

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4535/2012

In the case between:-

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

v

DANIE THOMAS BOERDERY CC

Respondent

AND

Case No. : 4534/2012

In the case between:-

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

v

DANIEL BAREND THOMAS N.O.

1st Respondent

PETRUS ALBERTUS VAN SCHALKWYK N.O.

2nd Respondent

(in their capacities as trustees of the DANIE
THOMAS TRUST, IT416/06)

JUDGMENT BY:

DAFFUE, J

HEARD ON:

14 FEBRUARY 2013

DELIVERED ON:

21 FEBRUARY 2013

INTRODUCTION

- [1] I am required to adjudicate two applications which are interwoven, to wit applications for the provisional winding up of the Danie Thomas Boerdery CC and the provisional sequestration of the Danie Thomas Trust, represented by its two trustees, Daniel Barend Thomas and Petrus Albertus van Schalkwyk.
- [2] The applicant in both applications is the Standard Bank of South Africa Ltd. The one trustee, Mr Van Schalkwyk, played no role in the litigation and apparently also not in any of the business dealings with applicant or the farming operations of Mr Thomas, the close corporation or the trust. As can be gathered from the names of the close corporation and the trust as well as the affidavits before me, Mr Thomas was the key figure in both entities. In fact, it is probably correct to refer to the Thomas group, consisting of Mr Thomas personally, his close corporation and his trust. The trust is the owner of several farms in the Kroonstad district. Initially Mr Thomas farmed for his own account, but from August 2010 farming operations were conducted on the farms through the close corporation.
- [3] Full sets of papers have been filed in both applications and the legal representatives agreed that the applications be argued simultaneously. Applicant was represented by Adv P Zietsman SC and respondents by Adv J G Bergenthuin SC.

IDENTIFICATION OF THE ISSUES

- [4] The issues to be determined are the following:
- 4.1 Whether the requisites for a provisional sequestration order have been proven. Applicant relies on actual insolvency as well as certain acts of insolvency in terms of sections 8(a), 8(c), alternatively 8(d) and 8(e) of the Insolvency Act, 24 of 1936. Respondent trust denies this.
 - 4.2 Whether the requisites for a provisional winding up order have been proven. Applicant relies on the close corporation's insolvency, its inability to pay its debts and that it is just and equitable that a winding up order be issued. Respondent close corporation denies this.
 - 4.3 Whether the applicant's claims in respect of both applications are *bona fide* disputed on reasonable grounds. These averments by the respondents are denied by applicant.

FACTS NOT IN DISPUTE

- [5] The following facts are not in dispute:
- 5.1 That respondents were at all relevant times customers of applicant.
 - 5.2 That applicant advanced monies to respondents from time to time, *inter alia* by way of overdraft facilities, medium term loans and in respect of the close corporation, also several vehicle and asset finance facilities.
 - 5.3 A general notarial bond was registered over the movable assets of the close corporation in favour of

applicant in the principle sum of R10 million and an additional amount of R2,5 million.

- 5.4 A mortgage bond was registered in favour of applicant in the amount of R3,5 million over certain immovable properties of the trust and a further covering bond in the amount of R1.8 million was registered in favour of applicant over another two farms purchased by the trust late in 2011. Applicant did not advance the amount of R1.8 million to the trust to purchase the properties, but payment was effected by the close corporation which made use of its overdraft facilities with applicant. An interim overdraft facility in the amount of R1.1 million was granted to the close corporation in March 2012, but called up on 21 July 2012 whereby the original facility of R2.5 million was reinstated.
- 5.6 Deeds of suretyship were entered into in terms whereof Mr Thomas, the close corporation and the trust bound each other as sureties in favour of applicant for all the debts of the other entities within the Thomas group.
- 5.7 One of the managers of the Kroonstad branch of applicant, a certain Mr Von Wielligh, acted as personal banker of the Thomas group. On 3 August 2012 he was dismissed after being found guilty of conducting business dealings for financial benefit with Mr Thomas without applicant's knowledge. The investigations and disciplinary hearing were direct consequences of a letter of complaint written by Mr Thomas to applicant

earlier which letter contained several serious accusations against Mr Von Wielligh.

