IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **2556/2024**

In the matter between:

EXCEED PLANT TRADING CC **APPLICANT**

and

LKGA CONSTRUCTION & PROJECTS 1 CC **RESPONDENT**

Coram: JP DAFFUE J
Heard: 8 AUGUST 2024
Delivered: 8 AUGUST 2024

ORDER

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1 The respondent close corporation is hereby placed in final liquidation.

JUDGMENT

Daffue J

Introduction

[1] This is the extended return date of a rule nisi issued on 6 June 2024 against the respondent, LKGA Construction & Projects 1 CC, it being a close corporation. When the respondent filed its answering affidavit just before the return date of 18 July 2024, the parties agreed that the return date be extended and the application postponed to the opposed roll of 8 August 2024 with leave to the applicant to file its replying affidavit. This has now been done. The parties filed their heads of argument and oral argument was presented to the court this morning.

Statutory requirements and compliance with the court order of 6 June 2024

[2] It is not the respondent's case that the applicant failed to comply with any of the statutory requirements or the rule nisi granted on 6 June 2024. I have perused the papers and am satisfied that all requirements have been met and that the papers are technically in order.

The undisputed facts

[3] The following are not in dispute:

a. the citation of the parties;

b. that the written rental agreement was entered into between them on 19 September 2023 in respect of which the applicant would lease certain yellow equipment to the respondent to enable it to comply with its contractual obligations;

c. the invoices issued by the applicant to the respondent with particular reference to annexures TCA5F to TCA5L of the founding affidavit (excluding annexure TCA5J) in which regard the respondent's deponent stated the following:[1]

'Save to admit the attached annexures, [the reference is actually to all invoices and not only the aforesaid] I submit that the statement of account invoices confirm that the applicant is not owed what is alleged by the applicant but rather way below that.'

d. eventually, and during oral argument both counsel confirmed, bearing in mind invoices so admitted, the respondent conceded that an amount in excess of R 1.8 million was due and payable to the applicant;

e. the two counsel differ slightly in their calculations and were about R 30 000 apart,

f. if the amount of R 2 070 000 is subtracted from the total amount in the last statement,[2] the respondent admitted under oath the remainder of the invoices in an amount of R 2 240 918.70;

g. the last invoice for January 2024 was issued on 2 February 2024;

h. on 3 April 2024 applicant's attorneys sent a letter of demand in terms of s 345(1) of the Companies Act 61 of 1973 (the old Companies Act), read with s 69 of the Close Corporations Act 69 of 1984 (the CC Act), to various addresses provided by the respondent and its member, but it was particularly sent to the registered address of the respondent;

i. the respondent did not respond to this letter and did not make payment;

[1] Record at 98; para 23 of the opposing affidavit.

[2] Record at 39; annexure TCA5A to the founding affidavit.

j. the application was issued on 9 May 2024 and the documents were served on the respondents and others as is evident from the papers;

k. the application was not opposed and a rule nisi was issued on 6 June 2024 with return date 18 July 2024 on which date the rule nisi was extended and the application postponed to 8 August 2024 by agreement.

Evaluation of the parties' submissions

[4] The applicant brought the application in terms of s 345(1) of the old Companies Act, read with s 69 of the CC Act. These two sections set out the circumstances under which a company or close corporation is deemed unable to pay its debts. Mr Mogwera did not make any submissions about the letter of demand and the failure of the respondent to either reply thereto, or to pay what it accepted was due and payable.

[5] An unpaid creditor who cannot obtain payment and who brings his claim within the parameters of the aforesaid two sections is entitled to relief, subject to the limited discretion of the court.[3] Such creditor does not have to issue summons for payment, but may embark on a winding-up process as the applicant has done.

[6] As mentioned, the last invoice is dated 2 February 2024. The last payment was received from the respondent on 19 January 2024. I am satisfied that the applicant has proven that the respondent is commercially insolvent. It cannot pay its creditors and the applicant in particular.

[7] If an applicant's claim is *bona fide* disputed by the respondent on reasonable grounds, an application for a winding-up order cannot succeed. In terms of the so-called *Badenhorst Rule,*[4] accepted by the Appeal Court in *Kalil v Decotex*[5] the respondent must show the existence of a *bona fide* dispute on reasonable grounds. Corbett JA put it as follows in *Kalil v Decotex*[6]:

'Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the

[3] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440-441.
[4] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C.
[5] 1988 (1) SA 943 (AD).
[6] *Ibid* at 980B-D.

applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.'

[8] The respondent queried the acknowledgement of debt (AOD)[7] relied upon by the applicant in terms whereof the respondent agreed to pay R 2 070 000. In terms of the AOD this amount is indebted in respect of 'monies for agreed consultation and contract fees', whilst the applicant stated under oath that this claim is in respect of its portion of the profit to be made by the respondent and which was to be paid up-front. Mr Mogwera submitted that the applicant failed to attach the written profit sharing agreement entered into between the parties and therefore, this AOD could not stand on its own. I would have considered and dealt more fully with this issue if the applicant relied on this claim only. I must say that Mr Mogwera's submission is not in line with his client's version in the answering affidavit, stating that a deadlock arose between the parties and the profit sharing agreement had not finally been agreed upon.[8] Based on my approach, it is not necessary to come to a final conclusion regarding the amount of R 2 070 000. Even if I accept that respondent has shown that its indebtedness is disputed on *bona fide* and reasonable grounds, that does not follow that the applicant is not a creditor and that the rule nisi should be discharged. I refer to the facts agreed upon and the undisputed debt of at least R 1.8 million *ex facie* the invoices.

[9] Mr Mogwera submitted that the court's discretion should be exercised in favour of the respondent, the reason being that the applicant is guilty of 'greediness'. If it was prepared to wait a little bit, so he submitted, the claim would have been paid in full from funds payable by the Government to the respondent. Unfortunately for the respondent, it did not respond to the letter of demand and/or present facts under oath in its answering affidavit how much was expected from whom and when would payment be due. It is reiterated that the applicant waited three months since the last invoice before it sent its letter of demand. It is now the 8th of August 2024 and a period of sixth months has lapsed since the last invoice and the undisputed outstanding account has not been paid. Surely, it could not be expected of the applicant to allow the respondent to use its expensive equipment further without being paid the rentals

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[7] Record at 36; annexure TCA4 of the founding affidavit.

[8] Record at 97; answering affidavit para 16.

agreed upon. There is no commercial sense in allowing a lessee the usage of the lessor's equipment without payment of the remuneration agreed upon.

[10] The respondent failed to provide the court with details of its assets and liabilities. The court is in the dark as to its solvency status. However, even if the value of the close corporation's assets may exceed its liabilities – an aspect totally ignored by the respondent – this does not preclude a finding that it is unable to pay its debts. The respondent also failed to show what book debts and/or future claims are payable to it. What is known and certain, is that the respondent cannot pay its debts and it is therefore clearly commercially insolvent. This has been proven on a balance of probabilities.

[11] I am satisfied that the applicant has made out a proper case and that the rule nisi should be confirmed. Therefore, a final liquidation order shall be issued.

Order

[12] The respondent close corporation is hereby placed in final liquidation.

[redacted]

JP DAFFUE J

Appearances

For applicant: Instructed by:	Adv J Ferreira Noordmans Attorneys Bloemfontein.
For respondent: Instructed by:	Adv T Mogwera Fixane Attorneys Bloemfontein.