Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 1552/2006

Date Heard: 30/03/07
Date Delivered: 24/08/07

In the matter of:

GWK (PTY) LTD **APPLICANT**

versus

JANNIE COFFEE BOERDERY CC **1ST RESPONDENT**

JOHANNES ADRIAAN COFFEE 2ND RESPONDENT

MANDY INVESTMENT 195 (EDMS) BPK 3rd RESPONDENT

JUDGMENT

MOLWANTWA AJ:

1. The applicant, GWK (Pty) Ltd, is a registered company with limited liability with its head office at De Villiers Street, Douglas, Northern Cape. The first respondent, Jannie Coffee Boerdery CC ("*the CC*") is a Close Corporation registered in terms of the Act on Close Corporations No 69 of 1984 with its head office at No 9 Van Riebeeck Avenue, Prieska, Northern Cape and its business premises situated at 400 Premises, Gariep Nedersetting, Groblershoop, Northern Cape. Mr Johannes Adriaan Coffee is the second respondent the sole member of the CC as well as the sole director of Mandy Investments 195 (Pty) Ltd *("Mandy Investment")*. The third

respondent is also a registered company with limited liability with its head office situated in Namibia. Mr Coffee deposed to the respondents' Answering Affidavit.

2. The applicant sought the following relief:

2.1 An order declaring that the first respondent is insolvent as contemplated in the Insolvency Act No 24 of 1936 ("the Act") read with the provisions of the Companies Act No 61 of 1973 ("*the Companies Act*") and therefore be placed under provisional liquidation;

2.2 That a *rule nisi* be issued calling upon the first respondent to give reasons why a provisional winding up order should not be granted and be served on the first respondent;
2.3 That the applicant should comply with the provisions of section 346(4A) and section 346A of the Companies Act;
2.4 That the costs of the application should be costs in the liquidation; and
2.5 Further and alternative relief.

3. On 14 December 2006 the applicant applied for a provisional liquidation of the CC on an urgent basis. The Court however postponed the matter *sine die* and made certain orders pertaining to the filing of opposing and replying affidavits. On 22 June 2007 when I heard arguments from both counsel, the parties had filed all papers. The necessity for a provisional order therefore fell away.

4. In this application Mr Van Niekerk on behalf of the applicant argued that the CC was commercially insolvent by virtue of the fact that:
4.1 The CC was not able to pay its debts; and

4.2 It was only just and equitable that the CC be placed under provisional liquidation.

5. In deciding whether or not a company carrying on business should be wound up, **Berman J** in **ABSA Bank Ltd v Rhebokskloof (Pty) Ltd And Others** 1993 (4) SA 436 (C) at 440 paras F-I states :

> "*The primary question which a Court is called to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s345 (1) (c) as read with s344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up…"*

6. The parties entered into a written agreement that stipulated that the applicant will give the CC credit for goods sold and delivered. In terms of this agreement the CC had to pay instalments on or before the 1st day of every month failing which the applicant could resort to the recourse of demanding payment of the outstanding balance plus interest. By virtue of his directorship, Mr Adriaan Coffee signed bonds on behalf of the CC and Mandy Investments for goods sold and delivered as per the summons marked Annexure "D" to the Notice of Motion. Hence the application cites the three respondents as alluded to above.

7. When the CC failed to pay as agreed upon the applicant, in a letter dated 19 September 2005, demanded payment of the outstanding balance in the amount of R733 945.69 in respect of both accounts payable on or before 3 December 2005. In a fax-letter dated 16 September 2006 the CC indicated that it had paid R20 000.00 in reduction of the debt and would as soon as it had received payment from a particular buyer, pay all the money due. Correspondence between the attorneys of both parties was exchanged and no resolution could be reached. On 2 November 2006 the applicant applied for default judgment against the CC for the outstanding balance in respect of both accounts in Case No 1320/06. The CC filed opposing papers in which it indicated that it had a *bona fide* defence. The applicant applied for summary judgment and that matter was still pending.

8. On 2 February 2006 as per Annexure "K1" of the Notice of Motion, the CC admitted its indebtedness to the applicant. In the same letter, it further, offered payment of an amount of R10 000.00 per month towards paying off the outstanding balance. The offer was accepted by the applicant and incorporated in the Certificates of Balance made out by the applicant on 25 October 2006 in the amounts of R264 244, 56 and R178 126, 33. These certificates are Annexures "A" and "B" to the Notice of Motion.

9. Section 344 of the Companies Act provides that if certain grounds or circumstances exist a company may be wound up by the court. These are if:

"(f) *The company is unable to pay its debts as described in section 345;*

(h) It appears to the Court that it is just and equitable that the company should be wound up."

