Case number: 64434/09

Date heard: 2 August 2010

Date of Judgment: ~~19 August 2010~~

26/8/2010

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

2010-08-26

DATE SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD **APPLICANT**

and

HEATCO CC **RESPONDENT**

JUDGMENT

Hiemstra AJ

[1] This is an application for the winding-up of the Respondent on the alleged grounds that the Respondent is unable to pay its debt and that it is just and equitable for the Respondent to be wound up.

[2] The Applicant alleges that the Respondent is indebted to it in the sum of R3 917 001.74 as a result of fraud committed by a member of the Respondent, a certain Pieter Abraham Bredenkamp. It is alleged that the Respondent, represented by Bredenkamp, had represented to the Applicant that certain goods covered by an instalment sale agreement between the Applicant and a company, Intuitions Quality Flowers (Pty) Ltd (in Liquidation) ("Intuitions"), had been delivered to Intuitions and acquired by Intuitions from the Respondent,

whereas in fact, the goods had not been delivered. Acting on the strength of the alleged misrepresentation, the Applicant paid the sum to the Respondent. The Applicant accordingly alleges that it has no reservation of ownership as provided for in the instalment sale agreement and will not be able to recover the loan from Intuitions, which has in the mean time been liquidated. Its only recourse is therefore an action for damages against the Respondent on the ground of the fraud perpetrated by Bredenkamp.

[3] The following facts appear to be either common cause, or not placed in dispute: The Respondent, represented by Bredenkamp, had agreed with Intuitions, represented by a certain Chammas, to deliver certain goods to Intuitions and to install them. On 20 February 2007, the Respondent issued an invoice for R3 000 141.88 to Intuitions for the agreed price of the goods and installation. After further negotiations, the price for the goods and installation was increased to R3 917 001.74, and a fresh invoice for this amount was issued on 20 March 2007.

[4] The goods in question, as reflected in the invoice, included "KETEL 1400 KW COMPLETE DELIVERED", quantity 12 and "POMP NM40/12AE 2.2 KW", quantity 12.

[5] Shortly after the invoice was issued, the Respondent agreed with Intuitions to replace the 12 kettles with one large kettle and the 12 pumps with 3 larger pumps.

[6] On 4 April 2007 the Applicant paid to the Respondent the amount reflected in the invoice. Respondent claims that it has delivered and installed the goods as agreed, including the large kettle and the three pumps. The Respondent attached to its answering affidavit photographs taken on the premises of Intuitions of installed large equipment, such those described in the invoice. Although the Applicant initially claimed that the goods had not been installed at all, it did not dispute in its Replying Affidavit that the goods on the photographs had actually installed as alleged by the Respondent. The Respondent's origi-

nal case was reduced to the allegation that there is a discrepancy between the goods installed and those reflected in the invoice.

[7] Mr M.P. van der Merwe, appearing on behalf of the Applicant, argued that by virtue of the change of the items specified on the invoice, it has no protection of a valid reservation of ownership over the assets. Intuitions have in the mean time been liquidated and the Applicant may be unable to recover the amount advanced to it. It is correct, as pointed out by Mr van der Merwe, that both invoices created the impression that the goods had been delivered by the time the money was paid to the Respondent and that it had paid over the money on the strength of that impression, which was created by Bredenkamp. However, nothing turns on this apparent misrepresentation because the goods were in fact delivered, albeit not precisely the goods as specified in the invoice.

[8] It is not disputed that Bredenkamp, representing the Respondent, had committed fraud on various other parties. However, on the facts, it does not appear that he had defrauded the Applicant. Mr van der Merwe argued that the Applicant has suffered a loss, or stands so suffer a loss, as it has no valid reservation of ownership of the goods by virtue of the incorrect description of some of the goods. However, it does not seem that the Applicant had made any attempt to have the invoice rectified, insofar as it may be necessary. On the Respondent's version, the agreement between it and Intuitions had been amended in the sense that certain goods had been replaced by others with the same function. The Applicant did not dispute that. Rectification of the invoice should not be an obstacle. In fact, all parties will probably readily agree to such a rectification. Photographs of the goods on the premises of Intuitions are attached to the Answering Affidavit and they are still in possession of the liquidator of Intuitions. The Applicant did not allege that it had attempted attach the goods.

[9] On 27 August 2009, the Applicant's attorney wrote to the Respondent demanding payment of the sum of R3 917 001.74. The letter continues to advise the Respondent that should its failure to pay the amount persist for a period of 21 days, the Respondent shall be deemed to be unable to pay its debts within

the meaning of s 69(1)(a) of the Close Corporations Act, 69 of 1984. According to the Founding Affidavit, the letter was delivered by the Sheriff at the Respondent's registered address, as required by s 69(1)(a).

