



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 41913/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES ✓
- (2) OF INTEREST TO OTHER JUDGES: YES ✓
- (3) REVISED: 25/11/2018

In the matter between:

**THE BODY CORPORATE OF SANTA FE
SECTIONAL TITLE SCHEME NO 61/1994**

Applicant

and

BASSONIA FOUR ZERO SEVEN CC

Respondent

JUDGMENT

Sardiwalla AJ:

Introduction

[1] This is a winding up application brought in terms of section 69 of the Close Corporations Act 69 of 1984 (the Act) read with section 345(1)(b) Companies Act 61 of 1973 (the Companies Act) as read with the Companies Act 71 of 2008 (the Companies Act, 2008). The Applicant is seeking an order for the winding up of the Respondent who it alleges has failed to honour its debts.

The parties

[2] The Applicant, The Body Corporate of the Santa Fe Sectional Title Scheme 61/1994, is a duly registered and incorporated body corporate in terms of the Sectional Titles Act 95 of 1996. The Respondent, Bassonia Four Zero Seven CC (CK 2007/125058/23) is a close corporation registered in terms of the Act.

Background

[3] The Respondent is the owner of Flat Nos 13 and 15 Santa Fe, Soetdoring Street, Bassonia Extension 1 in the Sectional Title Scheme known as Santa Fe. The Applicant being the Body Corporate responsible for the management of Santa Fe is responsible for the collection of all charges and monthly levies for the repair, upkeep, control management and administration of the common property.¹ The Body Corporate may also require owners to make contributions for it to satisfy any claim against it.²

[4] The Respondent has allegedly failed to pay monthly charges and levies for a period up until July 2015 amounting to R330, 135.39 and R221 799.63 for the flats it owns. Following this failure to honour its debt the Applicant has brought winding up proceedings against it.

Applicant's case

[5] The Applicant's case can be summed up as follows: on 20 August 2015 a letter of demand was delivered to the Respondent highlighting the extent of indebtedness and advising the Respondent to remedy within 21 days. The

¹ Section 37(a) of the Sectional Titles Act 95 of 1986.
² Section 37(b) of the Sectional Titles Act.

Respondent failed to pay the debt or respond to the demand letter and thus the Applicant instituted these proceedings.

[6] Another application will also be considered, the Applicant filed its replying affidavit more than 10 days after the answering affidavit had been filed. Thus a separate application for condonation of such late filing has been sought. The explanation offered by the Applicant is that the Respondent raised a number of issues in its papers that required further investigation on the Applicant's part in order to establish the veracity of those issues.

Respondent's case

[7] The Respondent's case can be summed up as follows: Firstly, Theresa Azar, the alleged executrix nominate of the late Michael Azar (the deceased), the sole owner to the Respondent provided the answering affidavit. She states that she and the deceased were married in community of property and an undivided half share of the Respondent belongs to her and by virtue of his death the other half belongs to her being the sole heir of the deceased's estate. She states that she is unable to register her interest until an executor is appointed and suggests that these proceedings are held in abeyance until then. Secondly, the Respondent argues that the Applicant does not have the necessary *locus standi* to bring this matter before the Court because the resolution relied on to evidence the decision is defective. The meeting was allegedly improperly constituted as the Respondent never received notice of such meeting; the *locus standi* of the trustees is called to question; and the resolution is incomplete because it does not specify the date on which the meeting was held.

[8] Further, the Respondent alleges that the Applicant's affidavit is invalid as the oath was not administered in terms of Government Notice R 1258 of 21 July 1972, as amended, and Government Notice R 1648 of 19 August 1977. Additionally, the Respondent argues that the accounts provided by the Applicant indicate that Bassonia Four Seven Zero (Pty) Ltd and not the Respondent owe the amount and there is no supporting evidence in the form of an affidavit by the person who captured the amounts. Further, the Respondent argues that there is an on-going arbitration proceeding between the parties and these should be finalised prior to an application in Court.

[9] The Respondent alleges that the Applicant is using the Close Corporations Act to overcome its shortfalls in proving any amount owed to it. The Respondent to support this claim states that the amount claimed in the Applicant's papers differs greatly from the statement of account. Further, the Respondent states that the winding up would not be for the benefit of its creditors and thus would not be just and equitable and its assets greatly outweigh its liabilities.

