

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 6436/2022

(1) REPORTABLE: Yes/ No

(2) OF INTEREST TO OTHER JUDGES: Yes/ No

(3) REVISED.

DATE: 15/02/2024

SIGNATURE

In the matter between:

AFRICOR AUCTIONEERS (PTY) LTD

Applicant

And

BLUE DOT PROPERTIES 1875 CC

Respondent

and

ALLSCHWANG, ALLAN LOUIS N.O.

Intervening party

JUDGMENT

MBONGWE, J:

INTRODUCTION

[1] This is the return date in the application for the final winding up of the respondent in terms of the provisions of sections 344(f), 346(1)(b) and 346(3) and 346(4A) of the previous Companies Act 63 of 1973 read with item 9 of Schedule 5 of the current Companies Act 71 of 2008. The applicant was

previously granted an order for the provisional winding up of the respondent on the ground that the respondent was unable to pay its debt as envisioned in section 345 of the 1973 Companies Act. The application for the final liquidation of the respondent has become opposed by the Intervening Party who is the executor of the estate of the deceased which holds a 50% interest in each of the respondent corporation and another company, Simply Fruit CC, both co-owned by the deceased and his brother, Tony.

BACKGROUND FACTS

- [2] The respondent is a close corporation and registered owner of the immovable property situated at [...] F[...] Road, Spartan, Kempton Park, Ekurhuleni Metropolitan. The property consists of office space and a production area occupied by Simply Fruit CC, the business entity the brothers used for the manufacture of fruit juices and flavoured water, amongst other products.
- [3] Subsequent to his brother passing in December 2019, Tony relocated to Greece, having entrusted Mr Previliotis, a prospective buyer of Simply Fruit CC, with the running of its business operations and to generally be in charge of the entire premises whose keys he kept in his possession.
- [4] The intervening party was officially appointed as the executor of the estate of the deceased on 21 January 2020. He had not transferred the deceased member's 50% interest in the respondent to the rightful heir when the discussions and agreements concerning the disposal of the respondent and its sister company occurred and he still has not done so, nor was he party in the discussion and alleged agreements.
- [5] The business of Simply Fruit CC deteriorated following the passing of the deceased, the relocation of Tony and the lockdown restrictions resulting from the Covid-19 pandemic that ensued in March 2020. Simply Fruit CC ceased trading towards the end of 2020, at a time it had accumulated extensive debts to its suppliers.

- [6] Tony and the heir to the estate of the deceased, Costa, agreed on the sale of Simply Fruit CC. In August 2021 Tony requested Mr Basil Vardakos, an auctioneer, to assist him with the sale of Simply Fruit CC. Vardakos agreed, but, in turn approached Ms Karen Keevy, an attorney and director of the Commonwealth Trust to assist with the preparation of relevant documents ostensibly for the execution of Tony's mandate. Ms Karen Keevy subsequently advised Tony and Costa to rather place Simply Fruit CC in business rescue. On 21 August 2021, Tony and Costa gave Ms Karen Keevy a written mandate to place Simply Fruit CC in business rescue.
- [7] Still in August 2021, Tony instructed Mr Previliotis to hand over the keys to the premises of the respondent to Mr Basil Vardakos. This gave Vardakos control of the premises respondent. It is to be noted that at that stage, the premises had only be known to be housing Simply Fruit CC, but it was in October 2021 discovered that the premises were in fact owned by the respondent.
- [8] On 7 September 2021, Ms Karen Keevy advised Tony and Costa that the Commonwealth Trust had resolved to appoint Keevy and Keevy as the business rescue practitioners to attend to the rescuing of Simply Fruit CC.
- [9] As a result of a concern that the premises on which Simply Fruit CC had traded were vulnerable to vandalism and looting. It was also during the same month of October 2021 that it was discovered that the immovable property on which Simply Fruit CC is situated is in fact owned by the respondent. The applicant provided the necessary security services from 12 October 2021 to protect the property. It is the provision of this service that constituted the source of the respondent's debt to the applicant leading to the present proceedings.
- [10] On 25 October 2021 Ms Keevy informed the Intervening Party's consultant, Ben, that Tony had advised her that the respondent was owing a considerable amount in respect of rates and taxes and that Tony had

instructed her to place the respondent in voluntary winding up. The instruction by Tony was conveyed to Costa by Mr Vardakos on 3 November 2021.

