FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 1597/2013

In the matter between:-

PEARL CONSTRUCTION (PTY) LTD Applicant

and

SEABO CONSTRUCTION, PLUMBING AND BUSINESS VENTURES CC Respondant

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JUDGMENT BY: THAMAGE, AJ

HEARD ON: 12 SEPTEMBER 2013

DELIVERED ON: 26 SEPTEMBER 2013

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[1] This is an opposed application for provisional liquidation of the respondent together with ancillary relief.

[2] Respondent had sub-contracted applicant for the supply and installation of electrical works at the Bloemfontein Public Library and there was a further contract of the supply and installation of air-conditioning of the same library.

[3] Applicant's version is to the effect that there is an undisputed amount of at least R40 296,06 in respect of air-conditioning contract and R45 285,48 in respect of electrical work. These figures were highlighted in the applicant's replying affidavit.

Respondent's version is that an amount of R72 416,03 which represent the balance owed to the applicant was paid and that an amount of R10 633,00 was outstanding pending the issuing of Certificate of Compliance.

[4] This application is based on three grounds, namely that the respondent must be deemed to be unable to pay its debts in terms of section 69(1) of the Close Corporation Act, read with Act 71 of 2008 ("the Companies Act"), secondly that the respondent is insolvent, and lastly that it is just and equitable that the respondent be liquidated. The respondent is disputing the said three grounds and further state that applicant had cited the wrong respondent as the close corporation was converted into a company on the 11 July 2012.

[5] It is thus prudent to consider the issue of conversion from a close corporation to a company before venturing into the merits of this application. Schedule 2, section 2 of the Companies Act 71 of 2008 provides as follows:

> "All the assets, liabilities and obligations of the close corporation forthwith (after conversion) rest in the company.
> Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, including that any other thing done by or in respect of the company. Any enforcement procedures that could have been commenced with in respect with the close corporation in terms of the Close Corporation Act 1984, for conduct occuring before the date of registration, may be

> brought against the company on the same basis, as if the conversation had not occurred.
> The juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company."

[14] Respondent counsel argued that this application was launched approximately nine months after the conversation of the respondent from close corporation to company and the application is destined to fail. It is interesting to note that on the 21 March 2013, a letter was written by the respondent's attorney to applicant's attorney *inter alia* stated

> "We confirm that we are acting on behalf of Seabo Construction Plumbing & Business Ventures CC".

This letter was written almost eight months after the conversation. Again on the 26 March 2013, another letter was written by respondent's attorney to applicant's attorney stating as follows: "We confirm that the <u>Close Corporation</u> is doing well." (my emphasis) These two letters in contrast with the respondent counsel argument, is irreconcilable because on the correspondence, the respondent also refers itself as a close corporation.

[7] The argument of counsel for the respondent has no merits if one has to consider the provisions of schedule 2 of section 2 of the new Companies Act. The application for liquidation is an enforcement measure that could have been commenced with

against the close corporation (even if it was converted) in terms of the Close Corporation Act, for conduct occurring before the date of registration, as if the conversion had not occurred. It is thus my view that the issue of conversion does not make any difference and it cannot be said that a wrong party has been cited. Respondent further argued that applicant should at least after reading the respondent affidavit wherein it was indicated that the respondent is a company, withdrew the application and serve another application citing the company. This is unnecessary taking into consideration the provisions of schedule 2 of section 2 of the new Companies Act.

[8] Coming now to the merits of the application, as aforesaid, applicant is proceeding on three grounds. The first ground is respondent to be deemed to be unable to pay its debts. The respondent disputes the applicant's claim and further submits that such disputed liability is *bona fide* based on reasonable grounds. Applicant in this regard relied on section 69(1)(a) of the Close Corporation Act read with section 345 of the Old Companies Act 1973.

[9] The deeming provisions comes into effect when the "solvent" company, i.e. although its assets exceed its liability but does not have liquidity or cash resources to meet its debt obligations or when they are due, i.e. it becomes commercially insolvent. The onus is thus on the applicant to prove that the respondent is unable to pay its debts. In instances of the company, a minimum debt of R100 over a period of three weeks is sufficient for

applicant to acquire *locus standi* and in instances of close corporation, a debt of R200 over a period of twenty one days is sufficient for purposes of *locus standi*, see section 345 and 69(1) referred to *supra.*

[10] Counsel for the respondent argued that for the fact that a wrong party has been cited and thus the service of demand was done in terms of section 69(1) of the Close Corporation Act and not section 345 of the Companies Act, it is inappropriate for the applicant to rely on the deeming provision. I have already dealt with the provisions of schedule 2 of section 2 of the new Companies Act and consequently this argument falls off.

[11] From the written heads of argument as well as oral submissions made by both counsel, it is clear that they are *ad idem* that commercial insolvency is one of the grounds upon which a creditor may bring the application for liquidation of a company or a close corporation. I thus will not venture into section 81(1)(c) of the new Companies Act. It is apposite to mention that the judgment of this division of Zietsman, AJ in **<u>HBT Construction and Plant Hire CC v Uniplant Hire CC</u>** 2012 (5) SA 197 (FB) was overruled by the judgment of Snellenburg AJ in **<u>Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers</u>** 2013 (2) SA 439 (FB). I thus concur with the latter judgment in that the winding-up of a close corporation or even a company can be sought and granted on the deeming provision irrespective of section 81(1)(c) mention *supra*.