[10] Finally, the Respondent seeks condonation for the late filing of the answering affidavit. The deponent states that she only received notice of the application on 8 February 2016 given that she does not normally attend to the management of the properties and her son is responsible for this. She then outlines the steps she took to have the notice of opposition files following her discovery of the application.

Issues

[11] The parties in this case have raised a number of issues for determination and these shall be highlighted below:

- 11.1. Condonation
- 11.2. Preliminary points
- 11.3. The winding up application

Condonation

[12] Both parties have sought condonation in this application and neither have opposed their counterpart's application for condonation. Condonations are regulated by Rule 27(1) of the Uniform Rules of Court which states that:³

'In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.'

[13] This has been discussed in *Born Free Investments 128 (Pty) Ltd v Makulu Plastics and Packaging CC*⁴ highlighted the following three elements to be considered in an application for condonation:

'The two condonation applications were opposed by the applicant on the basis that no good cause was shown by the respondent for its delay in that no reasonable explanation was advanced for the respondent's failure to comply with the Rules of Court and the Practice Rules, secondly, that the respondent failed to satisfy the Court that it has a *bona fide* defense, and thirdly, that the respondent failed to show that the applicant will not be prejudiced.'

[14] The Constitutional Court in *Van Wyk v Unitas Hospital and Another*⁵ considered the first requirement and held that:

³ GN 315 (GG19834) of 12 March 1999.
⁴ (71816/13) [2014] ZAGPPHC 253 (2 April 2014) para 9.
⁵ 2008 (2) SA 472 (CC) para 22.

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'

In this case both parties have applied for condonation. The process of investigation undertaken after the answering affidavit revealed that the sole owner of the Respondent was deceased explains the Applicant's delay. The Respondent's deponent contends that she was not aware of the application until 8 February 2016 after which she sought to address it immediately.⁶ I believe in both instances a reasonable explanation has been advanced and given the lack of opposition this requirement is met.

[15] The second requirement is the presence of a *bona fide* defence. In consideration of this, the Respondent has raised a number of questions that this Court ought to consider the determination of which would negate the application, with that consideration a *bona fide* defence has been raised. Similarly, the replying affidavit serves to answer some questions raised in the answering affidavit and thus I feel meets this requirement even if it does not fall within the meaning of a defence.

[16] Finally, is the issue of prejudice. Given that neither party has opposed the other's condonation application it seems that neither party believes it will be prejudiced by condonation being granted. I am in agreement that the delay occasioned by the late filing has not prejudiced either party. Thus in consideration of all the above, the condonation applications are allowed.

Preliminary points

[17] The Respondent has raised a number of preliminary points the determination of which may mean we are not required to make a decision on the merits of the case. Firstly, the deponent, who is allegedly also the executrix nominate, suggests that the procedure should be held in abeyance until an executor is nominated. The Applicant objects to this on two grounds: that the Respondent being a close corporation has a separate legal personality and the deponent has not shared a marriage certificate which would indicate that she was married to the deceased in community of property. I think the question of proof of marriage is unnecessary to determine, as the Applicant's own exhibit 'RA1'⁷ is indicative that the deponent is the deceased's surviving spouse.

[18] On the former question, does the Respondent continue to exist without its sole member; this is an infinitely more complicated question. In South African Law a

⁶ *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at 640H-I?, the Court disregarded the period in which the applicant was unaware of the judgment in its determination of a condonation application. This approach is adopted in this case.

⁷ Page 80 of the Bundle.

member's interest in a corporation forms part of the deceased's estate until an executor is appointed and makes a determination on how such interest shall be used or distributed.⁸

[19] The question on what happens in a close corporation upon the death of a member married in community of property was considered in *Pro Stevens Products CC*.⁹ This Court found that:

'[T]he CC indeed does not lose its legal status, however on the appointment of the executor, the concern forms part of the sole member's deceased estate, by virtue of the deceased 100% member's interest ownership that now falls in his estate. The new owner of the business would be the deceased's estate, as above, at least until the estate was closed and the stock interest distributed as provided by the will or intestacy laws; see *F J S Painting CC v Absa Bank Ltd* (083/3) [2004] ZASCA 52 28 May 2004. In that case the executor administers the estate that now owns the business, therefore the executor is the one who controls the business. The CC being a juristic person acts through its members and now the member being the estate, before the interest is transferred it would be acting through the executor.'

