IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
30/09/14
DATE SIGNATURE

30/09/2014

CASE NUMBER: 33469/2013

In the matter between:

NEDBANK LIMITED **INTERVENING PARTY**

AND

EVERITE BUILDING PRODUCTS (PTY LTD **APPLICANT**

MPUMALANGA ROOF TRUSTEES CC **RESPONDENT**
(Registration Number: 2007/153329/23

JUDGMENT

LEPHOKO AJ

[1] The applicant brought an application for the winding-up of the respondent (the main application). Nedbank as intervening party brought an application to intervene in

order to oppose the winding-up of the respondent. The application to intervene is opposed by the applicant.

[2] The winding-up application was not proceeded with after the parties thereto entered into a written settlement agreement regarding payment of the debt owed by the respondent. The settlement agreement was made an order of court and as a result the application to intervene fell by the wayside. The only issue that the court has to decide is the costs of the application to intervene.

[3] During 2008 Nedbank granted two loans to the respondent. Both loans are secured by mortgage bonds registered in favour of Nedbank against two of the respondent's immovable properties. The immovable properties serve as security for the respondent's indebtedness to Nedbank. The security in respect of the two properties amount to R1 468 9112-50 and R779 260-00 respectively. Nedbank argued that as a secured a secured major creditor of the respondent it has a direct and substantial interest in the outcome of the application.

[4] A non-party can intervene if it can show that its right to relief was dependent upon the determination of substantially the same question of law or fact, as was the case in the main proceedings or that it had a legal interest in the subject matter of the case under consideration which could be prejudicially affected by the judgment in the main case. The intervening third party also has to show that it has a prima facie case and that the application is seriously made and not frivolous: See *Shapiro v South*

African Recording Rights Association Ltd (Galeta Intervening) 2008 (4) SA 145 (WLD) at 149G-153C.

[5] The main application is based on the respondent's deemed inability to pay its debts. On 19 February 2013 the applicant served a notice in terms of section 69 of the Close Corporations Act, 69 of 1984 read with sections 344 and 345 of the Companies Act, 61 of 1973 (the old Companies Act) on the respondent demanding payment of R384 355-20 together with interest thereon in respect of goods sold and delivered for which the respondent had during October 2010, signed a Deed of Settlement admitting its liability and offering to pay the debt in instalments.

[6] After the demand the respondent failed to pay the amount claimed or to secure or compound for payment thereof, as contemplated in section 345 of the old Companies Act. As a result the respondent is deemed unable to pay its debts and by law commercially insolvent. The respondent is accordingly not a solvent company as contemplated in section 81 of the Companies Act, 71 of 2008 (the new Companies Act). See *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA), *Scania Finance Southern Africa (Pty) Ltd v Thorni-Gee Road Carrier CC, ABSA Bank Ltd v Fernofire Betlhehem CC* 2013 (2) SA 439.

[7] Nedbank sought to intervene on the grounds that: the winding-up of the respondent is not just and equitable; there is no advantage to creditors; it is doubtful that there would be sufficient free residue from which to discharge the cost of winding-

up and therefore a real danger of a contribution to be paid by concurrent creditors; the applicant's claim had become prescribed.

[8] In terms section 81 (1)(c)(ii) of the Companies Act 71 of 2008 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 an order to wind up the company on the grounds that it is just and equitable for the company to be wound up. It is common cause between the applicant and Nedbank that the respondent is commercially and *de facto* insolvent. As a result of the respondent being insolvent it is not required of the applicant to establish that it would just and equitable for the respondent to be wound up: See *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd (supra)*

[9] No advantage to creditors is required to be established in winding-up proceedings. See *Caltex Oil SA (Pty) Ltd v Govender's Fuel Distributors (Pty) Ltd* 1996 (2) SA 522 (N) at 557A-B. It was therefore not necessary for the applicant to establish that the liquidation of the respondent would result in some advantage to creditors.

[10] In order to succeed with winding-up proceedings the applicant only need to establish that a claim of R100-00 is due by the respondent and that the respondent has failed to either pay, secure or compound for the amount demanded in terms of section 69 of the Close Corporations Act read with section 345 of the old Companies Act. Once this has been established the creditor has an unfettered discretion to choose his form of execution including a winding-up order as a lawful means of execution and any form of

discretion the court may have is a narrow one: See *Service Trade Supplies Ltd v Dasco & Sons Ltd* 1962 (3) SA 424 (TPD) at 428B-G; Bylo Rhodesian Barter and Export *(PVT) Ltd* 1974 (1) SA 601 at 602C-E.

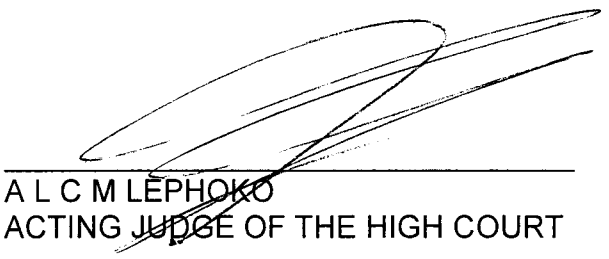
[11] Nedbank claims that the applicant's claim against the respondent has become prescribed as the cause of action arose in 2009. Reliance on prescription cannot be sustained as prescription was interrupted when the respondent acknowledged its indebtedness to the applicant on 5 October 2010 and during 2014.

[12] It appears that the applicant's application to intervene was not well founded as the basis of the application is applicable in sequestration proceedings and was bound to fail. See *Fullard v Fullard* 1979 (1) SA 368 as to established practice with regards to intervention of third parties in insolvency applications. In the result the applicant is entitled to its costs for opposing the application.

[13] The applicant has asked for costs on an attorney and client' scale. In my view such costs are justified as the applicant has been put in a position where it had to incur unnecessary costs: See *Alluvial Creek Ltd 1929* CPD 532 at 535; *Camps Bay Ratepayers' And Residents' Association v Harrison* 2011 (4) SA 42 (CC) at 71B.

In the premises I would make the following order:

1. The intervening party is ordered to pay the costs of the application on the scale as between attorney and client.



A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

Heard on: 28 July 2014.

Judgment delivered on: 30 September 2014.

For the Applicantt: Adv L W De Koning SC.

Instructed by: Mills Groenewald Attorneys

For the First Intervening Party: Adv B Lee.

Instructed by: Van Hulsteyns Attorneys