IN THE KWAZULU-NATAL HIGH COURT, DURBAN **REPORTABLE**

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 4165/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

R-BAY LOGISTICS cc Respondent

(Registration No. 2003/010632/23)

JUDGMENT

Delivered : 31 October 2012

KING AJ

[1] On 16 October 2012, four interrelated applications were heard before me. In all those matters, the Standard Bank of South Africa Limited ("Standard Bank") is the Applicant.

[2] Under this case number, R-Bay Logistics CC ("R-Bay") was the Respondent and Standard Bank applied for a winding-up order. Under Case No. 4166/2012, Cosmopolitan Transport CC ("Cosmopolitan") was the Respondent and Standard Bank applied for its winding-up.

[3] The other two matters (5847/2012 and 5848/2012) involved

applications brought by Standard Bank against R-Bay and Cosmopolitan respectively, to obtain possession of various trucks which Standard Bank had sold to those close corporations in terms of instalment sale agreements which Standard Bank alleged had been breached.

[4] All these matters came before me as opposed applications. Counsel for the parties agreed that there was no need for me to decide the repossession applications because the relief sought therein was predicated upon the outcome of the two winding-up applications. Counsel also agreed that because the two winding-up applications were virtually identical, only this application needed adjudication. Whatever order was granted in this matter should be granted in the other matter as well.

[5] Standard Bank's case in this matter is that it is entitled to obtain a provisional winding-up order against R-Bay because R-Bay is unable to pay its debts. The application is brought pursuant to the provisions of Chapter 14 of the Companies Act No. 61 of 1973 ("the old Companies Act"). The essence of R-Bay's opposition to the "merits" of the application is that, because there exists a dispute (raised *bona fide* and upon reasonable grounds) as to whether Standard Bank's claims against R-Bay are due and payable, winding-up proceedings are not appropriate to resolve that dispute and the application should therefore be dismissed.

[6] However, in Heads of Argument presented by Ms Lennard, R-Bay raised a preliminary point which relates to the effect of the provisions of

Item 9 ("Item 9") of Schedule 5 to the Companies Act 71 of 2008 ("the new Companies Act"). The point deals with whether Standard Bank must first show that R-Bay is "insolvent" before it becomes entitled to apply for R-Bay' winding-up under the provisions of Chapter 14 of the old Companies Act.

[7] At the commencement of the hearing, counsel also informed me that a third issue, which related to the giving of notice of the application to various parties, had fallen away. Accordingly, I am required to decide the aforementioned preliminary point and the "merits" of the case. It makes sense to deal with the preliminary point first because, on R-Bay's contentions, if the point is well taken, this application must fail.

[8] Schedule 5 to the new Companies Act deals with transitional arrangements. Item 9 thereof deals with the continued application of the old Companies Act to the winding-up and liquidation of companies. It reads as follows:

> "(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
>
> (2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353
> do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
>
> (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a

solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the Gazette, may –

(a) determine a date on which this item ceases to have effect but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)."

[9] The Respondent in this application is a close corporation and one must look to the provisions of the Close Corporations Act No. 69 of 1984 ("the Close Corporations Act") to find what it provides about applications to wind-up close corporations. Section 66(1) thereof has been amended and now reads as follows:

> "The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act."

[10] Section 69 of the Close Corporations Act provides for the circumstances under which a corporation shall be deemed to be unable to pay its debts but that Act does not otherwise deal with applications for the winding-up of a corporation. Accordingly, the present position is that an application for the winding-up of a close corporation falls to be dealt with on

the same basis as an application in respect of a company, having regard to the provisions of Item 9, namely, in accordance with the provisions of Chapter 14 of the old Companies Act. To date, the Minister has not determined a date as contemplated in Item 9(4) and, at present, no alternative legislation exists for the winding-up and liquidation of insolvent companies.

[11] Part G of Chapter 2 of the new Companies Act ("Part G") deals with the winding-up of solvent companies. In the case of such a winding-up by the Court, the only relevant ground upon which a creditor, such as Standard Bank, can apply is that it is just and equitable for the company to be so wound up. At least on the face of it, a creditor cannot apply, under the new Companies Act, for the winding-up of a solvent company upon the ground that such company is unable to pay its debts, as contemplated by Section 345 of the old Companies Act. Having regard to section 66(1) of the Close Corporations Act (as it now reads), the winding up of a solvent close corporation is also governed by Part G.

[12] In this case, the Respondent's argument may be summarised as follows:

(a) Because the application is based upon the ground that R-Bay is alleged to be unable to pay its debts, the application must be treated as one which has been brought under the provisions of Chapter 14 of the old Companies Act which relates only to insolvent companies.

(b) Standard Bank has failed to make any allegations in its papers as to whether R-Bay is solvent or not.

(c) In the absence of evidence to establish that R-Bay is insolvent, Standard Bank cannot rely upon the provisions of the old Companies Act, in bringing its application.

[13] The point raised by the Respondent has received judicial attention in only a few cases because the new Companies Act has been in force for only 18 months or so. During argument, I raised various matters with counsel for the parties, and, because the issue is novel, I afforded both counsel additional time to file supplementary arguments. They did so and I am grateful to them both for their input.

[14] Central to the issue raised by the Respondent is what is meant by "solvent" and "insolvent" where those terms are used in Item 9 and Part G. It has long been accepted that, in our law, a state of “insolvency” has two different meanings. Actual or literal insolvency involves a comparative measurement of the value of a company’s assets and its liabilities. If the total value of those liabilities exceeds the total value of the assets, the company is actually insolvent. However, “commercial insolvency” recognises that, whether a company is actually insolvent or not, if it does not have sufficient cash resources to make payment of its ongoing obligations, as and when they fall due, the company is commercially insolvent.

> ***Ex Parte* De Villiers & Ano NNO: In re Carbon Developments** 1993 (1) SA 493 (A) at 502
>
> **Johnson v Hirotec (Pty) Ltd** 2000 (4) SA 930 (SCA) at 933 (para 6) to 934 (para 8)

[15] The two concepts (i.e. actual insolvency vs commercial insolvency) are quite different. The former involves the mere assessment of the value of a company's assets and liabilities. The latter involves an assessment of the company's cash flow, to determine whether it has the immediate wherewithal to pay its current expenses, as they fall due.

[16] To my mind, the first question to answer is whether, in Part G and Item 9, the reference to a "solvent" or "insolvent" company is intended to relate to actual insolvency or so-called commercial insolvency.

[17] It seems clear that the legislature was mindful of the distinction between these two meanings when it passed the new Companies Act. Section 4 thereof deals specifically with a "solvency and liquidity test". That test has to be applied in various circumstances, under the new Companies Act, in which, putting it generally, the capital of a company is used or distributed for a purpose other than the conduct of the company's ordinary business. For present purposes, the details of the test, and the circumstances in which it is applied, are not relevant. What is relevant is that Section 4 spells out that the test for solvency involves a comparison of the value of a company's assets with that of its liabilities whilst the test for liquidity involves a consideration of the likelihood that the company will be

able to pay its debts as they become due in the ordinary course of business.

[18] Sadly, the new Companies Act does not define “solvent” or “insolvent” in relation to the winding-up of a company. As far as I can detect, those terms are used only in Part G (dealing with the winding-up of “solvent” companies) and in Item 9 which deals with the law which is to apply to the winding-up of “solvent” and “insolvent” companies. Giving those words their ordinary meaning, one might well conclude that those terms refer to actual insolvency, as distinct from commercial insolvency.

[19] However, one needs also to consider the context in which those terms have been used in the new Companies Act. For many years, in our Company law, a reference to its “solvency” encompassed both actual insolvency and commercial insolvency, depending upon the context.

> ***Ex Parte*** **De Villiers & Ano NNO: In re Carbon Developments** 1992 (2) SA 95 (W) at 112 – 113
>
> ***Ex Parte*** **De Villiers (On Appeal** : See para 14 above) at pages 502 to 504

[20] What then did the legislature mean, in Part G and in Item 9, when it referred to a “solvent” company? Did it mean actual insolvency or commercial insolvency or, perhaps, both?

[21] To answer, I think it is first necessary to consider the apparent

intention behind the transitional provisions encapsulated in Item 9. It seems clear that the legislature's ultimate objective is to replace the provisions of Chapter 14 of the old Companies Act, dealing with the winding-up of companies, with new legislation which would deal, separately, with "solvent" companies and "insolvent" companies. However, at the time that the new Act came into force, it made provision (in Part G) only for the winding-up procedure for "solvent" companies. For reasons which are not apparent, the legislature had not got round to creating any new legislation to deal with the winding-up of "insolvent" companies.

[22] It is therefore clear that Item 9 is intended to serve only as a stopgap, until such new legislation is passed. Item 9(4)(a) specifies that Chapter 14 of the old Companies Act must continue in force until such new legislation, dealing with "insolvent" companies, is actually in place.

[23] Nothing in the new Companies Act has changed any of the provisions of Chapter 14 of the old Companies Act. Accordingly, for the purpose of winding-up an "insolvent" company, Section 344 thereof must still regulate the basis upon which it can be wound up. Of particular relevance in this case is Section 344(f) which requires an applicant to prove that the respondent company is unable to pay its debts, as contemplated in Section 345 of the old Companies Act.

[24] Accordingly, the legislature must have intended that, to wind-up an "insolvent" company, between the date of commencement of the new

Companies Act, and the implementation of intended new legislation, an applicant would have to establish one or other of the grounds for winding-up contemplated by Section 344, including, in particular, that the respondent company was unable to pay its debts.

[25] I have already said that the concept of "commercial insolvency" in the sense that a company is unable to meet its obligations when they fall due, is one which is well known in company law and is enshrined in Section 344(f). I have also said that such commercial insolvency requires the application of a test which is quite different to that which one must apply to establish actual insolvency. That being so, it would be quite incongruous for the legislators to require an applicant to establish the actual insolvency of a respondent company merely in order to entitle that applicant to bring an application for winding-up, making use of the provisions of Section 344(f), which requires the application of a completely different test.

[26] To my mind, this offers compelling evidence that what the legislature intended, when it used the term "solvent" in Item 9 was that a company must be solvent in at least the commercial sense, before any winding-up of that company could take place under Part G. For present purposes, it is not necessary for me to determine whether, for Part G of the new Companies Act to apply, it would have to be established that the company was also actually solvent.

[27] There has been judicial debate about whether, for the purposes of

Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f).

[28] I believe that my view is also reinforced by the provisions of Section 79(3) of the new Companies Act (which is in Part G), read together with Item 9(2). It will be noted that, under Item 9, only certain of the sections which form part of Chapter 14 of the old Companies Act are said not to be applicable in the case of the winding-up of a solvent company. What is noteworthy is that Section 345 of the old Companies Act still applies even to the winding-up of a solvent company under the provisions of the new Companies Act. Bearing in mind that commercial insolvency (ie: inability to pay current debts) is not one of the grounds mentioned in Section 81 of the new Companies Act, for the winding-up of a solvent company, the question arises as to why the legislature saw fit to preserve the operation of Section

345 of the old Companies Act even when the winding-up of a solvent company is under consideration by the Court. The provisions of section 69 of the Close Corporations Act, which mirror those of section 345 of the old Companies Act, were also preserved when the Close Corporation Act was amended, to take account of the provisions of the new Companies Act.

[29] I believe that the explanation is contained in Section 79(3) of the new Companies Act. It provides that, if during the course of an application to wind-up a solvent company, brought under the provisions of Section 81, it is determined that the respondent company is or may be "insolvent" the Court may order that the company be wound up as an "insolvent" company in terms of the laws referred to in Item 9. What the section contemplates is that if the "solvency" of the respondent company is in doubt, its winding-up can be dealt with on the basis contemplated by Section 344 of the old Companies Act. The only apparent purpose of preserving the operation of Section 345 of the old Companies Act, even when one is dealing with the winding-up of a "solvent" company is, it seems to me, that it provides the basis for a Court to come to the conclusion that the respondent company is or may be "insolvent", as contemplated by Section 79(3). As far as I can see, Section 345 of the old Companies Act has no other relevance in relation to any application to wind-up brought under the new Companies Act. I accordingly conclude that, in determining whether a respondent company is, or may be, "insolvent" as contemplated by Section 79(3), the Court would be entitled to have regard to evidence that the respondent company was unable to pay its debts, as contemplated by Section 345 of

the old Companies Act. In other words, the word "insolvent" in Section 79(3) is intended to refer to a respondent company which is or may be commercially insolvent. Again, whether that word also encompasses the notion of actual insolvency need not be decided for present purposes.

[30] I am further fortified in my views by the conclusions reached by the Court in an unreported case in the North Gauteng High Court.

> **Firstrand Bank Limited v Lodhi 5 Properties Investment CC**
> (Case No. 38326/2011) and two other related matters

[31] In the **Lodhi** case, the Court came to the conclusion that the expression "solvent company" in Item 9(2) meant companies which are neither actually nor commercially insolvent and, conversely, that insolvent companies are those that are either commercially insolvent or factually so.

[32] There is another aspect of the legislation which, to my mind, also points in the direction that, in referring to a "solvent" company, the legislature intended to refer to a company which was not just actually solvent, but also commercially solvent. Section 81(1)(c) of the new Companies Act sets out the only grounds upon which a creditor may apply for the winding-up of a solvent company. One ground has to do with the circumstances arising from the failure of business rescue proceedings in respect of the respondent company and the other is that it is "otherwise just and equitable for the company to be wound up".

[33] Bearing in mind that, as appears from Section 4 of the new Companies Act, the legislature was clearly alive to the distinction between actual insolvency and commercial insolvency, it seems to me that the absence, in Section 81(1)(c), of an additional ground for winding-up, namely, the inability of the respondent company to pay its debts, is telling. The body of law made pursuant to the provisions of Section 344(f) of the old Companies Act must also have been present to the mind of the legislature when it enacted Section 81 of the new Companies Act and, if it intended that a "solvent" company was one which was merely actually solvent, it would surely have catered for the prospect, in the new winding-up provisions, that a company which is actually solvent might nevertheless be unable to pay its debts and therefore be liable to be wound up anyway on that ground. Accordingly, the omission of any ground for winding-up which relates to the ability of a respondent company to pay its debts leads me to conclude that, in referring to a "solvent" company, the legislature intended to refer to a company which was both actually and commercially solvent because only in that case would there be no need to cater for the possibility, in Section 81, that an actually solvent company might not be able to pay its debts.

[34] In the **Lodhi 5** case, it was suggested to the Court that the reference in Part G to a "solvent" company must mean one which was actually solvent because, if such a company was actually solvent, but nevertheless commercially insolvent, the remedy provided to an affected creditor was to make use of the business rescue provisions under Chapter 6 of the new

Companies Act, so that such creditor could, when those proceedings fail, then bring itself within the provisions of Section 81(1)(c)(i) of the new Companies Act. The Court rejected that contention, and correctly so, in my respectful opinion.

[35] The contention postulates a situation in which a creditor has reached the conclusion that, on the evidence available to it, a company is unable to pay its debts and should be wound up. I do not understand how, in those circumstances, any such creditor can be expected to motivate business rescue proceedings. On the other hand, for any such creditor to be expected simply to wait for someone else to propose business rescue proceedings is equally incongruous.

[36] In the circumstances, I am unable to agree with the Respondent's submissions about the meaning of "solvent" in the legislation under consideration. I conclude that "solvent" includes the concept of commercial solvency. Correspondingly, for as long as the winding-up of an "insolvent" company is to be dealt with under Chapter 14 of the old Companies Act, that word must also be taken to include the concept of commercial insolvency.

[37] In the course of their submissions, counsel for the parties drew my attention to other recent cases in which the same issue arose. In **Firstrand Bank Ltd v Bunker Hill Investments 499 cc** [2012] JOL 29144 (GSJ), Van Oosten J agreed with the finding in the **Lodhi 5** case. In

Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers cc and another related matter (Case No.958/2012), Snellenburg AJ, in the Free State High Court reached the same conclusion as the court in the **Lodhi 5** case, and, in doing so, rejected the opposite conclusion reached in **HBT Construction v Uniplant Hire** 2012 (5) SA 197 (FB). I respectfully agree with the findings in the **Firstrand** and **Scania Finance** cases. In the **HBT** case, it does not appear that the meaning of “solvent” or “insolvent”, in the context of the new Companies Act was debated and the court appears to have assumed that what the new Act meant was actual solvency. I must respectfully disagree.

[38] I was also referred to the unreported judgment in this division of **Business Partners Limited v Yellow Star Properties 1061 (Pty) Ltd** (Case No.7188.2011) in which the court approached the matter on the basis that “solvent” in the new Companies Act meant actually solvent, but concluded (at para 21) that “the *onus* rests upon the Applicant to satisfy the court, that the Respondent is insolvent and therefore unable to pay its debts”. It is thus not entirely clear from the judgment as to whether the court accepted that commercial insolvency was still relevant to the issue. To the extent that the judgment suggests that only actual solvency is relevant, I must respectfully disagree. I am convinced that such conclusion is incorrect.

[39] Having reached that conclusion, it does not matter which party might bear the onus of establishing "insolvency" in order to justify the bringing of

a winding-up application under the provisions of Chapter 14 of the old Companies Act. However, it is perhaps appropriate for me to consider the question of onus, if one was to assume that, for the purposes of interpreting Item 9, the term "insolvent" is taken to mean actual insolvency.

[40] The effect of Item 9(2) is to create an exception or proviso to the general rule expressed in Item 9(1) (namely, that Chapter 14 of the old Companies Act will regulate the winding-up of companies under the new Companies Act). That being the case, I take the view that if the Respondent wishes to contend that the "general rule" does not apply, because the Respondent is "solvent" the onus, at least to adduce evidence of such solvency, must rest upon the Respondent. To the extent that the **Business Partners** case found otherwise, I must respectfully disagree again.

[41] The Applicant's papers do not deal at all with the Respondent's actual insolvency. They deal only with its commercial insolvency. What is quite plain is that **Standard Bank's** case is based on the proposition that the provisions of Chapter 14 of the old Companies Act apply to the application. From that, one must infer that **Standard Bank's** case is based upon the contention that R-Bay is “insolvent”, whatever that term means in Item 9. The Respondent's papers are equally silent upon the subject of its actual solvency. The Respondent's case, on the papers, rests squarely on the proposition that winding-up proceedings are inappropriate because the indebtedness upon which the Applicant relies is disputed, *bona fide* and

upon reasonable grounds.

[42] Thus, even if solvency under the relevant legislation is to be measured as actual solvency, the Respondent has not discharged the burden of proof which I believe rests upon it. Put at its lowest, and if that burden amounts only to a duty to adduce some evidence, the Respondent has not even suggested, in its papers, that it is actually solvent, still less has it supported any such contention with evidence.

[43] It follows that, even if solvency, for the purpose of the legislation, was to be given the meaning contended for by the Respondent, I do not agree that any onus of proof in that regard rests upon the Applicant. In the circumstances, the preliminary point taken by the Respondent is, in my view, without merit.

[44] Having reached that conclusion, it remains for me to deal with the merits of the application. It is as well to first consider the standard of proof which the Applicant must meet in order to obtain a provisional winding-up order.

[45] Put simply, the Applicant must establish that it is a creditor of the Respondent, as contemplated by Section 346(1)(b) of the old Companies Act and that the Respondent is unable to pay its debts as contemplated by Section 344(f) of the old Companies Act.

[46] When an application for winding-up is opposed, and even when there are disputes of fact on the papers, the test to be applied, in considering whether to grant a provisional winding-up order is that the Applicant must establish its case, *prima facie*, upon a balance of probabilities and upon a consideration of all the affidavits filed by the parties.

> **Kalil v Decotex (Pty) Ltd and Another**
> 1988 SA 943 (A) at 978-979

[47] However, if the dispute on the papers concerns the existence of the Applicant's claim, upon which the Applicant relies for its *locus standi* as a creditor, the onus rests upon the Respondent to show, on a balance of probabilities, that its dispute in regard to that indebtedness is *bona fide* and founded upon reasonable grounds. The Respondent is not required to prove that it is not indebted to the Applicant: it must merely show that the indebtedness is genuinely disputed upon reasonable grounds.

> **Kalil** case at 980

[48] As to Standard Bank's *locus standi* as a creditor of R-Bay, the founding affidavit alleges that R-Bay is indebted to Standard Bank in "various amounts, some as principal debtor some as surety and co-principal debtor for Cosmopolitan Transport CC..." Standard Bank also alleges that these debts consist of the amounts owing under various instalment sale agreements and two overdrafts. Under the instalment sale agreements, the full balance outstanding is claimed on the ground that R-

Bay and Cosmopolitan failed to adhere to the terms thereof, with the result that such full balances became due and payable.

[49] In the answering affidavit, there is no dispute that these debts exist, nor any dispute as to the amount of the overdrafts. Upon grounds with which I shall deal later, the Respondent disputes that these debts are actually due and payable.

[50] Section 346(1)(b) governs the establishment of Standard Bank's *locus standi* as a creditor. That section requires no more than that Standard Bank should establish that it is a creditor and, in doing so, it would be entitled to rely upon a contingent or prospective claim. Whether Standard Bank's claims are due and payable, or not, is not relevant to the determination of its status as a creditor. Its claims are not disputed and I am satisfied that its *locus standi* has been properly established.

[51] To establish that R-Bay is unable to pay its debts, Standard Bank relies, in its founding affidavit, upon the delivery to R-Bay of a demand, in respect of its claims, delivered in terms of Section 69(1)(a) of the Close Corporations Act. On the papers, there is no dispute that such demand was made and delivered properly to the Respondent and that the Respondent has not, within twenty one days thereafter, paid, secured or compounded for the amounts so demanded. Accordingly, Standard Bank has adequately established, at least *prima facie*, that R-Bay is deemed to be unable to pay its debts, as contemplated by Section 69 of the Close Corporations Act.

[52] But for the dispute raised by R-Bay in the answering affidavit, that would be the end of the matter. Subject to the Court's residual discretion in the matter, Standard Bank would otherwise be entitled to a provisional winding-up order.

Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd
1962 SA 593 (D) at 597

[53] The dispute raised by R-Bay in its answering affidavit may be summarised as follows:

(a) In February of 2011, an amount of R760,918.73 was paid to Standard Bank from a call account held by Cosmopolitan with Standard Bank, which amount was applied in payment of what Standard Bank said was owed to it in respect of toll charges arising from the operations of the trucking businesses of both R-Bay and Cosmopolitan. Apparently, for convenience, and with the consent of R-Bay and Cosmopolitan, all of these charges were debited to an account in the name of Cosmopolitan.

(b) Although this payment was actually sanctioned by R-Bay's sole member, (who is also the sole member of Cosmopolitan) that was because, at the time, such member thought that this amount was in fact due to Standard Bank. Subsequently, it is alleged, R-Bay and Cosmopolitan established that the amount was not due and a dispute was raised with Standard Bank in regard thereto.

(c) R-Bay contends that, in those circumstances, the full amount of the payment falls to be repaid by Standard Bank to Cosmopolitan.

[54] R-Bay contends that this dispute has the result that Standard Bank's claims are not due, owing and payable. R-Bay's case is that, had these funds not been paid out from Cosmopolitan's call account, those funds would have remained available to fund the instalments payable by R-Bay and Cosmopolitan under the terms of the various instalment sale agreements. R-Bay further alleges that, if the amount of the aforesaid payment was still available to it, there would have been more than enough funds to enable R-Bay to repay the full amount of its overdraft with Standard Bank, which Respondent says was "the only amount the Applicant may be entitled to call up on demand".

[55] It is therefore necessary to examine the dispute raised by the Respondent to see whether it raises a genuine dispute of fact, based upon reasonable grounds, in relation to Standard Bank's claim. It must first be noted that the dispute does not relate to the existence of those claims, as such. That is not disputed at all. What is said to be disputed is whether those claims are due, owing and payable. R-Bay contends that, as a consequence of the dispute around the payment from the call account,

Standard Bank was not entitled to accelerate payment of the amounts owed under the instalment sale agreements.

[56] What is perfectly obvious from the way in which R-Bay has expressed the dispute is that it actually admits that instalments payable under the instalment sale agreements were not paid when they should have been. The inevitable consequence is that, on the Respondent's own version, it must have fallen into breach of the instalment sale agreements. What R-Bay is really saying is that, but for the payment out of Cosmopolitan's call account, those breaches of the instalment sale agreements would not have occurred.

[57] The position is somewhat different in regard to R-Bay's contentions about the two overdrafts. From the words used in the answering affidavit, which I have quoted in paragraph 54 above, it is clear that there is no real dispute that Standard Bank was entitled to insist upon repayment of the overdraft, upon demand, and that it actually did so. I pause to mention that, in the application for the winding-up of Cosmopolitan, Cosmopolitan makes exactly the same allegation, namely, that if the funds paid to Standard Bank were still available to Cosmopolitan, there would have been more than enough money available to enable Cosmopolitan to pay its overdraft. There is accordingly no real dispute that Standard Bank was entitled also to require repayment of Cosmopolitan's overdraft, upon demand, and that it actually did so.

[58] Thus, what emerges from R-Bay's version in the answering affidavit is that the alleged dispute is not really what R-Bay contends it is. R-Bay is not saying that the instalments payable under the instalment sale agreements were all paid up to date. R-Bay's case is actually that the required instalments were not paid. Even on R-Bay's version, it thus follows that Standard Bank was perfectly entitled to call up the full balance outstanding in respect of all the instalment sale agreements, as it did. All that R-Bay is saying is that its failure to pay was caused by the failure of Standard Bank to repay the sum paid to it out of Cosmopolitan's call account.

[59] It also follows that the dispute alleged by R-Bay does not relate to the existence of Standard Bank's claim. Accordingly, there is no challenge to Standard Bank's *locus standi* as a creditor. The challenge is actually directed at Standard Bank's case that R-Bay is deemed to be unable to pay its debts because of R-Bay's failure to respond to the demand delivered to it under Section 69 of the Close Corporations Act. The Respondent's case is that the deeming provision in Section 69 cannot operate, in these circumstances, because the debts demanded by Standard Bank were not "due, owing and payable", which is what is required, upon a proper construction of the words of Section 69(1)(a) of the Close Corporations Act.