- 5.8 Mr Thomas and his family vacated their farmstead at the end of July 2012 and relocated to Pretoria, leaving a Mr Grobler and other employees in control of farming operations.
- 5.9 On 3 August 2012, the very same day when the aforesaid disciplinary hearing was conducted, applicant brought an *ex parte* application to perfect its security in terms of its general notarial bond. Hereafter the close corporation's live stock only was sold by agreement. The net proceeds of R3 135 506,21 were credited to the current account of the close corporation with applicant. The remainder of the attached movables is still under the control of applicant.

FACTS IN DISPUTE

[6] The following are in dispute:

- 6.1 Applicant's *locus standi* as creditor, i.e. whether its claims are *bona fide* disputed on reasonable grounds.
- 6.2 The amount of applicant's claims and whether these were due and payable when the applications were issued.
- 6.3 The value of the two estates of the respondents, and in particular the trust estate.
- 6.4 Whether or not the trust is insolvent or has committed any of the acts of insolvency alleged by applicant.

- 6.5 Whether sequestration will be to the advantage of creditors.
- 6.6 Whether the close corporation is unable to pay its debts and is actually insolvent.
- 6.7 Whether it is just and equitable that a winding up order be granted.
- 6.8 Whether the applications are an abuse of process.

RESOLVING THE DISPUTED FACTS: CERTAIN LEGAL PRINCIPLES

[7] Mr Bergenthuin, with reliance on **Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd** 1982 (1) SA 398 AD at 430H and **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 AD at 634 - 635 argued that insofar as there are factual disputes on the papers before me, I should adjudicate the matters upon the evidence of respondent together with the admitted facts in applicant's affidavits. Contrary thereto, Mr Zietsman submitted that the principles enunciated in these two judgments are applicable to application procedure in general, but do not apply to sequestration and winding up procedure. He quoted **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 AD as authority. Both counsel are wrong. The principles set out in the two judgments relied upon by Mr Bergenthuin apply to the adjudication of factual disputes to establish whether **final** relief in application proceedings, including sequestration and liquidation proceedings, should be granted. This is clear from a proper reading of **Kalil v Decotex (Pty) Ltd and Another** *loc cit* and **Paarwater v South Sahara Investments (Pty) Ltd** [2005] 4 All SA 185

SCA para [4] at 187. In the first judgment the Appeal Court dealt with the dismissal of an application for provisional winding up by the court *a quo* and the approach adopted is relevant to the adjudication of applications for provisional winding up only. (*loc cit* at 978 I - 980 C.)

- [8] In both applications respondents allege that they complied with all obligations in terms of the several agreements and that no instalments were due and outstanding when the applications were issued. Applicant's deponent elected not to respond at all to these averments and it must therefore be accepted as correct. It must also be emphasised that it is not applicant's case in both founding affidavits that respondents breached any agreements and if so, in what manner with reference to failure to pay instalments. The close corporation's overdraft facility of R2.5 million was never called up, whilst we know that the present debit balance is just over R660 000.00, leaving funds in excess of R1.8 million available.
- [9] Applicant chose to selectively attach some of the agreements allegedly relevant to this application. Its deponent alleges under oath that annexure C1 is proof of the medium term loan advanced to the close corporation, the outstanding amount which is just over R7 million according to a certificate by himself attached to his affidavit. This is either blatantly false or at the best for applicant an indication what can go wrong if parties rely on the evidence of people who do not have first hand knowledge of facts. Annexure C1 is not an agreement at all. The first seven pages thereof is

clearly a quotation with the intent to enter into a loan and it is dated 30 March 2012. The eighth to seventeenth pages are in English, dated 1 July 2010 and apparently incorporating applicant's standard terms applicable to a totally different agreement which is not before me. This portion does not contain any information pertaining to the loan amount, interest, instalments etc. Applicant has thus not placed reliable evidence before me that the close corporation owed it R7 383 436.71 as on 19 October 2012 in respect of a medium term loan. It is true that the financial statements relied upon by the close corporation show certain liabilities towards applicant as on 29 February 2012, e.g the amount due under the heading "oortrokke bankrekenings" was R8 442 827.00. This and other historical figures cannot be utilised to cure applicant's problems. Applicant has not proven the *quantum* of its claims.

