IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO A5001/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: **YES**	
(2) OF INTEREST TO OTHER JUDGES: **YES**	
(3) REVISED.	
12 June 2009 DATE	**FHD van Oosten** SIGNATURE

In the matter between

SANTINO PUBLISHERS CC **APPELLANT**

and

WAYLITE MARKETING CC **RESPONDENT**

Practice – applications and motions - Insolvency – provisional winding-up – Dispute of fact on papers - applicant not invoking Rule 6(5)(g) - court a quo dismissed application with costs – on appeal contended that court a quo should mero motu have ordered a referral – Held: although court having a discretion to adopt such a procedure mero motu - in casu Judge a quo correctly dismissed application with costs.

Appeal – application for referral made for the first time on appeal - power of court of appeal to order referral – claim relied on for indebtedness however having become prescribed – application for winding-up academic – appeal dismissed.

J U D G M E N T

VAN OOSTEN J

[1] This appeal concerns the power of the court of appeal to refer a matter for the hearing of oral evidence as envisaged in Rule of Court 6(5)(g). The appellant applied to the court *a quo* for the winding-up of the respondent in

terms of s 68(c) of the Close Corporations Act 69 of 1984 (the Act). The respondent opposed the application primarily challenging whether the appellant was a creditor of the respondent and therefore the appellant's *locus standi*. The matter came before Marais J. Having heard argument the learned Judge found that the appellant had failed to make out a *prima facie* case that the respondent was indebted to it and dismissed the application with costs. Leave to appeal was subsequently sought but refused. The appeal is before us by way of leave granted by the Supreme Court of Appeal, on the following basis:

> *Whether the application should have been granted, and if not, whether this was a proper matter to be referred to the hearing of oral evidence.*

[2] The first issue we are required to determine is no longer alive. In his heads of argument counsel for appellant conceded, in my view rightly so, that the learned Judge *a quo* correctly found that there were fundamental irresoluble disputes of fact on the affidavits filed in the application which warranted the dismissal of the application. The only issue accordingly remaining is whether this was a proper matter to be referred to the hearing of oral evidence.

[3] It is at the outset necessary to state that there was no application for the referral to oral evidence made at the hearing of the matter. The first reference thereto featured in the argument on behalf of the appellant when leave to appeal was sought. It was there contended that the learned Judge in the absence of an application for a referral, *mero motu* should have exercised his discretion in referring those issues on which he held no *prima facie* case had been established, to oral evidence. The argument found no favour with the learned Judge because no application had been made for such an order to which he added that had such an application been made, he would have refused it.

[4] In his heads of argument counsel for the appellant faintly submits that a request for the hearing of oral evidence was made in the appellant's replying affidavit, which on this aspect reads as follows:

> *Due to the very hostile and acrimonious relationship between the applicant and its former member, Mr Santino Cianfanelli, it is impossible for the Applicant to obtain any affidavit from Mr Santino Cianfanelli to support the Applicant's version. Should this Honourable*

> *Court require the viva voce evidence of Mr Santino Cianfanelli for the purposes of this affidavit, an order will be sought to compel Mr Santino Cianfanelli to be subpoenaed to give oral evidence at the hearing of this application. However, I respectfully submit that the version of Mr Santino Cianfanelli can be gleaned from the best evidence available, being notes recorded by him in his own handwriting…"*

The appellant was much criticised by both the Judge *a quo* as well as the respondent for relying on hearsay evidence to prove the agreement from which the respondent's alleged indebtedness arose. But as is apparent from the quoted portion of the replying affidavit, the appellant no doubt was in no position to do more than that. Cianfanelli at the time of the conclusion of the agreement was the appellant's sole member and he also acted on its behalf in concluding the agreement. The sole purpose for obtaining the proposed order (which was not persisted with at the hearing) was to present the oral evidence of Cianfanelli on a specified issue. It was clearly not intended nor can it in any way be construed as an application for the referral of the matter as a whole to the hearing of oral evidence.

[5] The question that arises is whether the court hearing an opposed application has the competence to *mero motu* order a referral to oral evidence. Rule of Court 6(5)(g) provides as follows:

> *Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*

The Rule extends a wide discretion to the court. See *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord Transvaal* 1970 (4) SA 350 (T) 365A-H and *Pautz v Horn* 1976 (4) SA 572 (O) 575H. In practice an application for a referral is typically made at the hearing of an opposed application by the applicant who is faced with the reality of irresoluble disputes of fact having arisen on the papers. I have no doubt that the court in principle has the competence to *mero motu* order such referral, but this in my experience as well as in the experience of a number of my colleagues in this Division who I have consulted on this aspect, has never occurred. The undesirability of a

Judge *mero motu* ordering a referral to oral evidence or to trail was highlighted and conclusively dealt with by a full court of the then Transvaal Provincial Division in *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) where Myburgh J writing for the court, said the following (428H):

> *It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial mero motu, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)(g) to be invoked. In the present case the amount involved is only half of R5 375. In my view is should not be left to the presiding Judge to determine, in the light of what I have said, whether the application should be decided on the affidavits or not. In proper circumstances the presiding Judge may, in his discretion, decide to do otherwise. In the present case, in my view, the Judge cannot be faulted for not having referred the case to trial, notwithstanding that he had not been requested so to do.*

See also *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) 337G.

