose to the Court". The judge determined that:

"[49] To sum up, a Court will always have a discretion to allow an affidavit notwithstanding any non-compliance with the Rules if it is in the interests of justice to do so. In exercising that discretion the Court will consider whether any party will be prejudiced by allowing the affidavit and furthermore whether allowing the affidavit will be conducive to the proper and expeditious ventilation of the dispute before it. Procedural objections should not readily be permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decision of cases on their real merits."

[7] I have considered the explanation furnished by the deponent to the answering affidavit, Walter Fisher (*"Fisher"*). Notably, Fisher is not a director or officer of the respondent but appears to be a consultant who was authorised to act on its behalf. At the outset, it strikes the Court as odd that in the face of a liquidation application the directors of the company would not depose to the affidavits. Fisher, however, goes on to say that he was materially involved in all of the contractual dealings with the applicant and as a consequence has direct knowledge of the events and the debt, which the respondent admits. The respondent nevertheless avers that this admission does not entitle the applicant to an order for its liquidation.

[8] It also appears that on 12 April 2022, I presume the first set down date for the application, the application was postponed *sine die* and it was ordered that the replying affidavit would be delivered by 10 May 2022 and heads of argument were also ordered to be exchanged by 31 May 2022 and 14 June 2022 respectively.

[9] I am not of the view, that the explanation furnished by Fisher which involved his being hospitalised for a hernia operation and a consequent

period for recovery from an infection, the necessity of obtaining documentation, which he contends is voluminous albeit not evident from the documentation filed to the answering affidavit, caused any prejudice to the applicant which filed its replying affidavit. To my mind, and as submitted by the respondent's counsel, the prejudice to the respondent is far greater. The relief sought will have a material and lasting effect on the company and those within its employ. I am of the view that it is in the interests of justice for the affidavit to be received and I, accordingly, condone the late filing of the affidavit.

- [10] To the extent that it was submitted in the applicant's heads of argument that alternative relief was sought for a money judgment, this did not find its way into the Notice of Motion. Accordingly, I am bound by the relief sought which is for the provisional liquidation of the respondent company.
- [11] The applicant's case is a simple one. It is common cause that the parties concluded an intermediary agreement on 25 March 2020, which agreement was to the effect that the respondent would collect monthly premiums from its policyholders, on behalf of the applicant, which would then be paid to the applicant. The papers reveal that the respondent sells and administers funeral policies. It transferred its funeral book to the applicant which included both individual policies and group financial policies. The intermediary agreement also permitted the respondent to market and sell certain of the applicant's individual policies to the public.
- [12] According to the applicant, the respondent breached the agreement and the only relevant agreement is that concluded on 14 May 2021 and which took effect from 1 May 2021. It is self-evident, and admitted by the respondent, in its answering affidavit, that in this agreement the respondent acknowledged its liability to the applicant in the sum of R10 000 000,00.
- [13] As provided for in the agreement:

“3. **PFS’S RESPONSIBILITIES**

In terms of this agreement PFS undertakes to:

- a. *make a payment of **R4 000 000,00** (FOUR MILLION RAND) to AUL toward the outstanding amount (this amount is based on outstanding premium and an agreed profit ratio to AUL for the period) within 90 (NINETY) days of signature of this agreement. The full outstanding amount **R10 000 000,00** (TEN MILLION RAND), effectively **R6 000 000,00** (SIX MILLION RAND) after payment of the R4 000 000,00, will be paid back on a monthly basis as per clause 3c, 3d and 4e underneath;*
- b. *immediately refrain from selling the old AUL individual product (a new individual product has been provided);*
- c. *sell the new AUL individual product where PFS will receive 5 (FIVE) times net-premium as an upfront commission on payment of first premium by the policyholder. Until settlement of the full debt as per paragraph (a) above, only 1 (ONE) time the premium will be paid over to PFS while the rest of the remaining upfront commission (four [4] x the premium) will be allocated towards the outstanding debt;*
- d. *ensure the monthly repayment of the outstanding debt, the upfront commission can be included in this calculation, at a minimum amount of R250 000,00 (THWO [sic] HUNDRED AND FIFTY THOUSAND* 17-6

RAND) per month until the full outstanding amount has been repaid;

- e. make the first monthly payment no later than the 9th of each month 2021 with first payment by the 9th of June 2021;*
- h. not sweep any PFS accounts that feed the current float account, all group scheme premiums must be collected by AUL;*
- m. at all times act in good faith towards AUL and do everything reasonably possible to ensure compliance with this agreement."*

[14] Clauses 5 to 8 of the agreement provide:

"5. RIGHTS AND BREACH OF CONTRACT

In the event of either party committing any breach of this contract the aggrieved party shall be entitled to give the defaulting party written notice of such breach, which notice is either to be handed to the defaulting party describing the defaulter's breach of contract, demanding that such breach be rectified within not less than 7 (SEVEN) days from the date on which such notice was handed to the defaulter. In the event of the defaulter failing to comply with such demand within the said 7 (SEVEN) days the aggrieved party shall be entitled, without prejudice to any other rights which he may, in law, be entitled.

