

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: 1575/2012

In the matter between:

GIDIZELA CONSTRUCTION CC

APPLICANT

and

HKB CONSTRUCTION CC

RESPONDENT

JUDGMENT

SISHI J

Introduction

[1] This is an application for the provisional winding up of the respondent on the basis that:

The respondent is unable to pay its debts and commercially insolvent as contemplated by section 69(1)(a) and section 69 (1)(c) of the Close Corporation Act 69 of 1984 ("the Close Corporation Act") alternatively:

[2] It is just and equitable that the respondent be wound up as contemplated by section 81(c)(ii) of Act 71 of 2008 ("the Companies Act").

Background

[3] The respondent was awarded a tender by the KZN Department of Transport which was for the construction of earth works, layer works and drainage at kilometres 11.0 to 14.0 on the main road E21A/P2710 situated at Mungulwane area neat Mungulwane General Hospital.

[4] A contract was concluded between the applicant and the respondent in terms whereof the applicant was a sub-contractor.

[5] It was agreed that progress payments received from the Department of Transport were to be paid into a joint account opened at Standard Bank, Ballito from where the monies would be transacted or paid. This agreement was to be operated by the party's joint signatures. The applicant was entitled to 97% of the monies received from the Department in respect of the work actually executed by it and the respondent was to 3% thereof.

[6] No serious disputes aroused in respect of the first two payments received from the Department of Transport. The dispute arose when the sum of R578 362,21 was paid by the Department of Transport of which the respondent paid the sum of R160 000,00 to the applicant and the balance thereof retained by the respondent. The applicant alleges that he has been short paid by approximately R405 000,00.

[7] According to the applicant, the amount due to it will be calculated as follows:

97% of R578 362,21 = R561 000, 011-34 less 160 000 paid to the applicant by the respondent, leaving the balance of R401 000,00 which is allegedly due owing and payable to the applicant.

[8] The respondent contends that the amount of R578 362.21 was obtained from the department by improper means and that the value of the work actually done by the applicant was 160 000,00.

[9] The respondent has alleged that without its knowledge and consent, Mr Ntuli of the applicant persuaded that site agent to approach the Engineer, one Dalaan of SSI (Pty) Ltd to focus a projection of the value of work which could be executed over a period of time and which was to be projected up to 15 December 2011. This amount is to R578 362,21. This “projecting” certificate was then without the respondent’s approval submitted to the department for payment and the aforesaid amount was then paid into the Standard Bank account.

[10] According to the respondent, the amount of R401 000,00 is not due, owing and payable to the applicant. The respondent contends that as the principal constructor, its legally obliged to fulfil its obligations to the Department of Transport. The allegations referred to are of course disputed by the applicant.

[11] The respondent submitted that the amount allegedly due to the applicant is disputed, which dispute is bona fide and which is borne out by the response annexure “B10” and “B11” to the founding affidavit, that is the letter of demand and the denial of the amount due by the respondent respectively. According to the respondent, the only interpretation of the aforesaid response, that is, annexure “B11” to the founding affidavit is that the respondent disputed or disagreed with the contents of annexure “B10” since the inception of the matter.

Whether the respondent is unable to pay debts

[12] Section 69 of the Close Corporation Act provides as follows:

“(Subsection 1) For the purposes of section 68(1)(c) repealed by section 224(2) of the New Companies Act 71 of 2008) a corporation shall be deemed to be unable to pay its debts if –

(a) A creditor, by session or otherwise, to whom the corporation is indebted in a sum of not less than R200,00 then due has served on the corporation by delivering at its registered office a demand requiring the corporation to pay the sum so due and, and the corporation has twenty one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ...

(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.”

[13] Annexure “B10” to the founding affidavit which according to the applicant is a letter of demand does not comply with the statutory requirements prior to liquidation. The matter does not comply with the demand as envisaged in section 69(1)(a) of the Close Corporation Act 69 of 1984 prior to liquidation proceedings and therefore cannot form the basis of this application.

[14] The applicant submitted that annexure “B10” to the applicant’s founding affidavit is a written demand as contemplated by section 69(1)(a) of the Close Corporation Act aforesaid and materially complies with all the requirements. Although the aforesaid demand was faxed and not delivered to the respondent’s registered offices contemplated by the Close Corporation Act, the applicant submitted that the respondent received the notice on the strength of the respondent’s reply to the aforesaid demand inviting the applicant to take legal action. This response is referred to as annexure “BN11” to the applicant’s founding affidavit.

