

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



Case number: 50307/2014

Date: 9 June 2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE

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SIGNATURE

In the matter between:

PAUL CRONJE VAN NIEKERK

APPLICANT

And

NEW CENTURY HOMES (PTY) LTD

RESPONDENT

JUDGMENT

PRETORIUS J.

- [1] This is an opposed application for the liquidation of the respondent. The applicant's claim is based on an acknowledgement of debt entered into with the respondent on 8 December 2011.
- [2] According to the acknowledgement of debt the respondent admitted to be indebted to the applicant in the amount of R5 200 000.00 (five million two hundred thousand rand). The respondent agreed to repay the amount in eleven instalments of R50 000.00 starting on 1 December 2011, eleven instalments of R200 000.00 starting on 1 November 2012 and a final instalment of R2 450 000.00 on 30 October 2013. A covering mortgage bond was provided as security and the director signed surety. The agreement constituted the whole of the agreement between the parties and no waiver of any terms and conditions of the agreement would be binding unless expressed in writing and signed by both parties.
- [3] The respondent paid ten of the eleven instalments of R50 000.00 between 7 September 2011 and 28 September 2012. The eleventh instalment was paid much later. Three of the eleven instalments of R200 000.00 were paid between 16 November 2012 and 15 January 2013. The eight further instalments were never paid. The final instalment of R2 450 000.00 was never paid.
- [4] Due to several demands from the applicant a further R250 000.00 was paid in instalments of R50 000.00 on 30 April 2013, 12 June 2013, 18 August 2013 and 30 September 2013. The outstanding balance is thus R4 221 475.58 with interest to be added.

- [5] The respondent has paid no further instalments and do not dispute the amount still outstanding.
- [6] The respondent's defence is that Noelene Enterprises (Pty) Ltd had taken over the debt of the amount of R2 500 000.00 as Noelene Enterprises had entered into two loan agreements for the amount of R5 000 000 and R2 500 000 respectively on 28 May 2008. This is three years prior to the agreement of debt was signed between the applicant and respondent.
- [7] According to the respondent the respondent was coerced into entering into the acknowledgement of debt in a fraudulent manner by the applicant's attorney. It is clear that the respondent was represented throughout by its attorney. There were negotiations and letters supporting these negotiations between the parties for six months prior to the launching of this application. There were negotiations for six months before the agreement of debt was signed. A letter by the respondent's attorneys, dated 19 October 2011, is attached which set out the proposed terms of the agreement. There can be no doubt that this acknowledgment of debt was agreed to by the representative of the respondent and that the respondent was at all times *ad idem* with the terms of the acknowledgement of debt.
- [8] Nowhere was it mentioned that the respondent is not liable to repay the amounts due to the agreements that the applicant had entered into with Noelene Enterprises. There is no proof whatsoever that Noelene Enterprises was involved in this acknowledgement of debt at all.

- [9] There is no basis to allege that Noelene Enterprises had accepted responsibility for the repayment of the loan. The last instalment the respondent paid was the payment of the amount of R50 000 on 30 September 2013. The court cannot accept that a party who denies owing any money will make payments over a period of two years in the amount of R1 350 000.
- [10] Furthermore this defence of Noelene Enterprises being liable for the respondent's acknowledgement of debt was never raised at all in any correspondence between the attorneys for the applicant and the attorneys for the respondent and was only raised in the opposing affidavit. The respondent's counsel could not refer the court to any term in any correspondence presented to court that the applicant had agreed that the respondent may pay the loan as and when the two transactions the respondent was involved in, would pay.
- [11] Counsel for the respondent conceded that the respondent is legally and factually insolvent, as the respondent's liabilities exceed its assets. It is common cause that the letter sent to the respondent in terms of section 345 of the Companies Act 61 of 1973, by registered post was sent to the *domicilium* address, and it was conceded by the respondent that it had received the letter.
- [12] The letter sent to the respondent on 21 May 2014 provided written notice to the respondent that it intended to proceed with liquidation proceedings against the respondent within 21 days. The notice of motion of the application for the respondent's liquidation was attached to the letter.

[13] The respondent replied that it did not deny owing the applicant money and admitted it was not in a position to pay the outstanding amount, once again referring to the Tshwane and Ga Rankuwa projects which could place the respondent in funds in future. There was no agreement between the applicant and the respondent that the applicant would wait for the respondent to honour the acknowledgment of debt until these two projects were completed. None of the promises previously made by the respondent had been honoured.

[14] I find that the respondent is deemed unable to pay its debts in terms of section 345 (1)(a)(i) of the 1973 Companies Act and section 345(1)(c) of the Act as the respondent has failed on demand to pay a debt which is due; there is an unsatisfied demand insufficient for the purposes of section 345(1)(a) and respondent has conceded it is unable to pay its debts and that its liabilities exceed its assets.

[15] As service of the provisional order should be affected on all the interested parties, the following order is granted.

[16] Order:

1. The respondent company is hereby placed under provisional winding-up;
2. All persons who have a legitimate interest are called upon to put forward reasons why this court should not order the final winding-up of the respondent company on 13 July 2015 at 10h00;
3. A copy of this order must forthwith be served on the respondent company at its registered office and be published in the Government Gazette and Pretoria News newspapers;

4. A copy of this order must be served on the employees of the respondent company at its registered address;
5. A copy of this order must be served on the respondent's employees' trade union at its registered address;
6. Costs of the application will be costs in the liquidation.

Judge C Pretorius

Case number : 50307/2014

Appeal heard on : 2 June 2015

For the Applicant : Adv. JE Ferreira

Instructed by : DR TC BOTHA ATTORNEYS

For the Respondent : Adv. MH Van Twisk

Instructed by : DE BEER JANSE VAN VUUREN INC

Date of Judgment : 9 June 2015