IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20123/2017

20124/2017

In the matter between:

SANRIA 21 (PTY) LTD Applicant

and

NORDALINE (PTY) LTD Respondent (Case no. 20123/2017)

ARNOLITE (PTY) LTD Respondent (Case no. 20124/2017)

Heard: 6 March 2018

Delivered: 19 March 2018

JUDGMENT

BOQWANA, J

Introduction

[1] The applicant lodged two separate applications for the provisional winding up of the respective respondents, Nordaline (Pty) Ltd ('Nordaline') under case number 20123/2017, and Arnolite (Pty) Ltd ('Arnolite') under case number

20124/2017 (collectively referred to as the 'respondents'). The parties agreed that these two matters are related and must be heard together. The facts of the cases are similar. The deponents are the same in both instances. Eradus Van Antwerpen ('Van Antwerpen') who is a deponent in the answering affidavits, is a director and a shareholder of both respondents, and Daniel Christiaan Burg ('Burg'), a deponent in the founding affidavit, is in the employ of the applicant.

[2] The applicant indicated in its replying affidavit that it does not persist with seeking a liquidation order in both applications. The issue remaining before me therefore, in both matters, is that of costs. Whilst the winding up orders are no longer being pursued, it is important to outline the background facts in these applications, for reasons that shall become evident in the judgment.

[3] As was held by Dlodlo J in *Hammel vs Radio city Contact Centre CC* [2009] JOL 22982 (C) (which Mr Steyn, for the applicant, referred me to, and which I deal with in more detail later), at para 5, in the matters at hand, "*it would virtually be impossible to reach a just decision without considering the merits of the application.*"

Background facts

[4] In respect of both respondents, the applicant claimed that it was owed outstanding amounts for goods and services delivered by it to the respondents, as well as monies owing by the respondents in terms of franchise agreements entered into between it and each of the respondents, during March 2007.

[5] In the Nordaline matter, the applicant alleged that it had entered into a franchise agreement in terms of which Nordaline would trade as a franchisee of the applicant, under the name and style of 'Java Bistro Somerset West'. In terms of such franchise agreement, Nordaline would make the following payments to the applicant: a monthly non-refundable royalty fee of 5% on the total sales of the business before any deductions, as well as a contribution towards marketing fees, of a minimum amount equal to a specified percentage (1%) of Nordaline's turnover sales. The applicant would also provide goods and products to Nordaline,

on Nordaline's special request and insistence, which Nordaline would purchase from the applicant, with payment due 30 days after receipt of invoice.

[6] The applicant alleged further that on 30 June 2017, Nordaline's total debt towards it in respect of the terms I have recounted above, amounted to R474 162.87. It contends that it demanded payment from Nordaline, but that Nordaline refused to pay.

[7] The applicant alleged that it sent a notice on 6 October 2017, to Nordaline's registered address, as envisaged in Section 345 (1) of the Companies Act 61 of 1973 ('the 1973 Companies Act'), as read with section 66 of the Close Corporations Act 69 of 1984 ('the Close Corporations Act') and item 9 (1) and / or (2) of Schedule 5 of the Companies Act 71 of 2008 ('the 2008 Companies Act').

[8] The applicant alleged that Nordaline had, for more than 24 days after receiving the notice, neglected to pay the amount due, or to secure or compound for each to the satisfaction of the applicant, and in light of that a proper case had been made out for its winding up as envisaged in Section 345 (1) (c) of the 1973 Companies Act, read with other Acts and provisions already mentioned above.

[9] It also alleged that Nordaline had made a small payment of R12 594.72 on 10 October 2017, and from that it was blatantly clear that Nordaline did not have the funds, nor would it make payment of its debts towards the applicant.

[10] In answer to the applicant's claim, Nordaline raised two points *in limine,* the first one dealing with lack of authority of the deponent to the founding affidavit (Burg), as well as his lack of *locus standi.* It appears that that point was not pursued by the respondent, pursuant to further allegations made in the replying affidavit.

[11] The second point raised *in limine,* was that Nordaline is solvent as its assets exceeded its liabilities, and therefore the applicant could not rely on the provisions of Section 345 (1) (c) of the 1973 Companies Act. The last point raised, although not a point of law, was that in order to demonstrate its solvency and its ability to

meet its obligations, Nordaline had paid the full amount allegedly due by it to the applicant, into its attorney's trust account. It submitted that the aforesaid conclusively confirmed that it is able to meet its obligations as and when they fall due.