7. ENTIRE CONTRACT

This agreement contains all of the provisions agreed on by the parties with regard to the subject matter of the agreement and the parties waive the right to rely on any alleged provision not expressly contained in this agreement.

8. **VARIATION, CANCELLATION AND WAIVER**

No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.”

[15] As a consequence, the applicant, on 11 October 2021, via its attorney addressed a letter to Fisher and Clarence Reynders (“Reynders”), a director of the respondent, calling upon the respondent, in accordance with clause 5 of the agreement, to rectify its breach, in circumstances where it had not paid one instalment in liquidation of its indebtedness.

[16] It is further alleged in this letter that the respondent has collected premiums as it was obliged to do on funeral group scheme business and failed to pay over these funds to the applicant as agreed. A further complaint, raised in the letter, is that certain funeral group schemes had been told by the respondent that their policies were underwritten by the applicant when this was not in fact the case as no agreements had been concluded with it. The applicant specifically refers to a client, Wisani, and called upon the respondent to explain in detail its relationship with Wisani.

[17] On 18 October 2021, Reynders replied to the letter of demand albeit addressed “*without prejudice*”. This letter was disclosed in the answering affidavit despite the privilege claimed. In essence, Reynders asserts that:

17.1 the R6 000 000,00 loan, as he terms it, would have been repaid from upfront and recurring income which is the respondent's 17-8

largest generator of income from new business and that this had been withheld by the respondent;

17.2 the new product which would have generated this income was delayed by the applicant to the detriment of the respondent's sales force;

17.3 of the group schemes which were contracted directly to the applicant and who paid their premiums directly to the applicant such commissions were never paid across to the respondent and a reconciliation was not received; and

17.4 there had been non-compliance with clause 4 of the agreement.

[18] As a consequence Reynders says the cancellation of the agreement led to a *"a huge decrease in PFS' commission income which PFS would have received"*. A concession, in my view, that the respondent's cash flow was tight.

[19] Insofar as Wisani was concerned, Reynders baldly averred that monthly reconciliations and payments had been sent to the applicant on a regular basis. There was no substantiation of this assertion.

[20] On 20 October 2021, the applicant issued a section 345 letter (as provided in the Companies Act 61 of 1973 (as amended) read together with the Companies Act 71 of 2008). It informed the respondent that it was indebted to it in the sum of R5 250 000,00 and called upon it to make payment of the indebtedness within a period of twenty-one days from the date of the delivery of the notice failing which it would be deemed to be unable to pay its debts and this liquidation application would be launched. The letter further alluded to potential frauds and theft by the respondent in respect of the applicant's account and it was informed that criminal proceedings may well ensue. There was no response to this letter and 17-9

pertinently no payments were made by 10 November 2021.

- [21] The respondent, and its counsel, did not submit that this indebtedness was not due. Instead, and as submitted to me by the applicant's counsel, the respondent contends (and in so doing, seeks to bury its indebtedness) for facts or events which it avers exculpates it from its liability to the applicant.
- [22] In essence, the respondent seeks that the Court have regard to the negotiations and the purported agreements that underlined its acknowledging its indebtedness to the applicant.
- [23] The first of these is the Lead Generation agreement which the respondent says was allegedly concluded by the parties on 3 August 2020 with the effective date of 1 June 2020. The applicant points out that the agreement was not signed by the applicant and was never finalised or concluded. Furthermore, the agreement predates the 14 May 2021 agreement where the respondent acknowledged its liability to the applicant in the amount of R10 000 000,00.
- [24] The contention made is that the Lead Generation agreement entitled the respondent to a lead fee equivalent to 5% of the gross premiums paid by each of the different schemes or clients referred to the applicant, as underwriter, subject only to the conditions that the applicant make a 15% profit and that the client and/or scheme remain profitable on a monthly basis. This of course presupposes that the agreement was concluded between the parties.
- [25] On reading the agreement, it appears that it would, if it had been concluded, only apply to Mpho Funeral Services CC and Mathseb Cattle and Meat Services CC trading as Dirisanang Ma Africa. Accordingly, the respondent's averments that this agreement regulated the B3 and MFG schemes business is incorrect and false. As such, the further aspersion