This Court goes further and holds that:

'On the basis of what has been illustrated above, the Respondent's allegation that as **the CC continues to exist separately from the deceased member's estate, the death of the sole member, holding 100% member's interest had no direct impact on the CC has no merit.**'¹⁰

[20] In casu we are guided by the dicta above, but we consider it with caution. In the *Pro Stevens Products CC* a default judgment had been obtained against the Applicant who was seeking to rescind it. Noteworthy in that case is that the Respondent was aware that the sole member had died and that his surviving spouse was the executor of the State. These factors considered together led to the conclusion that a member's interest in a close corporation forms part of their estate. However, guiding this is the finding that a close corporation maintains its legal status.

[21] In this case I do not think, as the Respondent suggests it is necessary to hold the proceedings in abeyance as an executor is appointed. Firstly, the deceased died in April 2014 and the deceased became aware of this matter in February 2016. A period of almost two years has passed with no explanation as to why an executor has not been appointed, further it was only due to the investigation of the Applicant that this Court became aware that an executor had been appointed at an earlier date but had recused themselves.¹¹ This was information not provided by the

⁸ *Pro Stevens Products CC v Standard Bank of South Africa and Another: In Re Standard Bank of South Africa v Pro Stevens Products CC* Unreported Case No 48241/2010.

⁹ Supra para 30.

¹⁰ Supra para 36.

¹¹ 'RA1' page 80 of the Bundle.

Respondent. Additionally, as the Applicant has suggested and indeed as the Court above indicates the close corporation does not lose its status. I believe it would be unreasonable to hold the proceedings in abeyance, particularly considering the alleged sole heir (a will has not been availed) of the estate is represented in this matter.

[22] The second point raised is the issue of *locus standi*. The Respondent argues that the Applicant does not have *locus standi* because the resolution relied on is defective. Firstly, the Respondent states that the resolution¹² is vague as to whose signatures appear on it. This is cured in reply with the confirmatory affidavits of the trustees.¹³ The Respondent alleges that the meeting was improperly constituted because it did not receive notice, however, no evidence has been brought forward to indicate that this is a decision that ought to have been taken in an owner's meeting or what type of notice was required for such a meeting and thus no finding can be made. Finally, the Respondent alleges the resolution was incomplete because the date at which the meeting was held was not stated. There is a date on the resolution, which signifies when the decision was taken and it would thus be delusive to be overly prescriptive and require that one specifically highlights the date of the meeting.

[23] The Respondent further alleges that the founding affidavit is defective when considered with Government Notice R 1258 of 21 July 1972, as amended, and Government Notice R 1648 of 19 August 1977. This allegation is unclear, the Respondent does not substantiate this further to indicate in what respect the oath has failed to meet the requirements. Therefore, without further explanation this allegation is seemingly a red herring.

[24] Finally, the Respondent argues that there is an on-going arbitration proceedings between the parties and these should be finalised prior to an application in Court. This is another issue cured in reply, the Applicant provided an arbitration award as exhibit 'RA6'¹⁴ which indicates that the matter under arbitration has been concluded and there are no on-going arbitration proceedings. The Respondent provided no evidence indicating that the matter concluded under arbitration is the same matter before this Court.

[25] Therefore, having considered the preliminary points raised by the Respondent and having disposed of them I shall proceed to consider the merits.

¹² Page 13 of the Bundle.

¹³ Exhibit 'RA2-RA4' pages 82-88.

¹⁴ Page 89 of the Bundle.

Winding up application

[26] This application is brought in terms of section 69 of the Close Corporations Act, which defines circumstances under which a close corporation is unable to pay its debt. The legislative provisions on winding up of a close corporation have become less clear since the repeal of section 68 of the Close Corporations Act, which can be described as the enabling provision.¹⁵

[27] The repealed section 68(c) provided for winding up by order of Court if a company is unable to pay its debt. This is no longer in force, however, section 69, which describes the circumstances under which a corporation is deemed unable to pay its debts has remained in force. Which has begged the question what is the effect of repealing section 68 and maintaining section 69 of the Act?

[28] The Courts have been divided on the effect of this repeal and there are a number of conflicting decisions to this effect. There are two schools of thought regarding such applications and this is necessary because of the gap created by the repeal of section 68. *HBT Construction and Plant Hire CC v Uniplant Hire CC*¹⁶ where the Court held that:

'It must therefore be borne in mind that s 68 of Act 69 of 1984 has been repealed and that the applicant can therefore only succeed if there is proof that the respondent is insolvent or that it is just and equitable that the respondent be liquidated.'