- [10] The value of the close corporation's movables attached earlier and which were not disposed of is not disputed by respondents. This value is R757 950.00. We know that the financial statements reflect a loan account in terms whereof the trust owes the close corporation R3.7 million. It is the respondent's case that it has a claim against applicant, which has not been quantified yet, but that it is not insolvent if that is taken into account. The close corporation's case is that due to the actions of applicant's officials and its manager, Mr Von Wielligh in particular, the business was effectively terminated. I must say that the close corporation will find it difficult to prove damages, bearing in mind the allegations

and calculations pertaining to loss of income of R1 339 144.00 referred to in the answering affidavit. A much more convincing complaint is Mr Von Wielligh's promise in 2011 that if the two adjacent farms were purchased at the price of R1.8 million, applicant would advance the amount needed. It so transpired that applicant indeed registered a covering bond over the properties purchased, but failed to lend the money as promised. Instead and after some time – in March 2012 only - applicant granted an interim overdraft of R1.1 million to the close corporation. The timing hereof is probably not a co-incidence. Annexure C1, the quotation in respect of a proposed loan of R8 million, is dated 30 March 2012. The close corporation paid the purchase price of the two farms on behalf of the trust and this had a negative effect on cash flow and working capital. Not only did applicant receive extra security, but after some time made insufficient funds available, i.e. R700 000.00 less than promised and also later than required.

- [11] Mr Thomas avers that he farmed all the years since leaving school for his personal account until his personal banker, Mr Von Wielligh became involved in his farming operations and even his personal life. He dictated when to buy and sell life stock and urged him to borrow more than the deponent believed was required. Von Wielligh went so far to “force” his client to register a close corporation in order to conduct his farming operations through this entity. The bank manager threatened to terminate his overdraft facility if he failed to adhere. In August 2010 he started farming through

the close corporation. Credit facilities increased from just over R2 million to about R10 million at a stage. Later on Mr Thomas learnt from his legal representatives that the advice of the bank manager might have been motivated in order to escape the application of the National Credit Act and the Consumer Protection Act. Applicant's deponent merely denies this version in reply, but fails to rely on an affidavit of Mr Von Wielligh, the person being accused and the only official that could shed any light on the topic. I shall deal hereunder with the particular issues and the possible relevancy of the two Acts.

[12] In order to consider the trust's alleged insolvency as well as the alleged acts of insolvency, it is necessary to evaluate the facts. Applicant relies on a Mr Snyman's unsworn valuation of certain of the trust's properties in the amount of R5 million. This is not acceptable evidence. In any event the so-called comparable properties relied upon range from selling prices of as low as R4 690.00 per hectare to R16 279.00 per hectare. Mr Snyman neglected to indicate his experience at all and in particular his knowledge of farm values in the particular area. Mr De Hart, a senior Kroonstad attorney and experienced sworn valuer, valued all the farms in the total amount of R 9 192 493.00. His valuations are properly deposited to under oath. I have no difficulty to accept his evidence.

[13] It is applicant's case that Mr Thomas left the farms in July 2012 and that he, the trust and the close corporation no

longer intends to conduct any farming business. Further reliance is also placed on a letter written by Mr Thomas' attorney. I shall deal with the contents of the letter later. Suffice to say that Mr Thomas made it clear that his departure to Pretoria could never be regarded as evading or delaying payment of the trust's debts. In any event, his version is that no trust assets were dissipated with the effect of prejudicing creditors or preferring one above the other. The only indication to selling of the farms is found in the letter to applicant's attorneys with which I shall deal later. There is no reason to doubt or reject Mr Thomas' version in this regard.

- [14] I shall deal with the relevant law applicable to sequestration and liquidation under the next heading and shall thereafter apply same to the facts *in casu*.