Alton Coach Africa CC v Datcentre Motors t/a CMH Commercial
2007 (6) SA 154 (D) at 163

The Respondent's own version does not, in my view, give rise to any real dispute that Standard Bank's claims were not due and payable. Hence, there is no real dispute that R-Bay is deemed to be unable to pay its debts because it failed to respond to Standard Bank's demand in terms of Section 69 of the Close Corporations Act. Instalments under the instalment sale agreements were unpaid and payment of the full balance owed thereunder was accordingly accelerated. Despite demand, the amounts owed under the two overdrafts were not paid and they accordingly became due, owing and payable as well. All that R-Bay really says is that the fault for all this should be laid at the door of Standard Bank because it failed to repay the amount which was paid to it from Cosmopolitan's call account. That fact does not, in my view, change the fact that Standard Bank's claims were due, owing and payable. All that results from R-Bay's allegations is that it has a counterclaim (disputed by Standard Bank) for repayment of the sum of R760,918.73.

[61] The existence of such a counterclaim by R-Bay against Standard Bank may well be a factor relevant to the exercise of the Court's discretion in regard to the grant of a provisional winding-up order but it is not, of itself, an answer to Standard's Bank case.

> **Ter Beek v United Resources CC and Another**
> 1997 SA 315 (C) at 333-334

[62] R-Bay has made no case for the exercise of any such discretion in its favour. On the facts, it is difficult to see how it could do so, bearing in

mind that the amount of the alleged counterclaim against Standard Bank is a little less than R800,000.00 whereas Standard Bank's claims exceed R4,5 million.

[63] That leads me to consider other facts which emerge from the papers and which are, to my mind, relevant to the consideration as to whether the dispute raised by R-Bay on the papers is really genuine and based upon reasonable grounds.

[64] R-Bay's own case is that initially, when it made payment to Standard Bank out of Cosmopolitan’s call account, R-Bay thought that the amount of the payment was actually owed to Standard Bank. If that was the case, then, at that time, R-Bay knew that it would not be able to rely upon the availability of those funds in order to fund the payment of any of the instalments which would become payable under the various instalment sale agreements. It must follow, on R-Bay's version, that without those funds, it would not have been able to pay the instalments which subsequently fell due under the instalment sale agreement. R-Bay does not explain how it could have made these payments if it had turned out that the payment from the call account was actually owed to Standard Bank. It seems to me that what R-Bay now says about its alleged dispute with Standard Bank is really just a ruse to try and explain the lack of funds to service its debt.

[65] The matter goes further. R-Bay's case is that, had Standard Bank repaid to Cosmopolitan the amount paid out from the call account, there

would have been more than enough money to pay the overdrafts of R-Bay and Cosmopolitan. The amount of the two overdrafts total R744,000.00. In reply, Standard Bank put up (as annexure VP24) a letter from its attorneys to R-Bay's attorneys, enclosing a schedule which recorded that, as at March 2012, the arrear instalments on all the instalment sale agreements amounted to about R350 000. R-Bay cannot have it both ways: either the money which should have been available in Cosmopolitan's call account could have been used to pay instalments under the instalment sale agreements or that money could have been used to repay the overdrafts, but not both.

[66] I am mindful of the fact that, even if one regards R-Bay's allegations as generating a dispute as to whether Standard Bank's claim is due, owing and payable (I have already said that this is not the case) the test is whether the dispute is one which is *bona fide* and raised on reasonable grounds. There is no onus upon R-Bay to actually prove its case on the papers. However, the factors which I have already mentioned lead me to conclude that the dispute is neither *bona fide* nor based upon reasonable grounds.

[67] Having regard to the test which I have referred to in paragraphs 46 and 47 hereof, it is not simply a matter of accepting R-Bay's allegations at face value. I am obligated to assess the genuineness of the dispute, and the reasonableness of the grounds therefor, having regard to the contents of all the papers, including what is said by Standard Bank in the replying

affidavit.

[68] In this regard, it strikes me as improbable that, having raised the dispute with Standard Bank as long ago as September 2011 (see paragraph 29.6 of the answering affidavit), neither R-Bay nor Cosmopolitan has ever instituted any proceedings against Standard Bank to recover what is alleged to be owed by Standard Bank. In circumstances in which R-Bay now contends that Standard Bank's recalcitrance has left R-Bay and Cosmopolitan unable to pay instalments under their instalment sale agreements that is remarkable.

[69] R-Bay is also more than a little ambiguous about the true amount of the alleged counterclaim against Standard Bank. On the one hand, it alleges that the whole amount paid to Standard Bank (in round figures R760,000.00) falls to be repaid but, in analysing the dispute, R-Bay says, in paragraph 22 of its answering affidavit, that Cosmopolitan "found that amounts had been incorrectly debited and/or claimed by the Applicant". In paragraph 27 of the answering affidavit, R-Bay recorded that the documents attached to its answering affidavit were simply a random sample to illustrate the nature of the dispute and that it would, if seriously challenged, make available supporting documentation relating to the details of all the queries. In paragraph 30.1 of the answering affidavit, R-Bay says that "if the said withdrawal, alternatively amounts overcharged were timeously refunded or credited to the various instalment sale agreements, R-Bay and Cosmopolitan would not be in breach thereof."