made that the applicant failed to account to the respondent for lead fees in relation to B3, who allegedly paid R17 000 000,00, to the applicant in November 2021 also do not follow. The applicant says that the reference to B3 is "*wholly misplaced*". It avers that it is involved in litigation with B3 which owes it in excess of R11 000 000,00. Consequently, if this agreement was concluded and could have related to B3, no profits would have been made let alone a 15% profit threshold, which in the face of the indebtedness did not happen. Furthermore, Fisher is allegedly intricately involved in the affairs of B3 and is acutely aware of this dispute. The averments made by Fisher are not only questionable but in any event appear to take the Court down a rabbit hole and have no relevance or connection whatsoever to the admitted indebtedness.

- [26] Next, the respondent avers that the intermediary agreement of 25 March 2020, which also predated the 14 May 2021 agreement, only took effect from March 2020 until November 2020. It contends for a further agreement between Reynders and Ferreira effective 1 November 2020. Notably, the respondent does very little to explain why the purported agreement is oral when all the remaining agreements concluded or not between the parties are written. The respondent overlooks this and does not even deal with it. There is no objective evidence which supports the conclusion of this agreement other than a confirmatory affidavit by Reynders.
- [27] Furthermore, the respondent offers no explanation as to the legal basis for this oral agreement in the face of the "*no variation*" clause in the intermediary agreement of 25 March 2020. As also submitted to me this purported oral agreement also predated the May 2021 agreement.
- [28] To then aver that this oral agreement was breached by the applicant which failed to collect the premiums, clear the bank account, and pay commissions in terms of the referral fee due is implausible. More so because the respondent baldly avers that the applicant honoured its

obligations four times but does not underpin this allegation with facts. Not a shred of evidence is provided to demonstrate that these events transpired or that the applicant acted in terms of this agreement on four occasions or at all. The applicant's denial that this agreement was ever concluded is, in the circumstances, well founded and accepted by this Court.

[29] Insofar as the May 2021 acknowledgment is concerned, the respondent relying on clause 4 thereof avers, as Reynders did in the 18 October 2021 letter, that the applicant:

- 29.1 ceased all commission payments to the respondent which meant it was unable to pay the applicant the outstanding indebtedness;
- 29.2 failed to provide a final individual funeral product to the respondent for marketing and sale;
- 29.3 failed to conclude a new intermediary agreement with the respondent;
- 29.4 circumvented the respondent on schemes referred to the applicant by the respondent;
- 29.5 failed to distribute upfront fees and commission payments as agreed;
- 29.6 failed to diligently administer the policies and claims resulting in policy cancellations and a further loss of income to the respondent; and
- 29.7 refused to transfer premiums as a result of its own administration

of the group schemes and used same for claim settlement.

- [30] In so doing, the respondent relies on clauses 3c, 4a, 4c and 4i of the agreement in making these averments. It furthermore baldly alleges for a term entitling it to receive 30% commission on a monthly basis in respect of individual policies as well as the 5% referral commission on existing schemes. This term is not contained in the agreement and would amount to an express variation of its terms, in contravention of clauses 7 and 8 of the agreement. These clauses expressly provide that the agreement contains all of the agreed provisions and any variations to the agreement shall be reduced to writing. Accordingly, this term cannot find contractual muster.
- [31] So too the allegation that because of the applicant's failure to provide the individual funeral product by 30 April 2021, premiums were not paid to the applicant and the indebtedness was not reduced as provided for in clause 4c. The applicant denies this averring that at best clause 4c provides it with a right to offset upfront commissions against the indebtedness. The Court is inclined to accept that this is the position, in the face of the admitted indebtedness. Importantly, and as submitted by the applicant, the respondent failed to place the applicant in breach, as it was entitled to do, and has never done so. In fact, the respondent appears to be still in the process of calculating its alleged counter-claim which it says arises from the invoices attached to its answering affidavit and which allegedly display the purported indebtedness by the applicant to the respondent. The Court is told that once this counterclaim has been ascertained it will be quantified. The allegation, without more, does not suffice.
- [32] On consideration of the purported invoices, it is immediately apparent that four of the purported invoices namely:

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| 32.1 | 18 January 2021 | R441 506,00; |
| 32.2 | 16 February 2021 | R405 029,00; |

| | | |
|------|---------------|--------------|
| 32.3 | 16 March 2021 | R377 195,50; |
| 32.4 | 13 April 2021 | R346 211,75, |

if due and owing would surely have been set off against the admitted indebtedness to the applicant. If not, there is no explanation furnished by the respondent as to why, if these invoices were due and owing the applicant agreed to an indebtedness of R10 000 000,00 in May 2021. The remaining invoices tendered are dated 1 June 2021 for R309 886,00; 12 July 2021 for R329 954,25; 12 July 2021 for R300 433,50; 24 August 2021 for R309 386,00 and 14 September 2021 for R294 110,50. No information is given to the Court about these invoices and how these amounts are arrived at. The applicant counters these allegations. It avers that all correct invoices submitted up to May 2021 were settled or set off against the admitted indebtedness and any premiums post-May 2021 do not form part of the monetary claim. More importantly, if these invoices are valid, the respondent should be able to demonstrate that it paid the premiums due from the policyholders to the applicant. It does not do so. It does not even attach a schedule to its answering affidavit, which surely would have been a relatively simple exercise, given that it was obliged to account to the applicant in any event on a monthly basis. It allegedly has been calculating its counterclaim and so these figures and calculations would surely be at Fisher and the respondent's finger-tips.

[33] Furthermore there is no validity in the assertion that an intermediary agreement was not concluded. The applicant discloses the intermediary agreement, concluded on 19 July 2021, between the parties, represented by Ferreira and Reynders respectively. Albeit that I am advised that nothing turns on this agreement, as already mentioned aforesaid, the submission made is false.

[34] More so, as stated above, the respondent has not once formally placed the applicant on terms to remedy all of its alleged breaches which raises doubt that it is even able to do so.

[35] There are further inconsistencies in the respondent's affidavit which have not been properly explained or substantiated but it is unnecessary to enumerate them all here. I do not intend to deal with each and every instance thereof.

[36] Section 345(1)³ provides:

"345(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 as its registered office, a demand requiring the company to pay the sum 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;"

[37] There is no question that there has been no compliance with section 345(1).

[38] Furthermore it is not disputed that the application was properly served on

³ Companies Act 61 of 1973 as amended read together with the Companies Act 71 of 2008

the respondent, its employees, the South African Revenue Service and the Master of the above Honourable Court, as evidenced by the various returns of service.

- [39] A security bond was uploaded to CaseLines in terms of section 9(3) of the Insolvency Act 24 of 1936 (as amended) in terms of which security in the sum of R30 000,00 was provided by the applicant to the Master on 7 December 2021.
- [40] It was submitted to me, both in the heads of argument and in argument by the respondent's counsel, that albeit an admission that a debt is owing, the debt is *bona fide* disputed on reasonable grounds. The argument proceeded to label the application for liquidation as an abuse of Court process.
- [41] It is trite that winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is *bona fide* (generally disputed on reasonable grounds). That approach is part of the broader principle that the Court's processes should not be abused. A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the *bona fide* bringing about of the company's liquidation.⁴ That principle has been so entrenched in our law and has become known as the Badenhorst Rule. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is *bona fide* disputed, or where the motive is to oppress or defraud the company or frustrate its rights.⁵
- [42] In this matter it cannot be disputed that the applicant has a valid claim. Not a single instalment has been paid in repayment of the debt. The

⁴ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)

⁵ Henochsberg on the Companies Act, Issue 23 at 694

indebtedness has not been disputed and in fact has been admitted. Instead, the respondent seeks to take the Court down various rabbit holes to prior agreements which do not assist and explain the May 2021 agreement and the admitted indebtedness, which agreements predate the acknowledged indebtedness. I do not accept that a further oral agreement was concluded, as dealt with above. Furthermore, the counter-claims which the respondent contends for have never been calculated and it has made no effort to pursue its rights under the agreement to call for payment from the applicant. It fails in numerous respects to explain why in admitting the indebtedness of R10 000 000,00, if these claims existed, that these claims were not deducted. The applicant says they were. The respondent has also failed to tender to pay what it considered to be the correct indebtedness even at this late stage. The Court does not believe Fisher and a number of his statements are false.

- [43] I am of the view that there is no merit in the proposition that the respondent has *bona fide* disputed its debt. I am, accordingly, of the view that the applicant is *bona fide* in bringing the winding-up proceedings and the winding-up proceedings do not constitute an abuse of this Court's process.
- [44] It was further submitted to me that should I find that there is no *bona fide* dispute to the alleged debt then the respondent is commercially and factually insolvent and that any winding-up order will severely prejudice its staff.
- [45] I was referred to the decision of **ABSA Bank v Rhebokskloof (Pty) Ltd**⁶ where the Court held that:

"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible.