[12] As to the merits of the application, Nordaline denied that it entered into a valid and binding franchise agreement with the applicant. It alleged that, apart from missing essential terms, the agreement was not signed by, or on behalf of, the franchisee, and thus it did not comply with the requirements of the Consumer Protection Act 68 of 2008 ('CPA'). Furthermore, the applicant failed to provide it with a disclosure document as is required by the CPA and is in this respect also in breach of its provisions. It categorically stated that it never entered into a valid and binding franchise agreement with the applicant. Nordaline further stated that the parties had embarked on negotiations aimed at concluding the agreement, but this fell through and the agreement was never signed on its behalf. It denied that it was indebted to the applicant in the amount alleged, claiming that the applicant was unable to produce valid invoices when called upon to do so, and setting out how the amount was calculated. It alleged that the applicant, at all relevant times, was aware that Nordaline disputed that it was indebted to it, but nevertheless proceeded with the application.

[13] It further submits that the applicant should have filed a notice of withdrawal of the application, instead of filing a further affidavit in which it emerged that it was not persisting with the liquidation order in respect of Nordaline.

[14] In its replying affidavit, the applicant states that given that it had approached this Court in terms of section 345 (1) (c), the grounds of opposition, if accepted by the Court, would be enough to stave off the liquidation application. It further states that, whilst not accepting the correctness of the dispute, it appreciates that given the nature of the proceedings such a dispute cannot be ventilated in this forum; it would issue a summons in due course for the recovery of the amount claimed.

[15] The applicant then states the following at paragraph 3.3 of the replying affidavit: "*I confirm that the applicant is not persisting with the relief seeking a liquidation order in respect of the respondent*."

[16] It further states that the dispute was never declared and / or communicated to it before the launching of the winding up application, and the same applies with regards to the funds held in trust. The applicant submits that because no reaction was forthcoming from Nordaline, it was entitled to proceed with the application, especially in light of the deeming provisions underlying section 345.

[17] The applicant contends in its replying affidavit that despite Nordaline denying the existence of the franchise agreement, the reality is that it is currently trading under the applicant's trade name, 'Java'. It also advertises under that name, as evidenced by its latest Facebook page. Therefore, the *de facto* position does not support Nordaline's denial of the existence of the franchise agreement. Accordingly, the applicant could not have been aware of the existence of the dispute alleged in the answering affidavit.

[18] The facts in Arnolite are similar, save for the fact that the amount allegedly owed is R124 255.20 and that the applicant specifically mentions that it entered into a written agreement with Arnolite. Furthermore, the alleged trade name in this instance is 'Craft Somerset West'. In the Arnolite matter, Van Antwerpen states that he did sign "*a document which purports to be a 'Craft Wheat and Hopps' franchise agreement with the applicant*", which document is annexed to the answering affidavit. He states, however, that the applicant did not comply with the CPA because it failed to provide Arnolite with a disclosure document as is required by the provisions of the CPA; the applicant has also not signed the agreement as required by the CPA; Arnolite further effected changes to the said agreement, which were initialled by Van Antwerpen and a witness, containing a counter-offer to the offer made by the applicant, which counter-offer had not been accepted by the applicant. Arnolite claims that it made payment to the applicant of a franchise fee of R150 000 in the *bona fide* but mistaken belief that it was due. Further

amounts totalling R2 million were paid either to the applicant or to the suppliers, shop fitters and for the purpose of furniture and equipment.

[19] It further alleges that the applicant had to supply and install a stove in Arnolite's trading premises, but it neglected to do so and Arnolite was obliged to purchase a stove *in lieu* of the stove not supplied by the applicant, at the reasonable cost of R24 961.44. Furthermore, the applicant is indebted to it in the amount of R91 967.43, made up of the fact that the applicant wrongly represented to Arnolite the amount payable to Cape Imposters, as a result whereof Arnolite overpaid the applicant an amount of R28 280.00. The applicant incorrectly calculated the discount on the electrician costs, which resulted in an over payment by Arnolite to the applicant in the amount of R57 723.43, and the applicant incorrectly calculated the discount on plumbing costs, to which Arnolite was entitled, which resulted in an overpayment by Arnolite to the applicant in the amount of R5 964.00.

