IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

14.10.11.
DATE

SIGNATURE

Case number: 576992/10

Date: 14 October 2011

JORPE TURNKEY PROJECTS CC

Applicant

V

HCI KHUSELA COAL (PTY) LIMITED

Respondent

Application for compulsory winding up

Coram Sapire AJ

JUDGMENT

The Applicant is a close corporation, which undertakes construction work.

The Respondent is a coal mining company, a wholly owned subsidiary of a company listed on the Johannesburg Stock Exchange.

The Respondent employed the Respondent to perform construction works in furtherance of its Palesa and Mbali projects. Applicant completed the work that it had undertaken to do. The Applicant maintains that Respondent still owes R38 391 734.6, for its services. This amount is the difference between the total of R192 341 835.42 which is the amount Applicant claims should have been paid and, R153 950 100.73 which was in fact paid.

The Respondent does not agree. The Respondent, although at one time claimed to have overpaid the Applicant by some six million Rand, on a revised calculation by its expert, admitted indebtedness in an amount of R 1 155 095,94. Payment of this amount was tendered after commencement of these proceedings in Respondent's replying affidavit. The amount has since been paid and accepted. This leaves the balance, a substantial amount in dispute.

The present proceedings are clearly employed by the Applicant to recover what it contends is owning to it. The application is brought correctly, as far as the applicable legislation is concerned, in terms of the old Companies Act, the provisions of which presently continue to govern, winding up and liquidation proceedings.

On 21 May 2010, the Applicant delivered notices in terms Section 345 of the Act. The amounts therein demanded, totalling R3 008 734, 00, although significant and substantial, are but a fraction of what Applicant alleges is owing to it. Nothing however turns on this.

The respondent did not, to use the words of the section, pay the amounts claimed nor did it secure or compound for it to the reasonable satisfaction of the creditor. The consequence thereof, but for the fact that it responded by denying liability, would have been that the Respondent would have been deemed to have been unable to pay its debts. In view of the denial of liability this presumption does not operate.

The Applicant relies on the alleged indebtedness by the respondent to qualify the Applicant as a creditor of the Respondent, to apply for the winding up of the respondent.

The crucial issue to be resolved therefore is whether the Respondent is indebted to the Applicant or not.

The winding up procedure is generally not amenable to the resolution of such disputes. The applicant when embarking on this application should have been aware of the dispute. Indeed, the Applicant was demonstrably so aware, for it attached to the founding papers an opinion of Kingsbourne Quantity Surveyors. With reference thereto the applicant maintained, *"having regard to the expertise of Messers Kingsbourne as set out in their report and the mode of calculation, there can no longer be any bone fide or reasonable dispute with regard to the amount due, owing, and payable to the applicant"*

The Respondent has countered this opinion with one of its own expert which as I have previously observed limited the Respondent's indebtedness to an amount which has since been paid. Whatever criticism there may be of the expert's opinion it cannot be said that the opinion has to be rejected or disregarded until tested under cross examination and the expert's explanation considered. For present purposes, there are two conflicting opinions and the Respondent cannot be said to be prevaricating in acting in reliance of one of them. There is a genuine dispute, on a crucial issue which cannot be resolved on the affidavits.

Applicant's counsel urged me, should this be my finding, to refer the matter for the hearing of oral evidence, on this issue. I reject this option for clearly a trial action should have been instituted by the Applicant.

The Respondent although clearly insolvent as appears from its financial statements, is the subsidiary of a company with a quotation on the Johannesburg Stock Exchange, which has in writing undertaken to support the Respondent. This in effect means that the Respondent notwithstanding its insolvent position is not unable to pay its debts

Should the Applicant therefore succeed in establishing that the Respondent is indebted to it in the amount it alleges or at all, there is every prospect that the respondent's obligations in regard thereto will be discharged.

The application is dismissed with costs

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