THE APPLICABLE LAW

- [15] Generally speaking a creditor who wishes to obtain satisfaction of his claim may avail himself to the institution of action procedure and once judgment has been obtained, an execution process may follow in terms whereof the debtor's assets are attached and sold in execution. Nothing prohibits a creditor from making use of the machinery of the Insolvency Act (in respect of debtors who are natural persons, partnerships and trusts), or the provisions of Chapter 14 of the Companies Act, 61 of 1973, ("the 1973 Act") if applicable, or Part G of Chapter 2 of the Companies Act, 71 of 2008 ("the new Companies Act") read with Item 9

of Schedule 5 thereto (in the event of solvent companies and close corporations). Insofar as sequestration procedure in accordance with the Insolvency Act is relevant, it must be taken into consideration that the main object of insolvency proceedings is to benefit creditors, not one creditor or some creditors, but the general body of creditors. Insofar as a *concursum creditorum* comes into being once a sequestration order is made, a further object of insolvency proceedings is achieved insofar as creditors are protected against ‘the possible greed and mendacity of other creditors.’ See **Joubert et al** LAWSA 2nd ed, vol 12, para 199 with reference to **Richter v Riverside Estates (Pty) Ltd** 1946 OPD 209 at 223.

- [16] In accordance with section 9(1) of the Insolvency Act, a creditor with a liquidated claim of not less than a R100 against a debtor who has committed an act of insolvency or is insolvent, may apply to the High Court for the sequestration of the debtor’s estate. Section 9(2) of the Insolvency Act reads as follows:

“A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition shall be reckoned as a liquidated claim for the purposes of subsection 1.” (emphasis added)

It is clear that in order to qualify as a creditor for purposes of a compulsory sequestration application, an applicant does

not have to prove that any amount of his accrued claim is due and payable as at the date of hearing.

- [17] Section 10 of the Insolvency Act deals with the requirements for provisional sequestration and unlike section 12 applicable to final sequestrations, an applicant for provisional sequestration does not have to satisfy the court that the requirements have been met, but merely has to make out a *prima facie* case. The section reads as follows:

“If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* – (a) the petitioning creditor has established against the debtor a claim as such as is mentioned in sub-section 1 of section nine; and (b) the debtor has committed an act of insolvency or is insolvent; and (c) there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.”
(emphasis added)

There is ample authority that even if the three requirements referred to in section 10 have been met, a court is not obliged to issue a provisional sequestration order, but has a discretion whether or not to grant such order. See **Epstein v Epstein** 1987 (4) SA 606 (C) at 612G, **LAWSA** *loc cit*, para 226 and **Mars, The Law of Insolvency in South Africa**, 9th ed, para 5.21 at 123 – 124.

[18] Section 8(a) of the Insolvency Act insofar as might be relevant here is concerned with the departure of a debtor from his dwelling with the intent by so doing to evade or delay payment of his debts. Section 8(c) is applicable when a debtor makes or attempts to make any disposition of his property which has or would have the effect of prejudicing his creditors or preferring one above the other. Section 8(d) applies when a debtor removes or attempts to remove his property with the intent to prejudice his creditors or preferring one above the other. In terms of section 8(e) an act of insolvency is committed if a debtor makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.

[19] Mr Bergenthuin at no stage submitted that the application for winding up of the close corporation should be considered in accordance with Part G of Chapter 2 of the new Companies Act which is applicable to solvent companies and close corporations. Thus the provisions of Chapter 14 of the 1973 Act applies to the close corporation as provided for in the aforementioned Item 9 of Schedule 5 to the new Companies Act. Therefore and insofar as applicant relies on the close corporation's inability to pay its debts and that it is just and equitable to be wound up, subsections 344(f) and (h) of the 1973 Act should be considered. No statutory demand was issued by applicant to the close corporation in accordance with section 69(1) of the Close Corporations Act – see also section 345(1) of the 1973 Act - for the deeming provision that the close

corporation is unable to pay its debts, to come into play. An unpaid creditor who cannot obtain payment and who brings his claim within the parameters of the particular subsection is entitled to relief, subject to the limited discretion of the court. See **Absa Bank Ltd v Rhebokskloof (Pty) Ltd** 1993 (4) SA 436 (C) at 440 - 441 and Meskin, **Henochberg on the Companies Act** vol 1 at 698 - 700.