Applied to the present matter the learned Judge *a quo* quite clearly was neither obliged nor can he be faulted for not having *mero motu* referred the matter to the hearing of oral evidence.

[6] It is in this context that this Court's competence to order a referral to oral evidence, at the request of the appellant where it was neither applied for nor considered in the court below, needs to be considered. It is true, as I have already alluded to, that Marais J did express himself in the judgment on the application for leave to appeal on the fate of such an application, had it been made at the hearing. It however remains a view expressed by the learned Judge for the purpose of deciding the application for leave to appeal. An application for referral was plainly not made at the hearing and the learned Judge therefore was not required to nor did he address his mind to it.

[7] The appellant belatedly for the first time in counsel for the appellant's heads of argument filed in this appeal, sought an order for the matter to be referred to the hearing of oral evidence. The question arising is

whether this court can entertain the application. A court of appeal is endowed with wide powers on the hearing of an appeal under s 22 of the Supreme Court Act 59 of 1959, and in particular sub-sec (b) thereof:

> *to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.*

See *Erasmus: Superior Court Practice* A1-58.

In principle I cannot see any reason for disentitling this court from entertaining the application.

[8] Assuming this court to have the power to order a referral, a number of problems face the appellant. It is only necessary to deal with one thereof. In argument before us we raised the point with counsel whether *prima facie* the appellant's claim on which the winding-up application was based, by now has not become prescribed. *Ex facie* the papers before us the appellant's claim became due at the latest on 8 March 2006 which is the date of the letter of demand in terms of s 69 of the Act, sent on the appellant's behalf to the respondent in respect of the appellant's claim. More than three years have since elapsed. Counsel for the appellant informed us that no legal steps for the enforcement of the appellant's claim against the respondent have been taken. Service of the present application for the respondent's winding-up did not interrupt the running of prescription - see *Misnun's Heilbron Roller Mills Holdings (Pty) Ltd v Nobel Street Central Investments (Pty) Ltd* 1979 (2) SA 1127 (W) 1129. Both counsel agreed (correctly in my view) that the appellant's claim has become prescribed. A prescribed debt is unenforceable and cannot be proved against an insolvent estate. See *Aspeling and Another v Hoffman's Trustee* 1917 TPD 305 at 307. Should a winding-up be ordered the liquidator will be able to prevent the appellant from proving a claim that has become prescribed. See *Nicholl v Nicholl* 1916 WLD 10 at 13; *Henochsberg on the Companies Act* Vol 1 p 720(1). For this reason the court in the exercise of its discretion will not grant a winding-up order on a claim which is prescribed. See *Jhatam and Others v Jhatam* 1958 (4) SA 36 (N) 38F. The application for the winding-up of the respondent has therefore become academic. The application for the referral to oral evidence accordingly must fail. This finding at the same time disposes of the appeal.

[9] Finally, to revert to the second issue before us as articulated in the Supreme Court of Appeal's order granting leave to appeal. The issue in view of what I have said above, of course, is no longer decisive of the appeal. I therefore propose to only briefly deal with it. I am satisfied that a dispute of fact incapable of decision on the affidavits as they stand, exists. I am unable to agree with the learned Judge *a quo* that the appellant has failed to make out a *prima facie* case. In my view the probabilities were evenly balanced which on the approach enunciated by Corbett JA (as he then was) in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 977/8, would have led me to conclude that this matter indeed was a proper matter to be referred to the hearing of oral evidence, had such an application been made at the hearing of the matter. Such application, as I have mentioned, was not made.

[10] In the result the following order is made:

1. The appellant's application for the referral of this matter to the hearing of oral evidence is dismissed.
2. The appeal is dismissed with costs.

_____
FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
FR MALAN
JUDGE OF THE HIGH COURT

I agree.

_____
RRD MOKGOATHLENG
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT ***ADV BW MASELLE***
APPELLANTS' ATTORNEYS ***MERVYN J SMITH***

COUNSEL FOR THE RESPONDENT	***ADV GB ROME***
RESPONDENT'S ATTORNEYS	***RAYMOND DRUKER***
DATE OF HEARING	***3 JUNE 2009***
DATE OF JUDGMENT	***12 JUNE 2009***