[29] A similar position was adopted by the same Court in *Herman and Another v Set-Mak Civils CC*¹⁷ where it went further and interrogated the effect of the repeal of section 68 stating that:

'As stated earlier, section 68 of the CC Act, and in particular section 68(c), referring to the inability of a close corporation to pay its debts as a ground for winding-up, has been repealed. At this stage of our jurisprudence a solvent close corporation can only be wound-up and liquidated by a court order as contemplated in s 81 of the 2008 Act. . .

If the 2008 Act is considered in context the legislature most probably intended to provide for efficient rescue of financially distressed companies, including close corporations, in order to ensure that winding-up and liquidation should be a creditor's last resort. A solvent close corporation can therefore only be wound up by the court on application of a creditor thereof if business rescue proceedings have ended and it is just and equitable, alternatively if it is otherwise just and equitable, to be wound up.'

¹⁵

Section 68 of the Act was repealed in Schedule 3 of the Companies Act, 2008.

¹⁶

2012 (5) SA 197 (FB)

¹⁷

2013 (1) SA 386 (FB) paras 13 and 14.

[30] And thus the first school of thought is captured above. Because section 68 has been repealed a creditor would not be able to effect winding up proceedings only on the basis that a debtor is unable to pay its debts. Thus section 81 of the Companies Act, 2008 would be applicable and a creditor would only have this avenue after business rescue proceedings have ended and if it is just and equitable to grant the order, or if it is just and equitable.

[31] The second school of thought however, differs in its application and in this we are guided by *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carrier CC, ABSA Bank Ltd v Fernofire Bethlehem CC*¹⁸ where the Court disagreed with the above holding that:

'I respectfully disagree with the *ratio decidendi*, in so far as it relates to the issue at hand, in both the well-reasoned judgments in HBT and SET-MAK CIVILS. The misconception of requiring a creditor to prove insolvency before being able to rely on Chapter 14 of the previous Act is apparent merely from the provisions of section 345, read with 344 of the 1973 Act, which clearly does not provide for factual insolvency, merely a deemed inability to pay its debts (and also if it is proved to the satisfaction of the court that the company is unable to pay its debts). The section has always brought about a peculiar consequence, namely that the debtor was deemed to be unable to pay its debts, although it may well be able to pay other debts. One of the grounds available to such debtor to oppose the application for winding-up on this basis was to prove solvency. Then the court still retained its discretion.'

The Court went further and held that:

'As matters stand, to my mind, both section 69 of the Close Corporations Act and section 345 of the previous Act are still deeming provisions. I will henceforth refer only to section 345 and that must be read to include section 69 of the Close Corporations Act. If any of the statutory elements are satisfied, for example the non-payment after being duly served with a demand in terms of section 345, the company is deemed to be unable to pay its debts and the company may, as in the previous disposition, be wound up solely on this ground. Such applicant is entitled to seek a winding-up order on that basis. The court retains its discretion. Should the respondent however prove that it is solvent, then (and only then) the applicant will obviously have to satisfy the requirements of sections 79(2) and 81 of the 2008 Act.'¹⁹

[32] Another proponent of this school of thought is *Abisa Bank Limited v Tamusai Empire Park CC* where the defendant raised the Applicant's inability to rely on Section 68(c) as a defence. Here the Court held that:

'As matters stand, to my mind, both s 69 of the Close Corporations Act and s 345 of the previous Act are still deeming provisions. I will henceforth refer only to s 345, and

¹⁸ 2013 (2) SA 439 (FB) para 12.
¹⁹ Para 14.

that must be read to include s 69 of the Close Corporations Act. If any of the statutory elements are satisfied, for example the non-payment after being duly served with a demand in terms of s 345, the company is deemed to be unable to pay its debts and the company may, as in the previous disposition, be wound up solely on this ground. Such applicant is entitled to seek a winding-up order on that basis.²⁰

[33] This position is also proposed in *FirstRand Bank Ltd v Bunker Hills Investments 499 CC*,²¹ *Standard Bank of South Africa Ltd v R-Bay Logistics CC*²² and *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC*²³ where it was found that commercial insolvency remains a ground for the liquidation of a close corporation.