[20] In the premises, so contends Arnolite, it overpaid the applicant in the amount of R116 928.87. It further states that the applicant was at all relevant times acutely aware that Arnolite disputed any liability to it. Arnolite, in fact, claims that the applicant was indebted to it, but in spite of that it proceeded with the application.

Discussion

[21] Mr Steyn submits that *Hammel* supra supports the proposition that, as in that case, the question to be considered is not whether the applicant ought to have succeeded with the winding-up of the respondents on the basis that they were not able to pay their debts, but whether the applicant was justified in launching the applications for the liquidation of the respondents. Mr Steyn submits that the applicant in this case was justified in doing so.

[22] In *Hammel,* a creditor had brought an application for the winding-up of a respondent in terms of Section 68 (c) the Close Corporations Act on the basis that the respondent was unable to pay its debts. In that case, the respondent did not dispute its indebtedness to the applicant and paid the claimed amount pursuant to

the launching of the liquidation application. By the time the application for the provisional winding up of the respondent was heard, the cause for the application had been removed.

[23] The applicant, in that case, had tendered to withdraw its application with each party paying its own costs. This tender was rejected by the respondent and the Court had to consider the issue of costs under those circumstances.

[24] Dlodlo J held, at para 8, that "*[t]he question is not whether the applicant ought to succeed with the winding-up of the respondent on the basis that it is not able to pay its debts in terms of section 68 (c) of the Close Corporations Act. Rather, the question is whether the applicant made out a proper case, in principle, in the founding papers that the respondent was not able to pay its debts and was hence justified in bringing the application.*"

[25] Mr de Villiers, for the respondents, argues that the general principle that when a party withdraws its action or application, that such party is in the same position as an unsuccessful litigant, and therefore, the other party is ordinarily entitled to cost, must follow. He submits that a departure from the principle that costs must be awarded to the party which was put to the expense of defending withdrawn proceedings, is only warranted in 'exceptional circumstances', which the applicant has not shown to exist. In this regard he refers to a number of well-known decisions on this aspect.

[26] I am of the view that the *Hammel* judgment is distinguishable on a number of fronts from the present matter. In *Hammel,* the respondent's version was found to be far-fetched and untenable, it gave contradictory versions and its initial denials that the debt was due and payable at a specified date were clearly unsustainable. It admitted the applicant's version. The Court there found, at para 16, that "*[b]y the time that the applicant caused its letter of demand to be written to the respondent on 20 August 2008, there was, even on the respondent's own version, no dispute as regards the quantum of the sum payable to the applicant*."

[27] The Court noted, as in this case, the fact that the respondent was forewarned that the application might be brought if no payment was received by a certain date. In that case, however, the respondent paid the debt before even filing the answering affidavit. The Court said, at para 17, "*[t]he respondent must have known that paying that amount owed to the applicant necessarily meant that the applicant had to withdraw the application. That withdrawal would come about not because the applicant originally had no case against respondent. The withdrawal was eminent because the payment of the debt had an effect of removing the cause for the application. In other words, as soon as the money owed was paid, the applicant ceased to have locus standi in this application.*" This was known to the respondent, which was legally represented. The Court questioned why the answering affidavit had been filed (at para 17).

[28] None of that happened in the present matters. No payment of debt was made, removing the cause for the application. The Court in *Hammel* was very critical of the respondent's conduct, for a number of reasons, some of which I have already mentioned. The respondents, in the present cases, very much contested their indebtedness to the applicant. The money they paid to their attorneys' trust account was not to acknowledge their indebtedness, but to show their ability to pay their debts as and when they fall due. What prompted the applicant not to persist with its relief against the respondents is not payment of the amounts, but disputes raised which it felt could not be resolved in these proceeding.