- [11] It is noted that Costa had agreed with initiatives taken by Tony individually and which Costa had conveyed to the Intervening Party and also pointed out to him that the need may arise for the Intervening Party, as the executor of the deceased's estate, to co-operate with the other persons assisting with the sale or liquidation of the respondent and Simply Fruit CC.
- [12] The emergence of the Intervening Party in these proceedings appears to have been triggered by Costa's advice about the ongoing discussions of the sale or liquidation of Simply Fruit CC and the respondent which will require his co-operation and authorisation. The advice of a possible disposal of these assets which partially formed part of the deceased's estate did not sit well with the executor of the deceased's estate.
- [13] On 20 December 2021, the applicant issued the letter of demand in terms of section 69 of the Close Corporation Act 69 of 1984, as amended, read with sections 345(1)(a)(ii) of the Companies Act 61 of 1973, as amended, calling upon the respondent to pay the debt in the sum of R157,206.82 for the rendering of security services on the premises of the respondent.
- [14] On 13 May 2022, Costa was advised that the auctioning of the respondent would be ready to go ahead within three weeks and again, on 13 June 2022, that there was no need to consult the executor of the estate as Vardakos will sort out everything regarding the proceeds of the auction on Tony's behalf, with Costa. These allegations, contained in the Intervening Party's answering affidavit, para 46, are denied by the applicant.
- [15] On 22 June 2022, Costa sent an email to the executor, a copy of which the latter had sent to Vardakos, and sought information from him (Vardakos) about the source of his authority to auction or liquidate the respondent and Simply Fruit CC. Costa had alleged in the email that he had not been aware

of the auction until advised thereof by Vardakos. It further appeared in the email that Tony had agreed and gave permission for the sale of the respondent to the liquidator and the auctioneer. Costa stated in the email further that he had informed Vardakos to contact the executor to enquire if his authorisation would be required.

- [16] The executor had advised Vardakos that the sale of the major asset of the respondent was unenforceable in the absence of a resolution taken by 75% of the vote of the members of the respondent and that the deceased's estate held more than 25% interest in the respondent and had not voted in favour of the sale of the respondent.

INTERVENTION

- [17] At the hearing of the application for the final liquidation of the respondent on 22 June 2022, the Intervening Party was represented by counsel in court and had filed a notice to oppose the application. This resulted in the court extending the rule nisi to 22 August 2022 and directing that the Intervening Party files its answering affidavit within 15 days from the date of the order.

THE DELAY

- [18] The intervening party failed to file his answering affidavit within the 15-day period ordered by the court and only filed same on 28 July 2022, without filing an application in terms of rule 27(3) explaining the delay and seeking condonation therefor.

BASIS FOR OPPOSITION

- [19] The crux of the Intervening Party's opposition to the granting of the final order for the winding up of the respondent is the denial that there was a contract concluded in terms of which the applicant had rendered the alleged security services to the respondent's premises. On the basis of this contention or the absence of such contract, the Intervening Party disputed

that the respondent was indebted to the applicant in the amount of R157 206,82 claimed.

- [20] The Intervening Party has referred to a confirmatory affidavit of Costa, which he alleged to be annexed to the answering affidavit. The annexure concerned has, however, not been commissioned, despite it having been stated in the answering affidavit that a commissioned affidavit of Costa will be available at the hearing.

APPLICANT'S REPLICATION AND ARGUMENT

POINTS IN LIMINE

- [21] The applicant has contended that the present application ought to proceed unopposed on the grounds that, despite its compliance with legal requirements, *inter alia*, the delivery of the letter of demand dated 20 December 2021 by registered post at the respondent's registered address in terms of section 69 of the Close Corporation Act 69 of 1984, as amended, read with section 345(1)(a)(ii) of the Companies Act of 1973, as amended, for payment of the amount due and owing;

21.1 the respondent has remained unable to pay the debt or to secure or compound the amount owing to the reasonable satisfaction of the applicant and is, consequently, deemed to be incapable of paying its debt and liable to be wound up;

21.2 the Intervening Party's denial that the respondent is indebted to the applicant in the amount of R157 206, 82 for services rendered, is without any substantiation. The alleged affidavit of Costa purportedly confirming the contents of Costa's email and supporting the Intervening Party's opposition is not commissioned and, consequently, has no legal effect as it does not comply with the provisions of the Justices of the Peace and Commissioners of Oath Act 16 of 1963;

- 21.3 the Intervening Party, despite the filing of its answering affidavit well outside the period directed by the Court on 22 June 2022, has failed to bring an application for condonation of the delay as required in rule 27(3).

ISSUES FOR DETERMINATION

[22] The parties have listed in their joint practice note the undermentioned issues they seek to be determined by this court:

- 22.1 Whether there is a genuine factual dispute regarding the existence of the applicant's claim;
- 22.2 Whether a contract existed for the applicant's provision of security services to the respondent;
- 22.3 Whether the respondent is deemed unable to pay its debts in terms of section 69 of the Close Corporation Act of 1984 and, therefore, liable to be wound up in terms of section 68(c);
- 22.4 Whether there is a bona fide dispute of the alleged indebtedness of the respondent to the applicant;
- 22.5 Whether the sought liquidation is a sham.