- [20] The ground for liquidation based on the just and equitable principle, “postulates not facts, but only a broad conclusion of law, justice and equity, ...” See **Moosa NO v Mavjee Bhawan (Pty) Ltd** 1967 (3) SA 131 (T) at 136. This expression and ground for liquidation have been considered in numerous judgments. See *inter alia* **Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) LTD** [1999] 2 All SA 268 (W), (where the respondent company closed a number of its branches, engaged in large-scale retrenchments, virtually closed its head office and diverted funds to an overseas concern), **Sunny South Cannery (Pty) Ltd v Mbangxa** [2001] 1 All SA 474 (SCA) at 481 (the respondent company suspended its business, has not been trading for three years and was factually hopelessly insolvent) and **Pienaar v Thusano Foundation** 1992 (2) SA 552 (BGD), (the company’s workforce was discharged, there were internal disputes and it was inconceivable that it would be able to finalise a number of projects as the Governments of South Africa and Bophuthatswana which subsidised it, withdrew their financial assistance). Several

other examples of e.g. the disappearance of a company's substratum can be provided, but in essence, if its business has closed down with no prospects to become viable in future, the necessary conclusion should be arrived at that winding up is just and equitable.

[21] I am mindful of the fact that applicant needs to establish a *prima facie* case only in respect of both applications and in adjudicating the applications I am bound to consider all the affidavits placed before me. See **Kalil v Decotex (Pty) Ltd and Another** *loc cit* at 979 B – H. I must add that neither of the parties, and Mr Zietsman on behalf of the applicant in particular, applied that the matter be referred for oral evidence notwithstanding the issues raised by me during oral argument.

[22] If an applicant's claim is *bona fide* disputed by the respondent on reasonable grounds, an application for a sequestration or winding up order cannot succeed. In terms of the so-called **Badenhorst Rule** (**Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T) at 347H – 348C) accepted by the Appeal Court in **Kalil v Decotex**, *loc cit*, the respondent must show the existence of a *bona fide* dispute on reasonable grounds. Corbett JA (as he then was) puts it as follows in **Kalil v Decotex**, *loc cit*, at 980B – D:

“Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on

bona fide and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.” (emphasis added)

- [23] Brand, J (as he then was) summarised the approach to be adopted in applications for provisional winding up where a respondent disputes its liability to the applicant, with reliance on the guidelines laid down in Kalil v Decotex (Pty) Ltd and Another *loc cit* and I quote:

“Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent’s liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant’s version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, *inter alia*, the strength of the respondent’s case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent’s indebtedness, the test is whether it appeared on the papers that the applicant’s claim is disputed by respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about

an applicant's claim thus cuts across the approach to factual disputes in general. “(emphasis added)

See **Payslip Investment Holdings CC v Y2K Tec Ltd** 2001 (4) SA 781 (C) at 783 G – I and **Helderberg LaboratoriesCC v Sola Technologies** 2008 (2) SA 627 (C) paras 21 -23.

[24] The following dictum of Thring J in **Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)** 1998 (2) SA 208 (C) at 219F – 220A demonstrates the current position of the law in my respectful submission:

“Apart from the fact that they dispute the applicants' claims, and do so *bona fide*, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial... It seems to me to be sufficient for the trustees in the present application, as long as they do so *bona fide*,... to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company.”

[25] The issue was more recently considered again by Griesel J in **Investec Bank Ltd v Lewis** 2002 (2) SA 111 (C) insofar as a defence was raised that the bank's restructuring of a financial transaction prejudiced the sureties and the respondent in the sequestration proceedings in particular. The learned judge was not prepared to grant a provisional sequestration order and remarked *inter alia* as follows at 119F - H: "...there appears to be merit in the argument on behalf of the respondents, namely that Investec, in breach of its contractual obligations, acted in a way that prejudiced the sureties. However, bearing in mind the test to be applied at this stage, it is both unnecessary and undesirable to come to any final conclusion as to the legal validity of the defence.....It is sufficient to find ...that the debt ... is disputed on *bona fide* and reasonable grounds."

See also **Standard Bank of South Africa Ltd v Essop** 1997 (4) SA 569 (D) at 575 – 576D; **Millward v Glaser** 1950 (3) SA 547 (W) at 550 H – 551 B; **Amod v Khan** 1947 (1) SA 150 (NPD) at 152 – 153.