[10] The deeming provision has the effect of creating a rebuttable presumption that the company in question is unable to pay its debts. In *Ter Beek v United Resources CC and Another*[1], Van Reenen J. referring to s 68 of Act 69 said:

"In view of the fact that in terms of s 68 of Act 69 of 1984 a Court's discretion in regard to the winding-up of a close corporation operates even in those instances where the application for winding-up is based on a deemed inability on the part of the close corporation to pay its debts, I incline to the view that the provisions of s 69(1) of Act 69 of 1984 are merely supplementary (ie extending what the subject matter includes) and prima facie (i.e. rebuttable). Accordingly, first respondent is not precluded from assailing the 'conclusion of law' . . which results from a failure to respond to a statutory demand in terms of s 69(1)(c) of Act 69 of 1984."

[11] The Respondent did not respond to the statutory notice of 27 August 2009. Mr F.C. Nagel, a member of the Respondent, stated in the answering affidavit that since the Respondent denied liability for the amount, it had rejected the letter with contempt. Although the alleged contempt is gratuitous, no negative inference can be drawn from the Respondent's failure to respond. A response would not have averted the deeming provision. The only way, in terms of s 69(1)(c) in which the presumption can be averted is to "pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor."

[12] The Respondent attached the financial statements of the corporation for the year ending 29 February 2008 as well as a list of its assets to the Answering Affidavit. The deponent also stated that the corporation has 51 employees and that its turnover from the beginning of the current financial year to date was R10 859 985.00. The financial statements reflect a profitable organisation with a positive cash flow. Its assets are substantial. The only issues raised by the Applicant in its Replying Affidavit are that the statements have not been signed and are not current. Although that is correct, Mr Nagel confirmed the financial statements and list of assets under oath. Although the Respondent has not provided conclusive proof of its financial health, in the absence of evi-

[1] 1997 (3) SA 315 (C) at 331

dence to the contrary, the answering affidavit is sufficient to rebut the presumption that it is unable to pay its debts.

[13] The Applicant has for two reasons failed to make out a case for the Respondent's liquidation. The first is that it appears that the Respondent has a *bona fide* defence to the claim. The second is that the Respondent has rebutted the presumption created by s 69 of the Close Corporations Act that it is unable to pay its debts.

[14] It is necessary for me comment on the manner in which the Applicant is attempting to recover the amount paid to the Respondent in respect of the goods delivered and services rendered to Intuitions in terms of the instalment sale agreement. It had at least two alternative courses of action at its disposal.

1. It could have attached the goods by virtue of its reservation of ownership. This is obviously unattractive because it would have had to sell the goods in order to recover as much as possible from the loan. On the other hand, to have the Respondent wound up would have been equally cumbersome. There may also have been problems because of the incorrect description of some of the goods, but as I have stated, they are far from insurmountable.

2. If it were convinced that it had been defrauded by the Respondent and that it had suffered damages, it could have instituted an action against the Respondent.

[15] The course of action adopted by the Applicant is clearly a tactical device to compel the Respondent to pay the alleged debt. It was held in *Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial*[2] that this was an abuse of the process and the Court made a punitive cost order against the offending party. In *Kalley Flooring Co (Pty) Ltd v President Carpeting Manufacturers Ltd*[3] it was argued that no matter how sound the financial position of a respondent company, any creditor was entitled to bring an application for its

[2] 2007 (6) SA 154 (D)
[3] 1982 (4) SA 681 (C)

liquidation and thus force the company to either pay or appear as a respondent in liquidation proceedings if it wanted to dispute the claim. Burger J rejected this submission, stating the following at 683 - 684:

"After the affidavit setting out the financial position of Kalley Flooring was filed, it is clear that President Carpet Manufacturers Ltd persisted when it knew or ought to have known that Kalley Flooring was not insolvent and that the application for liquidation would not be granted. If thereafter it persisted because it merely wanted to recover its costs, then it was a simple matter to say so and it would have limited the relief prayed for accordingly. In that event I might have had a certain amount of sympathy. But it persisted with the main application and it seems to me that it persisted solely to embarrass Kalley Flooring and, in doing so, it was abusing the process of court.

...

It is inevitably so that under today's circumstances the moment a company's name is mentioned in court as respondent in liquidation proceedings, or even when its name appears as such on the roll published in a newspaper, that fact casts a shadow over its ability to pay its creditors. Hence liquidation proceedings should not be launched merely as an instrument to embarrass a solvent company when disputed questions of fact are involved."

[16] The Respondent in this matter is also clearly a solvent company and the Applicant has exposed it to severe embarrassment and might even have damaged its reputation by casting a shadow over its ability to pay its creditors.

In the result the application is dismissed with costs at an attorney and client scale.

J. Hiemstra AJ

Date heard:	2010-08-02
Date of judgment:	2010-08-19
Applicants' counsel:	Adv M.P. van der Merwe
Applicants' attorney:	David Oshry & Associates
Respondents' counsel:	Adv J.A. Pieterse
Respondents' attorney:	Lategan Viljoen & Pretorius