

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



Case number: 45546/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

19-02-2018

DATE

SIGNATURE

In the matter between:

DH CONSTRUCTION TECHNOLOGIES CC

FIRST APPLICANT

HM & H EIENDOMME CC

INTERVENING CREDITOR/

SECOND APPLICANT

and

CHAD CONSTRUCTION CC

RESPONDENT

JUDGMENT

VAN STADEN, AJ:
INTRODUCTION

- [1] The applicant and the intervening creditor apply for the liquidation of the respondent. This matter centers on the question of a bona fide and reasonable defence in the context of a liquidation application. What does a bona fide and reasonable dispute in respect of a creditor's claim mean in the circumstances of the matter?

FOUNDING AFFIDAVIT

- [2] The applicant, a close corporation which renders quantity surveying services, applies for the winding up of the respondent.
- [3] The applicant's application is premised on the provisions of section 345¹ of the repealed Companies Act, Act 61 of 1973 (the 1973 Companies Act), which has continued existence by virtue of the transitional provisions contained in the Companies Act 71 of 2008 (the 2008 Companies Act). The applicant relies on a notice in terms of section 345 dated 14 March 2017 served on the respondent's registered address. Section 345 of the 1973 Companies Act is applicable to Close Corporations by virtue of section 66 of the Close Corporations Act 69 of 1984.
- [4] The applicant alleges that the respondent is indebted to it in the amount of R168,150 in respect of quantity surveying services rendered. The

¹ Section 345 determines:

"(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

amount of R168,150 is made up of three different invoices, invoice number 1028 dated 8 December 2016 in the amount of R37,050, invoice number 1029 dated 8 December 2016 in the amount of R44,460 and invoice number 1033 dated 7 March 2017 in the amount of R86,6740.

- [5] Invoice 1028 pertains to quantity surveying services rendered in respect of the Willowood Park Retail Development. Invoice 1029 pertains to quantity surveying services rendered in respect of the Black Mountain Gamsberg project. Invoice 1033 pertains to quantity surveying services rendered in respect of tender preparation for 4 different projects.
- [6] Invoices 1028 and 1029 were forwarded to the respondent by way of e-mail on 8 December 2016. This was followed up by e-mails dated respectively 24 January 2017 and 6 February 2017, enquiring about payment. On 7 March 2017 the applicant forwarded invoice 1033. On the same day the respondent alleged that the work done in respect of invoice 1033 was done on risk, and as the respondent was unsuccessful with the tender, the respondent was not liable for payment of the invoice.
- [7] The respondent's response to the section 345 notice dated 25 April 2017, via its attorneys, was to offer payment of invoice number 1028 (payment was only made on 16 August 2017) and deny its indebtedness in respect of invoice 1033, as the work had been done on a contingency basis. The respondent also denied its indebtedness in respect of invoice 1029, and indicated that it was prepared to discuss same, with a view to reaching a compromise.
- [8] The applicant contends that as the amount of R168,150 was not paid within 21 days of service of the section 345 notice, the respondent is deemed to be unable to pay its debts, the respondent deemed to be commercially insolvent.

ANSWERING AFFIDAVIT

- [9] The respondent's defence is that it paid invoice 1028. The respondent furthermore states that it utilised the services of the applicant to prepare tenders. The respondent alleges that during or about August 2015 the parties agreed that in the event of the respondent being successful with a tender, the applicant would be paid in respect of its services so rendered. In the instances where the respondent was unsuccessful, no payment would be effected.
- [10] As far as invoice 1029 is concerned, the total provisional bill of quantities prepared by the applicant was for a sum of R121,639,638.12. The said tender was not accepted by the employer, instead a tender in the amount of R74,499,754 was awarded to the respondent. Accordingly the respondent contends the applicant cannot claim fees in respect of invoice 1029.

REPLYING AFFIDAVIT

- [11] In reply the applicant points out that it is not correct that the tender relating to invoice 1029 was successful. It was in fact a counter-offer that was made to the respondent, which the respondent accepted.