[29] The applicant seeks the court to grant costs in its favour because of the respondent's failure to respond to its section 345 (1) notice. It contends that had those disputes been raised in response to the letters of demand, it would not have proceeded with the applications. In other words, it could not have foreseen that the disputes would be raised, for reasons I have already highlighted. The difficulty with this proposition is that the existence or non-existence of franchise agreements is a legal issue. The applicant would have known whether it had complied with the requirements of the CPA prior to the issuing of the letters of demand. If there was

non-compliance, or question marks as regards the provisions of the CPA, the applicant would have foreseen the possibility of a dispute being raised regarding that issue. In other words, it would know whether or not it complied with the CPA and if the matter was uncertain, anticipate a potential legal issue on that aspect.

[30] I agree with Mr de Villiers that the respondents had no legal duty to disclose their defence in response to the section 345 (1) notice, in this case. Whether or not the franchise agreements existed, as required by the CPA, is something the applicant should have checked before launching an application. The applicant does not demonstrate in its replying papers that there were indeed binding and valid franchise agreements, after this issue was raised by the respondents. It simply dismisses the issue as being irrelevant for the determination of the issue of costs. Whilst the Court does not need to determine the existence of the franchise agreements in these proceedings, the issue is not immaterial. It is important in so far as it formed the basis upon which the applicant brought its case. The applicant alleged in its founding papers that these respondents are indebted to it because of the franchise agreements. It did not allege agreements of a different kind or some kind of business relationship as alternatives, in anticipation of the question marks around the franchise agreements, as a basis for the alleged debts.

[31] This does not mean the applicant, at an appropriate forum, would not be able to show the existence of such agreements, taking into account the alleged *de facto* position and therefore, the existence of debts. As Mr Steyn submits, that is not the issue I am concerned with. The relevant question before me is whether the applicant, before launching this application, could have foreseen that the existence of franchise agreements, upon which its case was based, could be disputed, in light of the undisputed requirements of the law. My view is that those disputes were foreseeable. The applicant therefore, at that stage, could have chosen a different forum. This is unlike cases where an applicant has a choice as to which forum it should approach to claim its debts, as it has been stated in *Hammel* and in a number of other cases.

[32] Mr Steyn indicated after the hearing of the matter that he had come across a judgment of *Gore NO & 2 Others v Lancelot Stellenbosch Mountain Retreat (Pty) Ltd*, Case Number 7884/12 WCHC 29 April 2013, which in his view had a bearing to the outcome of the costs argument. As a consequence, parties filed a consolidated supplementary note. The respondents differ with the applicant's view.

[33] I have had a look at that decision and I do not think it finds application to the issue in this case. In *Gore NO* the court had to decide whether or not the running of prescription had been interrupted by a tacit acknowledgment of liability, as contemplated by s 14 (1) of the Prescription Act, 68 of 1969 ('the Prescription Act'), "*more particularly, whether the respondent's failure to respond to the letters of demand in terms of s 345 can be seen as such a tacit acknowledgement of liability*." (At para 7.)

[34] In s 14 (1) of the Prescription Act the word 'tacit' had been used. Referring to *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C), the court in *Gore NO* supra, at para 8, found that "*…one must have regard not only to the debtor's words, but also to his conduct, in considering whether there has been acknowledgment of liability….Furthermore, and of great importance to the present case, it was held that whilst silence or mere passivity on the part of the debtor will not ordinarily amount to an acknowledgment of liability, this will not always be so. <u>If the circumstances create a duty to speak and the debtor remains silent, a tacit acknowledgment of liability may rightly be said to arise</u>*." <u>(Own emphasis, footnotes omitted.)</u>

[35] The court in *Gore NO* supra was very much emphatic that the circumstances of a particular case may give rise to the duty to speak; if that were not the case, in my view, it would mean that, in every situation, where the respondent has failed to respond to a section 345 letter, an inference that its silence constitutes a tacit acknowledgment of liability, would be justified.

[36] In my view, what distinguishes the circumstances of this case from *Gore NO* is the foreseeability of the liability being be disputed on grounds that the agreements the claims were based on, did not comply with the provisions of the CPA. The only issue raised in *Gore NO* was that of prescription, which in terms of the Prescription Act could be interrupted by a tacit acknowledgment of liability, as contemplated in that Act.

[37] Mr Steyn submits that the application was launched on the basis of the respondents' failure to respond to the section 345 letters and not the franchise agreements *per se,* and that the validity of the franchise agreements is not relevant for the cost argument because the *de facto* positions pointed to a business relationship. I have already dealt with this issue and would not repeat my observations in this regard.