⁶ 1993 (4) SA 436 at 440F

*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 that the company is unable to pay its debts within the meaning of section 345(1)(c) as read with section 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597E-F:*

'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'

*Notwithstanding this, the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order (see *Henochsberg on the Companies Act* 4th ed vol 2 at 586; *Samuel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662F)."*

[46] To demonstrate its alleged solvency the respondent attached its annual

financial statements for the financial year ending 28 February 2021, which cover the period 1 March 2020 until 28 February 2021. The annual financial statements were signed by its directors on 13 December 2021. Notably that portion of the R10 000 000,00 indebtedness which was incurred over the period March 2020 up to 1 May 2021 is not included in the financial statements. The submission made by respondent's counsel was that this is because the debt is in dispute. Given that the respondent has admitted the indebtedness, it is implausible that it can contend it is in dispute, and I have already found that it is not *bona fide* in this averment. It begs the question then why this substantial debt is not disclosed. Yet the directors sign the financial statements and state that "*they are not aware of any material changes that may adversely impact the company*". This is a misrepresentation of material import.

- [47] Fisher, the applicant's Financial Manager, avers that the respondent's assets as at February 2021 comprise a total sum of R20 900 000,00 of which R19 050 000,00 is an ostensible asset listed as goodwill on purchase of the business. This is clearly not a liquid asset. As such only R1 400 000,00 could potentially be liquid assets. Furthermore, the respondent's total liabilities amount to R18 500 000,00 of which R14 600 000,00 is an alleged loan to Fisher who is not a director of the respondent nor does he hold any equity in the respondent. Of concern is that an amount of R4 400 000,00 was paid over to Fisher over this period reducing his loan to the respondent and yet the indebtedness to the applicant is not mentioned. The inference is that Fisher is being unduly preferred above other creditors, like the applicant. If the admitted indebtedness was included in the balance sheet it would be closer to R38 500 000,00 and paints a very different picture of the financial position of the company. The tax liability for the company is an amount of R181 289,00 for the 2020 financial year. For the 2021 financial year it is R940 530,00 which reflects a total tax liability of R1 121 890,00. As such the respondent failed to pay its taxes to SARS which, as submitted to me, is a contravention of the Income Tax Act 58 of 1962. Fisher and Reynders

concede that the respondent's cash flow is tight.

[48] I am of the view that the annual financial statements do little to establish that the respondent is commercially solvent. This is a matter which requires further investigation.

[49] In addition and of grave concern is that the respondent, in breach of the agreement, and in failing to make payment of the premiums due to the applicant swept or cleared the bank account into which the policyholders paid their monthly premiums. The applicant avers that this was a regular event at erratic and bizarre times being late at night or during the early hours of the morning and outside of the normal working hours of the applicant when it would attend to the bank account. As a consequence, it is unsurprising that commissions were not paid to the applicant in circumstances where the respondent was surreptitiously emptying the bank account.

[50] In the circumstances, I find that the applicant has established a *prima facie* case for the granting of a provisional winding-up order. It is a well-established practice that a provisional order of liquidation should issue. This allows interested parties, especially creditors, an opportunity to support or oppose a final liquidation. There is no reason to depart from the general practice in this case.

[51] Accordingly, I grant an order in the following terms:

ORDER

51.1 The respondent company is placed under a provisional order of winding-up in the hands of the Master of the High Court.

51.2 A *rule nisi* is issued calling upon the respondent and all interested parties to show cause, if any, to the High Court by 28

February 2023 as to why:

51.2.1 the respondent should not be placed under final winding-up;

51.2.2 the costs of this application should not be costs in the winding-up of the respondent.

51.3 Service of this order shall be effected:

51.3.1 by the Sheriff of the High Court on the respondent at its registered office;

51.3.2 on the South African Revenue Services;

51.3.3 by registered post on all known creditors of the respondent with claims in excess of R5 000,00;

51.3.4 by publication in one edition of The Sowetan and Business Day circulating in the area where the respondent carries on business and in the Government Gazette;

51.3.5 on the employees of the respondent in terms of section 346A(1)(b) of the Companies Act 61 of 1973;

51.3.6 any registered trade union that the employees of the respondent may belong to.

P V TERNENT*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Appearances:**For The Applicant:**W J Bezuidenhout
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