

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

DATE : 1 DECEMBER 2011

CASE NO.: 5083/2011

5 *In the matter between:*

HBT CONSTRUCTION AND

PLANT HIRE CC

Applicant

and

UNIPLANT HIRE CC

Respondent

10

APPROVED BY THE COURT
31/12/2011
JUDGE

15

JUDGMENT

ZIETSMAN, A J :

[1]

This is an application on an urgent basis for the liquidation of the respondent close corporation, on the basis,
20 that the respondent is unable to pay its debts.

[2]

Before the facts of the matter are to be considered, it is necessary to evaluate the provisions of the new Companies Act, Act 71 of 2008, and the interrelation with the Close
25 Corporations /

Corporations Act, Act 69 of 1984.

[3]

It is firstly interesting to note that although the chapter dealing with liquidation of a company, to wit chapter 14 of Act 61 of 1973, is still to be applied in respect of winding up of companies under the 2008 Act in accordance with item 9 of Schedule 5 of Act 71 of 2008, it is made subject amongst others to sub-items 2 and 3 of item 9(1).

[4]

The relevant part of the aforementioned sub-items is sub-item 2 which states as follows:

“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.”

The last mentioned Part G of chapter 2 in terms of the 2008 Act.

[5]

With reference to Part G in the present matter, Section 81(1)(c) will be the relevant section. The last mentioned section entails that a court may order a solvent company to be wound up if one or more of the company's creditors have applied to the court for a winding up order on the grounds that a business rescue have ended as contemplated by Section 132(2)(b) /

132(2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up, or it is otherwise just and equitable for the company to be wound up.

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[6]

The effect of the foregoing as far as companies are concerned is therefore in my view as follows:

(i) Although Section 345 of Act 61 of 1973 is still in place as far as a solvent or insolvent company is concerned, Section 344 only applies in the case of an insolvent company.

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(ii) In order to liquidate an applicant should therefore after the 2008 Act came into operation, prove that the company is also insolvent notwithstanding for instance the deeming provisions of inability to pay its debtors as contemplated in Section 345 of Act 61 of 1973.

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(iii) The reason for the foregoing is that Section 344 of Act 61 of 1973 was the section which provided for the grounds on which a company could be wound up.

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(iv) Whereas Section 344 of Act 61 of 1973 now only apply in cases of insolvent companies, such grounds for liquidation as taken up in Section 344 are /

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are not available in cases of solvent companies.

(v) The only grounds for liquidation of a solvent company are those as provided for in Part E of chapter 2.

5 (vi) When a creditor of a company therefore applies for liquidation, the only grounds for liquidation of a solvent company will be those referred to in Section 81(1)(c) of Act 71 of 2008.

(vii) In summary thus the grounds on which a court can
10 grant a liquidation order will be different depending on whether a company is solvent or insolvent.

(viii) The only mutual ground on which a court can grant a liquidation order presently is the ground that it is just and equitable to do so.

15 [7]

If therefore the applicant cannot prove just and equity in an application for winding up, it shall be imperative for such an applicant to prove insolvency of the company before the whole chapter 14 of the 1973 Act will be applicable.

20 [8]

In the instant matter the respondent is a close corporation and not a company. However, and in my view, the same principle will apply because of the fact that Section 68 of the Close Corporation Act was repealed by item 7(3) of
25 Schedule /

Schedule 3 of Act 71 of 2008 and Section 66 of the Close Corporation Act, 69 of 1984, is amended to have the same effect on a close corporation as if a company with reference to item 9 of Schedule 7 of Act 71 of 2008.

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[9]

(i) It is also necessary to mention that the words used by the legislature in Section 81 of Act 71 of 2008, namely “just and equitable” is the same as used in Section 344(h) of Act 61 of 1973. Therefore it must be interpreted in the same way in
10 which “just and equitable” was interpreted by our courts through the years. It is still not a *numerus clauses* although the new Act now makes more specific mention and reference to the deadlock situation.

(ii) The aforementioned interpretation also in the light of the
15 legislature’s intention to emphasize rescue rather than liquidation.

[10]

In the instant matter the applicant relies on the inability of the respondent to pay its debts and more specifically the
20 applicant’s debt as contemplated in Section 68 read with Section 69 of Act 69 of 1984.