[34] Thus both positions have been outlined, without a binding decision to chart a clear path forward. I will thus consider this within our set of facts. The Applicant has relied on section 69 of the Act as read with section 345 of the Companies Act, 1973 and provisions of the Companies Act, 2008. The Respondent has raised some defences around this firstly, that it would not be just and equitable to grant the application; secondly that its assets outweigh its liability; and finally that there are some discrepancies in the accounts.

[35] I shall address the discrepancies first because they are the easiest to dispose of. Firstly, the Respondent states that the account states '(Pty) Ltd' and not 'CC' as required for a close corporation and argues that another party is being referred to. The Applicant has explained this as a mistake in reply and this is a reasonable conclusion to reach and thus it is accepted that it is a mistake. Secondly, the Respondent alleges that there are discrepancies in the amounts on the accounts as opposed to those in the pleadings, I am not aware of any such discrepancies and thus cannot consider them. Finally, the Respondent alleges that the evidence of the person who generated the accounts was not included. As I have mentioned above I believe this is another red herring, the Respondent has not disputed the accuracy of the accounts nor tendered any evidence that would render doubt as to the accuracy of the accounts and as such requiring a statement by the author of the accounts is not necessary unless there was doubt as to their accuracy.

[36] Next is the question of whether or not the Respondent is factually solvent and thus cannot be subject to such an application. I must note that as I proceed to answer this question the Respondent has not tendered any evidence before this Court proving that its assets outweigh its liabilities and nothing has been placed before this Court indicating the value of the Respondent's properties. However, we consider this question nonetheless because of the ground relied on by the Applicant.

²⁰ (1151/2013) ZAWCHC 187 para 24, quoting *Scania* para 14.

²¹ 2012 JDR 0755 (GSJ).

²² 2013 (2) SA 295 (KZD).

²³ 2013 (3) SA 212 (GNP).

[37] Having read the decisions of my colleagues above, considering the divergent points of view that are held I am inclined to agree with the second school of thought. The legislature repealed section 68 but opted to maintain section 69 and this must have been deliberate as the legislature had the option to repeal this section too. I agree with the judgment in the *Scania* case that the only manner in which a purposive interpretation of the maintenance of section 69 can be achieved is by construing it as referring to section 344(f) of the Companies Act, 1973. Further, it must be noted that the Court retains its discretion in this matter and had the Respondent proven that it was factually solvent then we would be guided by the *ABSA Bank Limited* decision and the provisions of section 79(2) and 81 of the Companies Act, 2008.

[38] On the question of whether or not it is just and equitable the answer would have to be the same as the above, that section 69 would be illusory if not read within the context of the Companies Act, 344(f) and this it must be purposively interpreted as such and it would not be necessary for the Applicant to prove that.

[39] This of course requires us to interrogate whether or not the Respondent has been unable to pay its debts within the meaning of section 69. Section 69 provides that:

'(1) For the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if-

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days 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 corporation is returned by a sheriff, or a messenger of a magistrate's court, 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 corporation is unable to pay its debts.

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

[40] In casu the Applicant served the Respondent with a notice to satisfy a debt of R330 135.39 and R221 799.63 for its respective properties (an amount considerably

more than R200) and the Respondent neglected to do so within 21 days. In fact to date the Respondent has made no attempt to satisfy these amounts and has not provided any evidence to indicate that it is not indebted to the Applicant. Therefore, I find that the Respondent is unable to pay its debts within the meaning of section 69 and the provisions of section 344(f) of the Companies Act, 1973 are applicable. Section 344(f) states 'a company (this applies to a close corporation) may be wound up by a court if it is unable to pay its debts'.

Conclusion

[39] Therefore, I conclude that the Applicant has made a case for winding up as it has proven that the Respondent is unable to pay its debts within the meaning of section 69 of the Act and that section 344(f) of the Companies Act will be applicable. However, guided by the dicta I have discussed above I opine that a provisional winding up order is granted giving the opportunity to prove that it is factually solvent on the return date.

Order

[40] I make the following order:

- a) The Respondent is provisionally liquidated with the return date of 23 February 2018.
- b) This order should be served on the Master of the High Court, the South African Revenue Services, any employees and be gazetted.
- c) The Respondent shall bear the costs of this Application.

88 Sundetha Molahlehi J

SARDIWALLA C

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG