

IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No.: 7806/2011

In the matter between:

MICHAEL DENNIS FRASER N.O.
WILLIAM DOUGLAS HOWIE N.O.
ANTHONY PAUL GREEN

First Applicant
Second Applicant
Third Applicant

and

AMALGAMATED BROKERS CC
(2000/041342/23)

Respondent

JUDGMENT

Date of hearing: 15 June 2012
Date of judgment: 27 June 2012

D. PILLAY J

[1] In this application for the provisional liquidation of the respondent, the first issue in dispute is whether the applicant, now deceased and represented by his executors, caused a demand for payment to be served in compliance with s 345(1)(a)(i) or (ii) of the Companies Act 61 of 1973 (CA) read with section 69 of the Closed Corporations Act 69 of 1984 (CCA). The respondent contends that the letter of demand was never delivered at the respondent's registered office in strict compliance with the requirements of the CA or the CCA. As such compliance is a jurisdictional prerequisite, the application should be dismissed.

[2] The applicant contends that the letter of demand was sent by registered mail to the respondent and before it could be delivered a member of the respondent collected the letter from the post office. Mr Harrison for the respondent referred the court to two high court

decisions¹ in support of his submission that the CA and the CCA required strict compliance. At the end of his argument he also handed up a recent judgment of Ndlovu J of this division in *Mouritzen v Greystone Enterprises (Pty) Ltd and Other* case number 10442/2011 (unreported)² in which he presented a similar argument. In that case the learned judge predictably preferred the views of the Appellate Division in *Odendaalsrus Municipality v Odendaalsrus Gold, General Investments and Extensions Ltd* 1959 (1) SA 374 (A) at 380B-D in which the AD accepted that there was sufficient compliance with the requirement of service if the respondent received the letter of demand no matter how it was delivered. Importantly, the notice must reach the person concerned and must effectually convey to him or her the information that needs to be conveyed.³ I agree with Ndlovu J that to insist on strict compliance when the respondent received the letter of demand would be to prefer form over substance.

[3] As to whether the respondent received the letter of demand, the respondent does not deny receiving it. Furthermore, the applicants adduced evidence in the replying affidavit attaching confirmation from the post office that the registered mail was collected by a person whose signature is identical to that of Brenda de Wet who signed the respondent's letters dated 8 October 2009 and 10 November 2009 (Annexures "E" and "F" to the answering affidavit). In any event, the identity number of the recipient of the registered mail is also recorded on the registered slip which the respondent could easily have checked if it disputed receipt of the letter of demand.

¹ *Phase Electric Company (Pty) Ltd v Zinman's Sales (Pty) Ltd* 1973 (3) SA 914 (W); *Afric Oil v Ramadaan Investment CC* 2004 (1) SA 35 (N)

² At para 25-33

³ *Mouritzen* para 25; *Odendaalsrus Municipality* para 380B-D

[4] The significance of the service of the letter of demand in this case is that it is a ground on which the applicant relies to prove that the respondent is unable to pay its debts. Section 345(1)(a)(ii) provides:

'A company or body corporate shall be deemed to be unable to pay its debt if:

In the case of any body corporate not incorporated under this act has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the court may direct, and a company or body corporate has for three weeks thereafter neglected to pay the sums, or to secure or compound for it to the reasonable satisfaction of the creditor.'

The respondent has not paid the debt demanded in the letter. This fact, coupled with my finding above that the letter of demand was served fulfils the requirements for deeming the respondent to be unable to pay its debts in terms of s 345(1)(a)(ii).

[5] The applicant also relies on the minutes of various meetings as proof that the respondent acknowledged its indebtedness. I cannot rely on such minutes because they are brief notes of what each speaker said and not a verbatim transcription. Furthermore, the respondent disputes the accuracy of the minutes. Besides, in the nature of evidence in the form of minutes, they usually require further explanation to clarify what the text actually means in the context. Such explanation is not adequate on the papers before me; it probably requires ventilation through oral evidence.