[15] In *Nathanias and Alpha Efthymakies Properties v Hasersbeer Spreit Landgood CC* (1996)(2) All SA 317 T (A case dealing with section 69 (1) (a) of the Close Corporation of 1984). The Court (after distinguishing the *Phase*

case¹ on the basis of its having been decided under the deference Act, i.e. (the 1926 Companies Act) and the *Hadrot case*² on the basis that consideration had been given to section 345(1)(a) as a whole and that the Appeal Court had left open the issue of substantial compliance), concluded “at 323” that strict compliance with the relevant provisions was not required provided that the Close Corporation had in fact received the demand, on the basis that to hold otherwise “would elevate form above substance” and would mean that “a demand which is delivered at the registered office but not received by the management of the Close Corporation is effective, but a demand received by the management but not delivered at the registered office is ineffective. This would be absurd”. In the result the court held that “the requirement that the demand must be served on the corporation is perentry but that the requirement that it be done at the registered office is not and that substantial compliance will in that respect suffice” see *Henesburg* 708 (1).

[16] I align myself with the approach inunciated in the above case.

[17] In my view, in the present case, there has been substantial compliance with the provisions of section 69(1)(a) of the Close Corporation Act.

[18] However, where an applicant seeks to rely on the inability of a Corporation to pay its debts by showing that a demand (although not delivered to its registered address) was in fact received by the corporation

¹ *Phase Electric Company (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 W

² *BP and JP Investment (Pty) Ltd v Hadrot (Pty) Ltd* 1977 (3) SA 753 W

and that it failed to respond to that demand within a reasonable time, the application for winding up could be brought under the provisions of section 69(1)(c). For the deeming provisions of subsection (1)(a) to apply there must be service at the registered office³. In this matter, it is common cause that the so-called demand was faxed to the respondent's attorneys and not delivered at the respondent's registered offices as contemplated by the Act.

[19] Section 69(1)(c) provides that for the purposes of section (68)(c), a Close Corporation shall be deemed to be unable to pay its debts if – (c) it is proved to the satisfaction of the court that the Corporation is unable to pay its debts.

[20] The respondent has contended that the sum of R405 000,00 rise at its disposal which is more than adequate to meet the alleged claim of the applicant.

[20] What is evident from the papers is that, the respondent disputed its indebtedness to the applicant even before the launching of this application. The grounds upon which the debt is disputed had been set out above.

[21] Apart from the fact that the respondent has failed to pay the amount which the applicant alleges the respondent owes, there is nothing in the papers to suggest that the respondent is unable to pay its debts. On the contrary, in his opposing affidavit, Buthelezi denies that the respondent is

³ Henesburg of the Close Corporation Act Miskien (3) Kom-(2)(14)(1)

commercially insolvent and states that the sum of ... at the companies disposal which is more than adequate to meet the alleged claim of the applicant. This allegation has not been seriously disputed by the applicant.

[22] The applicant only assumes that the respondent has other creditors and also assumes that the respondent utilised monies from the joint account between the respondent and applicant to settle other creditors of the respondent. The respondent has submitted correctly in my view that these are mere assumptions without any foundation and are being made to booster and enhance the applicant's application. Other than this bold allegation assuming that there are other creditors, apart from the applicant, the applicant has not shown that the respondent has any other creditors.

[23] In order to obtain a provisional order of liquidation an applicant is required to establish a prima facie case. Where the application is opposed, the necessary prima facie case is established only when the applicant is able to show that on a consideration of all the affidavits placed before court, a case for liquidation has established on a balance of probabilities⁴. Where, however, the respondent shows on a balance of probabilities that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the application will be refused. In Kalil's case⁵, Cobet JA as he then was, has the following to say in this regard: "Consequently, where the respondent shows on a balance of probability that the indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will

⁴ Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (A) at 987 D-E, 979 B-C and E-F

⁵ *Supra*, at 980, C-D

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 grounds⁶.