INTERVENING CREITOR'S FOUNDING AFFIDAVIT

- [12] After the intervening creditor had applied for leave to intervene, I ordered that such leave be granted.
- [13] The intervening creditor, a landlord, also applies for the winding up of the respondent. Its application is also premised on the provisions of section 345 of the 1973 Companies Act. The intervening creditor relies on a notice in terms of section 345 dated 24 October 2016 served on the respondent's registered address, read with the provisions of section 344.
- [14] The intervening creditor alleges that the respondent is indebted to it in the amount of R300,018.09 for arrear rental. During September 2011 or May 2012, the intervening creditor and the respondent concluded a

written lease agreement in respect of immovable property (the immovable property) situated at Kathu, Northern Cape.

- [15] During October 2012 the intervening creditor and the respondent concluded a verbal extension of said lease agreement. The parties agreed that the monthly rental would be subject to the 10% annual increase as determined in the written lease agreement.
- [16] During September 2015 the respondent breached the rental agreement by failing to pay the monthly rental of R26,620 (this rental increased to R29,282.01 during January 2016). After a few months had passed without any rental payment, the intervening creditor cancelled the lease agreement by way of correspondence dated 26 July 2016. Therein the intervening creditor also requested payment of all outstanding monies. The letter of cancellation was followed up by way of e-mails dated respectively 1 August 2016 and 1 September 2016, requesting payment.
- [17] The section 345 notice dated 24 October 2016 was answered by way of the respondent's attorneys' correspondence dated 11 November 2016. Therein the respondent's indebtedness is denied, and a request is made for an exposition of the amount claimed.
- [18] Due to the respondent's failure to comply with the section 345 notice, the intervening creditor submits that the respondent is deemed to be unable to pay its debts. The intervening creditor submits that the respondent is commercially insolvent.

**RESPONDENT'S ANSWERING AFFIDAVIT TO INTERVENING CREDITOR'S
FOUNDING AFFIDAVIT**

- [19] In answer the respondent states that on 30 June 2016 it concluded a purchase agreement with the intervening creditor in respect of the immovable property for the amount of R2,500,000. The respondent alleges that it was agreed that the respondent would build a store on

the immovable property. Improvements to the immovable property were done during 2014 and 2015. The respondent alleges that these improvements amount to R1,400,000. The respondent attaches a valuation of the immovable property in the amount of R2,700,000.

- [20] The respondent could not obtain a bond. However, the respondent alleges it was agreed that it would no longer be liable to pay rental, in exchange for the improvements to the immovable property. Such oral agreement was concluded after 30 June 2016. The respondent denies being indebted to the intervening creditor in the sum of approximately R300,000, it having been agreed that the intervening creditor would not claim or be entitled to payment of said amount.

INTERVENING CREDITOR'S REPLYING AFFIDAVIT

- [21] In reply the intervening creditor contends that bearing in mind that the purchase price for the immovable property was R2,500,000, and the immovable property was valued at R2,700,000, the respondent's version that it effected improvements to the value of R1,400,000, is implausible. It would mean that the respondent paid for the improvements twice, the first time when the improvements were effected, and the second time when the respondent was prepared to pay the increased value of the immovable property as the purchase price.
- [22] Furthermore, the intervening creditor points out that the respondent ignored the e-mails demanding payment of the arrear rental. Only on 11 November 2016 the respondent's attorneys denied liability on behalf of the respondent. The defences now raised by the respondent were not raised by itself or its attorneys, while it is evident that such a defence already existed at the time. The respondent never raised the defence in correspondence with the intervening creditor.

- [23] The intervening creditor submits that the only reasonable inference to be drawn is that the respondent's defence is a contrived defence. The intervening creditor submits it can be rejected on the papers alone.

DISCUSSION OF APPLICANT'S CASE

- [24] In argument the applicant submits that even on the respondent's defence of the agreement in respect of work done on risk, the applicant was entitled to payment in respect of invoice 1029. The work that had to be done remained exactly the same, notwithstanding the reduction in the tender price. The tender was granted to the respondent on the strength of the tender documents prepared by the applicant. The applicant contends that the defence of it not being entitled to any payment due to a reduction in the tender price, stands to be rejected as simply untenable and far-fetched.
- [25] The question I need to determine is whether the applicant's claim is disputed on bona fide and reasonable grounds. I need not concern myself in this regard with invoice 1028, it having been paid. I can also not state that the defence in respect of invoice 1033 is not disputed on bona fide and reasonable grounds. The applicant knew the work in respect of invoice 1033 was done for tender purposes, that the respondent may not obtain the tender. Under such circumstances it does not appear implausible that the parties would agree that payment for services rendered would only occur if the tender is successful.
- [26] However, the same can't be said in respect of invoice 1029. The respondent's defence is that the parties agreed that in the event of the respondent being successful with a tender, the applicant would be paid in respect of its services so rendered. On the respondent's own version the tender was materially successful. On the respondent's own version, the applicant was entitled to payment in respect of invoice 1029.
- [27] I find it palpably implausible that the parties would agree that in the event of the tender not being awarded in the exact amount as tendered,

the applicant would not be entitled to any remuneration and all its work would go up in smoke. This appears far-fetched.