[12] On 30 October 2012 and 20 November 2012 amounts of R109 545,00 and R192 746,77 were due by the respondent to the applicant according to the invoices sent to the respondent. The respondent through Martin Koster replied after receipt of the invoices, as follows:

> "I received the final account that you had sent to me. Everything looks in order … I will proceed to draw up a payment certificate and forward it to the guantity survey to be processed."

Respondent however denied that he admitted liability in that Mr Koster is not his employee but the employee of Public Works.

[13] Section 69(1)(a) of the Close Corporation Act demand was issued on the 30 January 2013 and was served upon the respondent on the 7 February 2013. On the 21 February 2013, respondent through its attorney disputed applicant's claim and stated that the only amount outstanding was an amount of R72 416,08 and that same was to be paid on the 8 March 2013. This amount was however paid on the 9 March 2013. Applicant requested respondent financial statement, but same was not provided, respondent indicated that it is solvent. According to the respondent, the only outstanding amount was R72 416,08 which was paid and that R10 633,00 was a retention money pending the issuing of certificate of compliance, that the above calculation was done by the quantity surveyor and even invited the applicant for a round table conference to sort out the dispute. Such round-table conference was never held. Applicant in his replying

affidavit, indicated that there are certain amounts which are not disputed i.e. R45 285,00 and R40 296,06.

[14] From the respondent's evidence it is clear that there is a dispute over the amount and the applicant became aware of the dispute as far back as when the amount of R72 416,08 was paid and the respondent made suggestion of round-table conference to iron out the dispute.

[15] In **Kali v Decotex and Another** 1988 (1) SA 943 AD Corbit JA (as he then was) stated as follows on page 980 A – C:

> "As in the present case, the disputes which arise on the affidavits may relate to *locus standi* of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. 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."
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> (Own underlining)

[16] Respondent indicated in his affidavit that applicant failed to take into consideration the deduction based on saving and prolongation, and such amounts are not for the account of the respondent. Applicant then brought a reconciled account on his

replying affidavit and thus by implication, the respondent could not have challenged or concurred with the reconciliation. In motion proceedings, applicant must stand and fall with his papers. See **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw** 2008 (5) SA 339 (SCA) at 349. The necessary allegations upon which the applicant relies must appear on its founding affidavit.

[17] The question to be decided is whether there is a *bona fide* dispute of claim and whether such dispute is based on reasonable grounds. It is sufficient if the respondent *bona fide* alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it. See **Heidelberg Laboratories CC and Others v Sola Technologies** 2008 (2) SA 627 at 634. It is both unnecessary and undesirable to come to any final conclusion as to the legal validity of the defence once there is evidence that the debt is disputed on *bona fide* and reasonable grounds. See **Investec Bank Limited v Lewis** 2002 (3) SA 111 C at 119.

[18] The existence of the dispute on applicant's claim is a factor to be taken by this court when exercising its discretion as to whether to grant a provisional winding-up order or not. From the evidence and documents before me, I am satisfied that the claim is disputed on *bona fide* and reasonable grounds, and it was so disputed as far back as the 7 February 2013 where upon applicant was invited to a round-table conference to sort out the dispute. The dispute thus has to be ventilated and argued by

means of a trial action. The winding-up of the corporation or the company should be the very last resort, having taken all the circumstances into consideration when the court exercises its discretion.

[19] The other ground upon which applicant relied on for the liquidation of respondent is that respondent is insolvent. This I take it to mean actual insolvency as opposed to commercial insolvency. Actual insolvency involving a comparison of the value of company's assets vis-à-vis its liabilities. From the founding affidavit of the applicant, there is no evidence shown that the respondent's liabilities exceed its assets, save to say that applicant requested the financial statements from the respondent with no success. In the circumstances, I come to the conclusion that applicant had not make out a case.

[20] Lastly, applicant relied on the ground that it is just and equable for the liquidation of the respondent. Applicant stated as follows in his affidavit:

> "6.5 It will also kindly be submitted that (notwithstanding the fact that the respondent is unable to pay its debtor) that it will also be just and equitable that the respondent be liquidated. Reason for this averment, I humbly submit, is because of the fact that when pressure was put on the respondent to effect payment, since December 2012, the respondent although its members, is carrying on business while the respondent is not in a viable position to do so."

Respondent refuted this averment and also stated that it is unsubstantiated.

[21] Applicant submitted that respondent is venturing into reckless trading by being unable to pay its debts in the normal course of business as they became due, hence it is just and equitable that the respondent be liquidated.

[22] Five broad categories upon which reliance on “just and equitable” grounds have been developed by courts. See **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd** 1985 (2) SA 345 (W). It is my view that applicant did not satisfy any of the categories developed over the years by the courts in respect of section 344(h) of the old Companies Act. I must say that the decision in Rand Air (Pty) Ltd *supra*, was based on companies liquidation but same is applicable to close corporations. In the circumstances, applicant failed to make a case under this heading.

ORDER

[23] The following order is made.

23.1 Application is dismissed.

23.2 Applicant to pay costs.

S. J. THAMAGE, AJ

On behalf of applicant:	Adv. N. Snellenburg Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv. P. Zietsman SC Instructed by: P D Yazbek BLOEMFONTEIN

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