ANALYSIS

[23] The initial challenge in the determination of this matter lies not in the sole considerations of the legal principles and laws governing liquidations, but the scrutiny of whether the approach that was adopted from the early stages of the discussions relating to the respondent and Simply Fruit CC was founded on sound legal principles.

[24] It is common cause that at the time Tony and Costa engaged in discussions with Vardakos and the applicant in connection with the respondent and

Simply Fruit CC, these two entities or 50% interest therein vested in the estate of the deceased. A curator of the estate of the deceased had been appointed and his contact details could be gathered from Tony or Costa. Vardakos and the applicant ought to have known that Tony despite holding a 50% member's interest in these entities, would have no authority individually to enter into any agreement that would be binding on these entities or at least the other 50% interest therein. The participation of the Intervening Party, as executor of the estate holding 50% interest was necessary and a sine qua non to the validity of any such agreement. The applicant's or Vardakos's contention that they received instructions in some instances from Tony and Costa cannot legally hold. Costa, while being the heir to the deceased estate, had no authority whatsoever to bind or contract on behalf of the assets of the estate. Thus, any agreement, including the mandates for the sale and liquidation of the respondent and Simply Fruit CC and that for the alleged provision of security services to the premises of the respondent is invalid.

- [25] A written demand for payment of a debt for purposes of the winding up of a company must meet the requirements of the law, including the manner of its delivery to the debtor. Importantly, the purpose of the written demand and the manner of its delivery is not only to make it known to the debtor, but to also prove that the debtor has been notified that, unless payment of the debt is made within the specified period, steps will be taken to wind it up.
- [26] Causing the delivery of the letter of demand at the registered address of the respondent was in line with the prescripts of the law, but was, knowingly to Vardakos and the applicant, not going to serve the desired purpose of alerting Tony or the executor of the deceased's estate who were neither present nor resident at that address or premises which were under the control of Vardakos.
- [27] The deviant conduct of the applicant in this regard tainted the entire process of the winding up of the respondent, rendering it rather an assimilation of the winding up of a company. Compliance with the rest of the requirements in

the winding up of a company was no longer of value in the circumstances. It is a fact that concerted effort is made in assimilations to make the process appear seamlessly compliant with legal requirements. The Intervening Party is justified, in my view, in disputing the premise of the purported liquidation of the respondent. The liquidation of a company is meant to benefit its creditors.

[28] Whether the liquidation of the respondent was, as it is supposed to be, for the benefit of its creditors, is, in my view, doubtful. It is unfathomable how the applicant would have transferred ownership of the respondent and Simply Fruit CC without authorisation of the disposal of at least the 50% member's interest owned by the estate of the deceased. Thus, the purported winding up could only have been for sinister purposes and an abuse of process by the applicant. In addition, the winding up were it to be granted in these circumstances, would result in Costa unlawfully losing his inheritance.

[29] Without pouring cold water on the otherwise valid points in limine raised by the applicant to the Intervening Party's failure to seek condonation for his delayed filing of the answering affidavit and other points raised, the interests of justice warrant that the shortcomings of the executor / intervening party be condoned in the circumstances of this case.¹ In addition, the facts found to be correctly opposed by the Intervening Party above, such as the absence of a contract for the provision of security services and of the authority of the applicant to sell the respondent by auction, constitute disputes that preclude the entertainment of these proceedings on motion.

CONCLUSION

[30] The single answer, in my view, to all the issues raised by the applicant and the Intervening Party against each other's case and stated earlier, is that without exception, there was never a valid agreement with the applicant for the provision of security services in respect of at least the 50% value of the

¹ *Grootboom v National Prosecution Authority & Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

respondent and Simply Fruit CC. The application for the liquidation of the respondent must, therefore, fail.

COSTS

[31] There is no reason why the general rule that costs follow the outcome should not hold in this case.

ORDER

[32] Consequent to the findings in this judgment the following order is made:

1. The application for the liquidation of the respondent is dismissed.
2. The applicant is ordered to pay the costs on the opposed scale.

MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant: Adv J Kamffer
Instructed by: Andrew Venter Inc

For the Respondent: Adv HP van Nieuwenhuizen
Instructed by: Allan Allschwang and Associates

Date of hearing: 16 August 2023

Date of delivery: 15 February 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTETIVES AND UPLOADED ONTO CASELINES ON 15 FEBRUARY 2024.