[26] *In casu* respondents *inter alia* rely on the misconduct of at least one senior employee of applicant, to wit Mr Von Wielligh. It is alleged that reckless credit was granted to the close corporation as defined in section 80 of the National Credit Act, 34 of 2005 ("NCA"). It is furthermore respondents' case that several transgressions of the Consumer Protection Act 68 of 2008 (CPA) occurred for which applicant is to be blamed and for which it must accept responsibility. These include unconscionable conduct and

absence of fair dealing. For these reasons, it is necessary to consider the relevant sections in these Acts that might be applicable. Before I do so it is important to indicate that the close corporation, bearing in mind its nature as a juristic person and the fact that its turnover exceeds the threshold provided for in the NCA and the definition of “juristic person” in the CPA, is not entitled to protection under either Act. See *infra* for the threshold applicable to juristic persons in the CPA. However and based on the averments by Mr Thomas to the effect that he was not only influenced, but threatened to conduct his farming operations through a close corporation whilst all the years prior to that he conducted same in his personal capacity, it may still be relevant to refer to the applicable legislation as another court may find that the corporate veil should be lifted as submitted by Mr Bergenthuin. The trust has two trustees only and therefore qualifies for protection under the NCA, bearing in mind the definition of “juristic person” in this Act, but it does not qualify for protection under the CPA. See in this regard the definition of “juristic person” which includes any trust as defined in the Trust Property Act, 57 of 1988, read with sections 5(2)(b) and 6 as well as the Minister’s notice GN 294 of 1 April 2011 pertaining to the threshold determination issued in accordance with section 6, which is presently R2 million.

- [27] In terms of section 80 of the NCA, read with sections 83 and 84, a court finding that reckless credit was advanced, may set aside all or part of a consumer’s rights and obligations

under the agreement or suspend the force and effect thereof. Section 40 of the CPA forbids a supplier of services, which includes banking services, to *inter alia* use undue influence, pressure, harassment, duress, unfair tactics or similar conduct in connection with e.g. the supply of services or conclusion of an agreement pertaining to the supply of services. In terms of section 41 it is forbidden to make false, misleading or deceptive representations in relation to *inter alia* the marketing of services. The powers of the courts to ensure fair and just conduct, terms and conditions are wide and the reader is referred to section 52(3) of the CPA. Courts may even order that compensation be paid to the consumer for losses suffered relating to the impugned agreement.

APPLICATION OF THE LAW TO THE FACTS

[28] I enquired from both counsel whether they agreed with my proposition that, notwithstanding the fact that the requirements differ insofar as sequestration and winding up applications are concerned, if the one application succeeds, the other is bound to succeed as well, and *vice versa*, if the one fails, the other should fail accordingly. Both agreed. I was also invited to write one judgment only. This appears to be a sensible approach. No doubt the two applications are intertwined, but furthermore, it is evident that not only did Mr Thomas play a key role in the affairs of the close corporation and the trust – they were for all intents and purposes his *alter ego* - but also that applicant in all probabilities advanced monies to the close corporation based on the suretyships of

the trust and Mr Thomas as well as the security it has insofar as the mortgage bonds over the trust's immovable property are concerned.

[29] Applicant knew long before the institution of the two applications that its manager and personal banker of the Thomas Group not only had secret dealings with Mr Thomas and/or his entities, but that several serious accusations were made concerning him. The paper trail starts with Mr Thomas' written complaint and carries on with his attorney's letters of 24 July 2012 and 25 October 2012 right through to his answering affidavits. This lends support for the view that he has not now suddenly made up a version in order to avoid sequestration and liquidation. Mr Thomas' allegations contained in the two answering affidavits pertaining to Mr Von Wielligh, and also his successor, Mr Van der Merwe, have not been denied by either of them. Instead applicant decided to rely on the allegations of Mr Pillay, a manager based in Durban who I accept is overall in charge of respondents' accounts with applicant. However, he has no personal knowledge of the factual situation in Kroonstad and could not possibly and responsibly respond to the serious allegations.

[30] As is apparent from the case law it is not necessary for respondents at this stage to prove their defence. I am of the view that sufficient information has been placed before me to show that applicant's claims, or at least a substantial portion thereof, are *bona fide* disputed on reasonable grounds. It is

not the function of this court to adjudicate respondents' allegations in order to ultimately find whether or not reckless credit was given as defined in section 80 of the NCA, and if so, whether the NCA could be applied insofar as the close corporation is the consumer, or whether applicant should be sanctioned in accordance with the powers given to courts to ensure fair and just conduct, terms and conditions, as provided for in section 52 of the CPA, again on the basis that the consumer was in reality Mr Thomas and not his close corporation or trust. At this stage I am satisfied that if respondents are able to prove the allegations made herein at the eventual hearing of the matter in the appropriate forum, the defences relied upon might succeed.