[24] In all the circumstances of this application, I am satisfied that the applicant has not established on the balance of probabilities that the respondent is unable to pay its debts. I am also satisfied that the respondent has succeeded in showing on the balance of probabilities that its indebtedness to the applicant was disputed on bona fide and reasonable grounds.

[25] Section 81(1) of the new Companies Act 71 of 2008 set out the grounds upon which a court may order a solvent company to be wound up. It reads:

- (i) A Court may order a solvent company to be wound up if –
 - (a) The company has-
 - ...
 - (d)
 - (e) One or more of his company creditors have applied to court for an order to wind up the company on the grounds that –
 -
- (ii) it is otherwise just an equitable for the company to be wound up.”

⁶ Van Zyl NO v Look Good Clothing CC 1996(3)SA 523 (SE) at 530 A-D).

[26] In Rand Air case⁷ dealing with the Oil Companies Act, the court enunciated and discussed five broad categories of cases that may be brought under it. These are following:

1. Disappearance of the Companies substructure;
2. Illegality of the objects of the company and fraud in connection therewith;
3. A deadlock in the management of the companies affairs which can only be resolved by winding it up;
4. Grounds analogous to those for the dissolution of partnership and ;
5. Oppression.

In this case, the court held that the just and equitable bases referred to in Section 344(h) of the Oil Companies Act has become rather a special ground under which only certain features of the way in which a company is being run can be questioned. The court in this case fully described what it meant by illegality of the objects of company and fraud committed in connection therewith. In describing this phrase, the court stated that if a company is promoted in order to perpetrate a

⁷ Rand Air (Pty) Ltd v Ray Bester Investment (Pty) Ltd 1985 (2),

serious fraud or deception on the persons who are invited to subscribe for its shares, it is the kind of case in which the persons who are defrauded in that fashion can take the promoters to court and, provided the circumstances demand that, ask that the company be wound up”⁸.

[27] Although there are allegations of fraud and theft against the respondent, in the present matter, these are not the ones contemplated in paragraph 2 of the grounds referred to in this case. The court went on to say that the just and equitable ground is not some catch all ground for winding up a company.

[28] In *Budge & Others* case⁹, the court held that just and equitable basis for the winding up of a solvent company in terms of section 81(1) D (iii) should not be interpreted so as to only include matters *eiusdem generis* the grounds in section 81. The *eiusdem generis* rule was in applicable to section 81(1)(d)(iii) of the New Companies Act.

[29] Consequently in the present matter, I am satisfied that there are insufficient grounds to justify liquidation on this ground.

[30] The issue which now remains is whether the matter should be referred for the hearing of oral evidence in order to enable the applicant to attempt to establish that the respondent is unable to pay its debts on a balance of probabilities and other issues. In my judgment, I am satisfied that the case

⁸ Rand Air case, supra, page 350, paras D-A.

⁹ *Budge & Others NNO v Midnight Storm Investments 256 (Pty) Ltd & Another* 2012 (2) SA 28 (GSJ) at paras 3 & 9.

has not been made out for the referral of this matter for the hearing of oral evidence. On the information of the affidavits, I am satisfied that there is nothing to suggest that the applicant will be in a position to achieve these objectives for this matter to be referred to the hearing of oral evidence. Consequently, the request that the matter be referred for the hearing of oral evidence cannot be upheld.

[31] Finally, on the totality of the information placed before me, I am satisfied that the case has not been made out for the winding up of the respondent. Having reached this conclusion, I am satisfied that the application should be dismissed with costs.

[32] In the result, the following order is made:

(a) The application is dismissed with costs.

SISHI J

APPEARANCES

Date of hearing : 15 November 2012
 Date of judgment : 29 May 2013
 Counsel for the Applicant : C. HATTING
 Applicant's Attorneys : LISTER & LISTER
 1st Floor, Suite 101
 161 Pietermaritzburg Street
PIETERMARITZBURG
 Tel No.: 033 345 4530
 Fax No.: 033 342 2377

Ref: NTULI11/0001/05/N052/001/AH/CR

Counsel for the Respondent : J. NXUSANI
 1st & 2nd Respondent's Attorneys : Messrs Ngwenya & Zwane Attorneys
 C/O Yashica Chetty Attorneys
 Suite 1, 365 Longmarket Street
PIETERMARITZBURG
 (Ref: Ms Y Chetty/ N6793)