10. Section 345 of the same Act provides**:**

"*(1) A company …shall be deemed to be unable to pay its debts if-*

(a) a creditor…to whom the company is indebted in a sum not less than one hundred then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; …

and the company…has for three weeks thereafter neglected to pay the sum…

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

11. The CC had acknowledged its indebtedness to the applicant in February 2006 and then pledged to pay the applicant in instalments but did not keep this undertaking. Instead after the applicant demanded payment of the outstanding balance, the CC simply ignored the demand and claimed that the applicant had calculated the interest incorrectly. The CC subsequently signed a bond in favour of First National Bank for payment of a debt with First National Bank. This on its own shows that the CC was giving preferential treatment to other creditors to the detriment of the applicant.

12. Where the main object for which a company was formed is not possible of being attained; in other words, the company's *substratum* has failed or disappeared then it is just and equitable to wind up such a company as was held to be the case in **<u>Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd</u>** 1985 (2) SA 345 (W). Mr Van Niekerk contended that this is exactly what happened in this case. The CC was until recently registered as a company but registered as a Close Corporation on 30 October 2006 as evidenced by copies of certificates of the Registrar of Companies as per Annexures "C^1" and "C^2" to the Notice of Motion.

13. Mr Coetzee, notwithstanding this inability on the part of the CC to pay or to satisfy this very substantial debt, argued in the first place that the CC was not commercially insolvent based on the following:

13.1 That it has already made payment of R360 000.00 to the applicant and has R495.000, 00 in its attorney's Trust Account to settle the applicant's debt;

13.2 That its assets are valued at R4 million - plus and therefore in excess of its liabilities of R2 million - plus.

14. He submitted, in the second place that the applicant had conducted its

affairs with the CC with mala fide and in an obstructive manner. In that when the CC approached FNB for financial assistance the applicant refused to release part of the bond in excess of its debt. In the light thereof he contended that it would not be fair nor just nor equitable to grant the applicant a winding up order. I am unable to uphold this contention.

15. It is perhaps the manner in which the CC has conducted itself in its dealings with the applicant referred to and elaborated upon below which made the applicant to opt for this route. It is a factor which is to be taken into account in deciding whether or not to exercise one's discretion against the CC and grant a winding up order.

16. There are several factors which support Mr Van Niekerk's contention that the CC has no *bona fide* defence. In paragraph 11 of the opposing affidavit Mr Coffee stated that there was no agreement that it repays the applicant and yet in the preceding paragraph 9 he stated that the agreement between him and the applicant was that the applicant will purchase the machines and packaging material and the invoices provided will then form part of the credit previously granted to the CC. If that is the position one wonders then how else would this business agreement benefit the applicant if there was no understanding that the CC will repay the applicant.

17. The sales agreement that the applicant and the CC concluded annexed to the replying affidavit marked "JK" clearly evidences the terms and conditions of the sale agreement. This documents states, *inter alia* under the heading ***"BETALING VAN TOTALE VERKOOPPRYS"*****,** payment of interest at 0,5 % lower than the interest payable on production accounts. The CC's argument that the applicant's calculations in respect of the interest charged are wrong is not supported by any evidence. Furthermore in a letter dated 3 February 2006 it is stated that the CC has made out two R10 000.00 cheques as well as payment proposals. The CC also undertook to pay the whole amount in full and final settlement with interest.

18. My view on the facts before me is that the CC is commercially insolvent. It has failed to pay its debts to the applicant and several other creditors. Even if its assets *ex-facie* the papers exceed its debts it is abundantly clear that the applicant had proved that the CC was unable to meet its indebtedness amounting to R733 945.69. See **ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & Others** *supra***.** In the event that the CC gets

deeper into financial trouble, as is inevitable, the applicant and other creditors will be seriously prejudiced. The CC has already manifested a preference of creditors by paying FNB its debt whilst owing the applicant.

19. I am satisfied that the applicant has made out a case that the CC is commercially insolvent and liable to be wound up. See **Johnson v Hirotec** (Pty) Ltd 2006 (4) SA 930 (SCA). The CC has managed to keep itself artificially afloat by means of paying its creditors selectively and negotiating extension for other payments. These are acts of insolvency which demonstrate that the CC was experiencing serious cashflow problems. See **Bree Holdings Pty Ltd** 1972 (3) SA 353 (T) at 354-355; **PA Venter Worcester Pty Ltd** 2000 (4) SA 598 (C). The situation is exacerbated by the fact that the farm namely *"Groot Drink No 400, Siyanda District Gordonia"* which was generating a substantial part of the CC's income has been sold to Henque 1273 CC.

20. Having regard to all the circumstances here present I am satisfied that it is just and equitable that the CC be wound up.

In the circumstances I make the following order.

ORDER

1. **That Jannie Coffee Boerdery CC is placed under liquidation in the hands of the Master of this High Court;**

2. **That Jannie Coffee Boerdery CC is ordered to pay the wasted costs of this application.**

BC MOLWANTWA
ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION

FOR THE APPLICANT	:	ADV J VAN NIEKERK (SC)
INSTRUCTED BY	:	DUNCAN & ROTHMAN ATTORNEYS
FOR THE RESPONDENT	:	ADV W COETZEE
INSTRUCTED BY	:	ENGELSMAN MAGABANE INC.