

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: 3838/2011

ACTIVE COOLING

Applicant

And

LEFUTSHE ELECTRICAL AND CONSTRUCTION CC

Respondent

Coram: **Chetty, J**

Heard: **2 August 2012**

Delivered: **10 August 2012**

Summary: *Close corporation – Liquidation of – Defence raised – Matter prescribed – Prescription Act 68 of 1969 – S 14 (1) – Interruption of prescription – Final order granted*

JUDGMENT

Chetty, J

[1] During December 2011, the applicant sought an order for the provisional winding-up of the respondent. In the founding affidavit, the deponent, *Jan Hendrik Strydom (Strydom)*, the applicant's sole member, alleged that as at 1 March 2009 the respondent was indebted to the applicant in the sum of R153 408.99 in respect of services rendered and goods supplied. It further alleged that on 31 March 2009 the respondent paid the applicant the sum of R100 000.00 leaving a balance of R53 408.99 which was due and payable. He

adverted to various attempts, culminating during November 2009, made to the respondent's sole member, Mr *Moeketsi Duiker* (*Duiker*) to extricate the aforesaid amount from the respondent but to no avail. *Duiker* prevaricated on all undertakings made by him to settle the respondent's indebtedness which ultimately led to the institution of the present proceedings.

[2] The opposing affidavit filed by the respondent was deposed to by its attorney, Mr *Marios Kyriacou* (*Kyriacou*), whence it appears that the opposition to the relief sought is premised upon the prescription of the applicant's claim. *Kyriacou* furthermore contends that the respondent neither tacitly nor expressly acknowledged its liability to the applicant. In reply, *Strydom* states that the various undertakings made by *Duiker* amounted to an admission of liability and in amplification of this averment filed a supplementary affidavit by the applicant's erstwhile debt collections clerk, Ms *Robyn Coetzee* (*Coetzee*), wherein she echoed the applicant's sentiments that at the end of 2009 *Duiker* made an undertaking to commence payments in settlement of the debt as from January 2010.

[3] The critical question which falls for determination is whether the undertakings made by *Duiker* constituted an express or implied acknowledgement of liability and interrupted prescription as contemplated by section 14 (1) of the **Prescription Act**¹. Counsel for the respondent contended that the papers revealed a factual dispute of such moment that the matter could

¹ Act No, 68 of 1969

not be determined on the affidavits and ought to be referred for the hearing of oral testimony. There is no merit in the submission. The applicant's case remains unanswered. The respondent, save for raising a defence premised on prescription, chose not to dispute any of the applicant's factual averments. There can be no doubt that the various undertakings to effect payment in settlement of the debt amounts to an acknowledgement of liability and as such interrupted the running of prescription.

[4] Although the applicant initially sought an order for the provisional liquidation of the respondent, the matter was fully argued and no purpose would be served in issuing a provisional order. The applicant has made out a case for the grant of final relief and in the circumstances, the following order will issue –

A final winding-up order, with costs, is granted.

D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Applicant: *Adv N. Mullins instructed by Gregory Clark & Associates; 9 Buffelsfontein Road, Mount Pleasant, Port Elizabeth; Tel: 041-367 3489; Ref: G Clark*

Obo the Respondent: *Adv C. van Rooyen instructed by Brown Braude & Vlok; 317 Cape Road, Newton Park, Port Elizabeth.*