[11]

As far as just and equitable is concerned, the mere say-so in paragraph 13 of the founding affidavit with reference to
25 the /

the history of the matter, takes the matter no further. The history, according to the applicant, is that the respondent now for more than three years promise and/or negotiate with the applicant to effect payment of the outstanding amount invoiced
5 by the applicant.

[12]

It must therefore be borne in mind that Section 68 of Act 69 of 1984 has been repealed and that the applicant can therefore only succeed if there is proof that the respondent is
10 insolvent or that it is just and equitable that the respondent be liquidated.

[13]

No proof of any nature was tendered by the applicant that the respondent is insolvent which has the effect that it
15 must be taken that the respondent is indeed still solvent. If solvent, Section 68 is no longer available to the applicant.

[14]

The only possibility is the ground of just and equitable. The fact that a close corporation is not paying anyone of its
20 creditors is not a ground as being a catch-all ground under just and equitable. It is rather a special ground under which the way in which a company is being run or conducted plays a role. (See *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W)).

25 **[15] /**

[15]

In this instance the mere fact that the respondent is not paying the applicant's debt and made promises and/or settlement proposals since 2009 (as averred by applicant) is not a ground which makes it just and equitable to liquidate the respondent.

[16]

Even if I am wrong with the interpretation of the Companies Act, 71 of 2008, read with Act 69 of 1984, and even if it is accepted that the applicant need not prove insolvency in the present matter, it is clear from the evidence tendered in this matter that

(i) The indebtedness relied on being R552 253,90 emanates from a statement of account 86 to the founding papers in which the last invoice referred to is dated 16 January 2008.

(ii) When a point *in limine* as to prescription is taken in the opposing papers, the applicant contrary to its own case in the founding papers, replied thereto as follows:

"Suffice to indicate that seeing that the *quantum* in this matter cannot be ascertained without the cooperation of the respondent, this matter is not subject to prescription."

25 (iii) /

- (iii) The aforementioned must be seen in the light of the respondent's opposing papers wherein the indebtedness is disputed on the basis that a verification of the hours of the leased equipment should have taken place on the basis that the number of hours of each vehicle utilised should have been recorded on a worksheet and signed and countersigned by the applicant's employee and the respondent's foreman. Thereafter the project manager would verify the hours. A dispute arose which until date could not be solved.
- (iv) It is thus clear that the applicant is blowing hot and cold at the same time. It is in any event quite clear that prescription is a *bona fide* and arguable defence in this matter which should not be decided on the papers.
- (v) It is also necessary to refer to the fact that the deeming provisions of inability to pay in Section 69(1)(a) of Act 69 of 1984 probably did not come into play in this matter as the letter of demand was posted to the registered address of the respondent on 7 September 2009 and no proof exists as to when and if this letter was ever received by the respondent. How would the 21 days be calculated and /

and even if it can be guessed, why did the applicant not proceed with any legal proceedings since September 2009?

[17]

5 In the matter of *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 A.D. at 980B-D, the Supreme Court of Appeal confirmed the *Badenhorst* rule that a respondent only have to show on a balance of probabilities that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds.

10 **[18]**

In my view the respondent did just that and that the application can therefore not succeed.

[19]

Although I also have serious doubts as to the urgency of
15 this application with reference to the grounds thereof, I make no finding in this regard.

[20]

The application on the aforementioned premises is
DISMISSED WITH COSTS.

20 **COURT ADJOURNS**

OORSKRYFSTERSERTIFIKAAT

Ek, die ondergetekende, sertifiseer hiermee dat in soverre dit hoorbaar is, die voorafgaande 'n ware en juiste transkripsie van die oorkonde is van die oorspronklike verrigtinge wat deur middel van 'n meganiese opvangtoetel opgeneem is in die saak van:

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that insofar as it is audible, the foregoing is a true and correct transcription of the proceedings recorded by means of a mechanical recorder in the matter of:

HBT CONSTRUCTION <i>and</i>	UNIPLANT HIRE CC
DATE :	1 DECEMBER 2011
CASE NO.:	5083/2011
FILING NO.:	DECEMBER 2011

OORSKRYFSTER/TRANSCRIBER: (MEV. MRS) L DE VILLIERS

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