[70] In the replying affidavit, Standard Bank did in fact "seriously challenge" what R-Bay said about the alleged dispute over what should have been paid back by Standard Bank to Cosmopolitan. Standard Bank contends that the alleged overcharge debited to Cosmopolitan, in respect of toll fees amounted only to some R15,000.00. In addition, the total amount owed to Standard Bank, and which was paid from the call account, did not relate only to toll charges, but also to quantities of diesel purchased with the relevant fleet cards. Despite the fact that R-Bay's allegations were so challenged, neither it nor Cosmopolitan made any attempt to produce the detail that R-Bay said it would, to back up what it said about the full extent of the dispute. Even in the context of what is said in the answering affidavit, it seems clear to me that R-Bay / Cosmopolitan do not, and cannot, dispute every debit on the fleet card statements. Only some of the debits are disputed but R-Bay has chosen not to be specific in circumstances in which I believe it was obliged to be more forthcoming, if it wished the Court to accept its *bona fides* and the reasonableness of its contentions.

[71] It is also more than strange that neither R-Bay nor Cosmopolitan responded in writing or otherwise to the demands addressed to them by Standard Bank, pursuant to the provisions of Section 69 of the Close Corporations Act at a time when it is clear from the correspondence referred to in the replying affidavit that R-Bay was already represented by attorneys. If R-Bay really believed in the dispute which it now alleges, the

overwhelming probability is that it would have ventilated that dispute in a written response to the Section 69 demand. It did not do so and, save for admitting that the Section 69 demand was sent and received, does not deal with that topic at all.

[72] Matters only become worse when one has regard to the documents which were put up by Standard Bank in reply. I have no doubt that, if those documents were not what they are said to be, or have been taken out of context by Standard Bank, R-Bay would have sought to file a further affidavit to explain itself. That did not occur.

[73] Standard Bank put up a copy of a letter, signed by both Cosmopolitan and R-Bay, in March 2011, which recorded the extent of, and terms applicable to, all of the finance facilities extended by Standard Bank to those two close corporations, including the overdrafts. That "facilities letter" makes it clear that amounts owed to Standard Bank on overdraft are repayable upon demand. Standard Bank also put up a letter dated 28 September 2011, addressed to the sole member of both close corporations, in which Standard Bank records that it had decided to terminate the banker/client relationship between the parties and it required both close corporations to repay their overdrafts by no later than 31 December 2011. Standard Bank also put up correspondence dated 29 March 2012 addressed by Standard Bank's attorneys to the attorneys representing both R-Bay and Cosmopolitan which enclosed a schedule which recorded that the then arrear instalments payable by R-Bay to

Standard Bank, under the various instalment sale agreements, was over R300,000.00. The covering letter threatened proceedings pursuant to the letters of demand sent in terms of Section 69 of the Close Corporations Act, unless R-Bay and Cosmopolitan came up with arrangements which were acceptable to Standard Bank. It is difficult to see how R-Bay could have remained silent in the face of this correspondence. It said nothing in its answering affidavit about these matters and did nothing about it when confronted with this correspondence in the replying affidavit.

[74] In all the circumstances, I conclude that R-Bay has failed to discharge the onus which rests upon it to establish that its alleged dispute with Standard Bank is *bona fide* and raised on reasonable grounds. In any event, the dispute, such as it is, does not affect the conclusion, which I believe I am entitled to draw, that R-Bay is deemed to be unable to pay its debts. Having regard to all the circumstances, and, in particular, R-Bay's failure to pay Standard Bank, and properly explain its failure to do so, I conclude that R-Bay is in fact unable to pay its debts.

[75] I still have a discretion in the matter, albeit a limited one. There is nothing in R-Bay's papers which seeks to justify the exercise of that discretion in favour of R-Bay, nor were any submissions made to me which might justify that.

[76] I accordingly conclude that Standard Bank has made out a proper case for a provisional winding-up order and I therefore grant an order in

terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion in this matter. In paragraph 1 of such order, the date shall be 12 December 2012 and, in paragraph 3, the date shall be 30 November 2012.

J.C. KING AJ

DATE OF HEARING	16 OCTOBER 2012
DATE OF JUDGMENT	31 OCTOBER 2012
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