[28] The work done by the applicant in respect of invoice 1029 remained the same, despite the reduction of the tender price. Even if I were to accept that this meant a concomitant reduction of the applicant's invoice 1029 (which seems implausible, bearing in mind that the work done remained the same), it would have required of the respondent to at least make payment of a substantial portion of the invoice. The lack of response to make part payment of the invoice, further indicates that the respondent's defence is not bona fide and reasonable.

[29] The fact that the respondent did not respond to the demands for payment in respect of invoice 1029 in the period December 2016 to February 2017, also serves to indicate a lack of bona fides in respect of the respondent's defence pertaining to invoice 1029. Surely the respondent would have indicated then already that it disputed liability, if that was indeed the case. I must take cognisance of such lack of candour, in determining the bona fide and reasonable nature of the defence.

[30] In the matter of *Van Wyk Von Ludwig & Hanekom Inc. v Ferguson*² a party's lack of candour, albeit in the context of an answering affidavit, is dealt with as follows:

"In my view the respondent's lack of candour and respect for the truth leaves much to be desired. His promises and undertakings carried very little weight. His denials and explanations are suspect... In my opinion he was not very frank, open and truthful to the court about his financial affairs. On the evidence before me, I therefore have serious doubts about the credibility of the respondent."

²² [2001] 2 All SA 592 C at 598.

- [31] Taking into consideration the so-called Badenhorst principle³, I find that the debt in respect of invoice 1029 is not disputed on reasonable and bona fide grounds.

DISCUSSION OF INTERVENING CREDITOR'S CASE

- [32] The respondent's defence in respect of the intervening creditor's claim is an agreement that it would no longer be liable to pay rental, in exchange for the improvements to the immovable property, that such oral agreement was concluded after 30 June 2016. I must assess this defence in the light of what happened in that time period.
- [33] The intervening creditor cancelled the lease agreement on 26 July 2016, and requested payment of all outstanding monies. This was followed up by way of e-mails dated respectively 1 August 2016 and 1 September 2016, requesting payment. This correspondence happened in the time period the respondent says the agreement absolving it from rental was concluded.
- [34] I find it palpably implausible that the respondent would after June 2016, during the same period as the intervening creditor's correspondence, conclude an agreement in terms whereof it is not liable for rental, but then not mention the agreement in response, when called upon to pay. It makes little sense to conclude an agreement, but in the same time period then not to rely thereon. It is farfetched to allege the conclusion of the agreement under such circumstances.
- [35] This is further exacerbated by the respondent's attorney's bold denial of liability on 11 November 2016, and the request for an exposition of the amount claimed. Such request for an exposition of the amount claimed conflicts with the respondent's version that the intervening creditor agreed that the amount claimed be written off. Had such agreement existed, there would have been no need for the respondent's attorney

³ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 348 A – C.

to request an exposition, as the amount had been agreed upon and written off.

- [36] Accordingly I find that the intervening creditor's debt is not disputed on reasonable and bona fide grounds. I find that the respondent should be wound up on the basis of section 345(1)(a)(i), read with section 344(f) of the 1973 Companies Act.

ORDER

1. Accordingly I order as follows:
 - a. The intervening creditor be joined as second applicant in the application;
 - b. The respondent be placed under final winding-up;
 - c. Both the costs of the applicant's application and that of the intervening creditor be costs in the winding-up of the respondent.



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M VAN STADEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 11 FEBRUARY 2020

DATE OF JUDGMENT: 19 FEBRUARY 2020

ATTORNEY FOR APPLICANT:	STRYDOM & BREDENKAMP INC.
ADVOCATE FOR APPLICANT:	ADV KLEIN
ATTORNEY FOR RESPONDENT:	JAN ROSSOUW ATTORNEYS
ADVOCATE FOR RESPONDENT:	ADV NEL