[38] The only circumstance, from which Mr Steyn suggests an inference of a tacit acknowledgment of liability should be drawn, is the respondents' failure to respond to the section 345 letter. In my view, more is required for such an inference to be drawn from the conduct of a respondent, for if that were not to be the case, every instance in which a respondent fails to respond to the letter of demand in terms of s 345, may be construed as an admission of liability, which may potentially elevate the assessment of this issue to a legal principle, something Griesel J, in *Gore NO,* was careful to clarify. It is perhaps worth noting that the *Gore NO* matter went on appeal where the appeal was dismissed but on different grounds by the Supreme Court of Appeal (being that the debt had not prescribed). (See *Lancelot Stellenbosch Mountain Retreat v Gore NO* (108/14) [2015] ZASCA 37 (25 March 2015 at para 15)

Abuse of process?

[39] As to whether bringing these applications amounted to abuse of process, I do not think so. Whilst I would query the fact that the written agreements are not attached in the applications or, failing that, if there were no written agreements, the

essential allegations that would normally be alleged (such as whether the agreement was verbal or not, where it was entered into, and who represented the companies etc.), I would not say that failure to fulfil the above pointed to abuse of process. I would further query the fact that no background facts pointing to the possible insolvency, or otherwise, of the respondents, other than the section 345 (1) letters, as the cases were based on section 345 (1) (c), were presented by the applicant; that would, however, also not lead me to conclude that the applicant abused the process by bringing the liquidation proceedings.

[40] Whilst the applicant might have jumped the gun without properly doing its homework, I do think that it might have genuinely moved from the premise that, given *de facto* position and the silence from the respondents after receipt of the section 345 notices, the applications could be brought. This, however, does not assist its case as to the question of whether legally it foresaw that using the franchise agreements as a basis for the applications, could attract disputes of fact.

[41] For those reasons, I do not see any reason why this case should be treated any different from the usual position, that when a party withdraws an application, it is in the same position as an unsuccessful litigant. As I have said before, the case is different from *Hammel*. Mr Steyn submits that the applicant has not withdrawn the applications but continued with them, though only on the aspect of costs.

[42] When the applications were brought, costs were an ancillary relief, the main relief being the liquidation of the respondents. In other words, the cases brought to Court were not about costs, but about the winding-up of the respondents. Paragraph 3.3 of the replying affidavit in both applications clearly states that the applicant does not persist with the relief seeking the liquidation orders. I am, accordingly, not sure how that could be distinguished from an applicant withdrawing the relief sought before the Court. I am willing to assume that the withdrawal did not come about because the applicant agreed with the respondents' version, that the franchise agreements did not exist, but because the plaintiff felt that this was not the proper forum to resolve the disputes. Mr Steyn agreed,

however, during the course of his argument, that the applicant had conceded the merits of the applications.

[43] Taking into account the circumstances of these particular cases, I see no reason why the respondents should not be entitled to costs, as a party that was put to the expense of opposing the matters, when disputes of fact were foreseeable, prior to the applicant embarking on liquidation proceedings.

Formulation of the relief

[44] I asked the parties what ought to be done regarding the fact that no formal notice withdrawing the liquidation relief was delivered. Mr Steyn suggested that the matter be removed from the roll, whilst Mr de Villiers was concerned that removal from the roll could notionally lead to re-enrolment of the matter and submitted that there ought to be a firm order in regard to the future of this application. After some debate both counsel agreed that an appropriate solution would be to confirm paragraph 3.3 of the replying affidavits as part of the order to be issued by the Court.

[45] I therefore make the following order:

1. Paragraph 3.3 of the applicant's replying affidavits in case numbers 20123/17 and 20124/17 respectively, stating that the applicant is not persisting with the relief seeking a liquidation order in respect of the respondents, is confirmed.
2. The applicant is ordered to pay the respondents' costs in respect of both applications.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicant: Adv R L Steyn

Instructed by: Brink De Beer & Potgieter, Tyger Valley C/O MacRobert Attorneys, Cape Town

For the Respondents: Adv A De Villiers

Instructed by: Morkel & De Villiers, Somerset West, C/O Heyns & Partners, Cape Town