- [31] Insofar as I am of the view that the financial position of the group as a whole should be considered for the reasons stated above, the net proceeds of the immovable property registered in the name of the trustees of the trust, which are valued in excess of R9 million, might be sufficient to ultimately settle all valid claims of applicant. In *casu* applicant is in the fortunate position that it is the registered mortgage bondholder over all the immovable properties of the trust and has already perfected its notarial bond and attached the close corporation's movable property. As indicated all the live stock so attached has been sold for its benefit. It may be that applicant is not fully secured in respect of all its debt, but it is in any event in a much better position than any other possible creditors of the close corporation in particular.

[32] Although a strong argument has been advanced that the close corporation, if regarded in isolation, is hopelessly insolvent, that it is unable to pay its debt and that it is also just and equitable to be wound up, I still have a discretion whether or not to grant the provisional winding up application. It must be considered why winding up instead of action procedure was resorted to. When the application was brought to perfect the notarial bond, action procedure was anticipated and the order obtained provided for institution of action within a month. Mr Zietsman supplied the answer. His client changed its mind in order to prevent a situation whereby it might take two years or longer to finalise the litigation due to the defences raised. It seems that applicant wanted to side-step a defended action. This is exactly Mr Bergenthuin's argument. He submitted that applicant did not want to be embarrassed by a counterclaim. It brought the application not to obtain a *conkursus creditorem*, but for an ulterior motive. He argued that the present proceedings were an abuse of process. He also submitted that applicant had not approach the court with clean hands for the reasons set out above. There is merit in his arguments.

[33] As indicated earlier, at this stage applicant only has to prove on a *prima facie* basis that the requisites for a provisional sequestration of the trust have been met. I am not convinced that these have been established. Serious doubt has been cast upon a portion of applicant's claims and I am

also not prepared to find that the trust is either insolvent or that it has committed any of the acts of insolvency relied upon by applicant. In relocating to Pretoria Mr Thomas could not have any intention to evade or delay payment of the trust's debts. In fact there is no averment that any amounts were payable at that stage. Furthermore the applicant is the registered bondholder and could, if it so wished, institute action in order to obtain judgment and have the properties declared especially executable. There is no averment that Mr Thomas removed or attempted to remove trust property (which are all immovable) with the intent as set out in section 8(d). The letter relied upon as proof of acts of insolvency, in particular insofar as sections 8(c) and 8(e) are concerned, must be seen in proper context. When this letter was written respondent already anticipated that action would be instituted (or a counterclaim filed) to claim damages from applicant. It was merely conveyed that the group intended to sell all assets and that the proceeds would be used to settle applicant's claims. In the event that there is a shortage, applicant should write off the balance in light of the damages caused by its officials and which were explained earlier in the same letter. It has not been shown that the trust has any other creditors except applicant and in the circumstances and bearing in mind the expensive machinery of insolvency procedure, I am not convinced that sequestration would be to the benefit of the body of the trust creditors, should it be found that there are such further creditors. In any event and even if I am wrong in this regard and on the basis that applicant has prima facie shown that all the requisites for a

provisional sequestration have been met, I still have a discretion to grant or dismiss the application.

RELIEF

[34] This is not an application for business rescue, but in exercising my discretion I must consider the fact that the close corporation which is clearly financially distressed, might be saved, bearing in mind not only the defences referred to above, but in particular when the trust's immovable properties are eventually sold. Consequently I have decided to exercise my discretion against applicant for the reasons stated herein. I also exercise my discretion in favour of the trust on the same basis as set out above and furthermore, as agreed to by both counsel, the two entities should fall together or stand together. In my discretion they should not be allowed to fall and therefore the applications are doomed to fail. There is no reason why applicant should not be burdened with the costs of both applications.

ORDER

[35] The following orders do issue:

- 35.1 Application number 4534/2012 for the provisional sequestration of the Danie Thomas Trust is hereby dismissed with costs.
- 35.2 Application number 4535/2012 for the provisional winding up of the Danie Thomas Boerdery CC is dismissed with costs.

J. P. DAFFUE, J

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