[6] The next question is whether the respondent is indebted to the applicants. The transaction giving rise to this claim stems from a request by the deceased to the respondent to procure a motor grader. The respondent sourced the grader from Canada. After receiving an invoice from Ontario on 23 August 2009 for \$118 000, it invoiced the

applicant for 50% of the purchase price, in the amount of R524 400.00, including VAT of R64 400 on 31 August 2009. The deceased paid the respondent on 2 September 2009. The respondent applied for foreign exchange through Standard Bank on 15 September 2009. The respondent paid the supplier US\$59 000.00. The applicant contends that this transaction amounted to a purchase and sale between the deceased and the respondent; the respondent contends that it merely acted as the deceased's agent.

[7] Factors that support a finding that the transaction was a purchase and sale include the following:

- (a) The purported seller invoiced the respondent not the applicant.
- (b) The dock receipt was issued to the respondent.
- (c) The respondent was the co-signee.
- (d) The respondent paid the purchase price to the purported supplier of the grader.
- (e) The respondent undertook to pay the balance when it received a signed bill of lading from the supplier.
- (f) The respondent levied VAT on the purchase price.

[8] Factors the respondent relies on as proof it was the applicant's agent are:

- (a) The applicant was a 'customer' of the respondent.
- (b) The respondent did 'not hold stock but buys and sells used plant, used equipment and parts as and when required' or 'source and sell specific parts as and when required'.
- (c) Prior to the transaction in issue the respondent sold a Hyundai 210 excavator for the applicant and received a commission as broker.
- (b) The applicant pre-paid 50% of the grader in advance.

[9] The Hyundai transaction was an agency with the deceased being the seller and the third party the buyer. The respondent merely facilitated the sale. Weighing all the factors together the dominant nature of this transaction was a purchase and sale of the grader. On the respondent's own version, it 'buys and sells' or 'source(s) and sell(s)' plant, etc. Another decisive factor is that the respondent could not levy VAT unless he was a vendor. Although the respondent describes the money he would have received from the transaction as a commission, it is its remuneration irrespective of whether it is called a commission or profit. Similarly, referring to the applicant as a customer of the respondent is no indication as to whether the transaction was one of agency or purchase and sale. The only buyer the foreign seller would have known was the respondent. The law pertaining to the passing of risk in an international sale of goods transaction would apply between the respondent and the foreign seller.

[10] Irrespective of whether the relationship was as buyer and seller or principal and agent, the respondent had another arrow to its bow. The respondent paid the money it received from the applicant to Mediterranean Chartered Shipping Company (MCSC) which masqueraded as Mediterranean Shipping Company (MSC). Did it act negligently in paying MSCS instead of MSC?

[11] The respondent alleges that the applicant refused to transact by means of a letter of credit because there would have been an additional cost of R85 000.00. The applicant denies this. In the respondent's letter to Standard Bank the respondent records that the sellers or their agents were not interested in a letter of credit and the respondent accordingly agreed to pay 50% of the purchase price via Standard Bank, the balance to be paid on receiving a signed bill of lading from

the suppliers. The decision to dispense with a letter of credit therefore was the respondent's. Furthermore, the respondent paid against the invoice only without waiting until it received a track shipping report confirming that the consignment had arrived at the terminal, dock receipt and bill of lading from the seller. In those circumstances the respondent was negligent. He failed to exercise reasonable care in effecting an electronic transnational transaction.

[12] This is an application for the provisional liquidation of the respondent. In determining whether a company is unable to pay its debt the court shall take into account the contingent and prospective liabilities of the company.⁴ If, following the liquidator's investigation it transpires that the respondent is able to pay its debts, then the respondent can avoid confirmation of this rule *nisi*.

[13] In the circumstances I grant an order in terms of paragraph 1, 2 and 3 with the return date in paragraph 2 to be 1 August 2012 and in paragraph 3 to be 27 July 2012.

D. PILLAY J

Counsel for the Applicant:

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⁴ s 345 of the CA