IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 15/12/16

Case Number: 9616/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/12/2016 DD Molefe
DATE **SIGNATURE**

FOUR SEASONS GUESTHOUSE CC **APPLICANT**

AND

OVIVO AQUA SA (PTY) LTD **RESPONDENT**

JUDGMENT

MOLEFE J

[1] This is an application in which the applicant seeks an order for a final liquidation of the respondent. The respondent opposes the relief sought.

[2] The applicant conducts a guesthouse business at 12 Gruisweg, Lephalale. The respondent is an erstwhile customer of the applicant in that the respondent's

employees were accommodated at applicant's guesthouse from 24 May 2015 to 31 July 2015.

[3] The applicant alleges that it is the creditor of the respondent and that the respondent owes the applicant an amount of R210 398, 40 as an outstanding debt for accommodation, breakfast and dinner rendered to the respondent's employees for the period 8 July 2015 to 31 July 2015.

[4] The applicant relies on its alleged status as a creditor of the respondent and on an allegation that the respondent is deemed unable to pay its debts alternatively that it is just and equitable that the respondent be wound-up.

[5] Applicant relies on section 344 (f) of the Companies Act 61 of 1973 ("the Act") as a ground of insolvency in that the respondent is unable to pay its debts after a demand for payment of the outstanding debt was made to the respondent in terms of section 345 of the Act on 24 November 2015.

[6] The respondent opposes this application on the following grounds:

6.1 deponent to applicant's founding affidavit has no authority to depose to the affidavit;

6.2 applicant has no *locus standi* as it was in deregistration at the time when the application was launched;

6.3 applicant has no valid cause of action as the claim is disputed on *bona fide* and reasonable grounds.

[7] An applicant for winding-up must show, on a balance of probabilities that he is a creditor of the company in order to establish that he has *locus standi* to bring the

application and to show on a balance of probabilities that he has a valid claim against the company[1].

[8] A company or other body corporate is deemed to be unable to pay its debts and may therefore be wound-up if a creditor to whom the company owes a due debt of not less than R200, has served a demand on the company requiring it to pay that amount and the company has for three weeks thereafter neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor[2].

Lack of Authority by Deponent

[9] Respondent's counsel, Advocate P Marx submitted that the deponent to the founding affidavit on behalf of the applicant is one Martha Hermina Pieterse ("Pieterse"), who claims to be duly authorized to depose to the founding affidavit. The member of the applicant is however a trust called R&R Pieterse Trust and not Pieterse. Accordingly, respondent's counsel argued that Pieterse is not authorized to bring this application nor to depose to the founding affidavit and on this basis, the application should be dismissed.

[10] Applicant's counsel Advocate C Richard submitted that the deponent to the founding affidavit Pieterse, is the only trustee of the R&R Trust, which trust is the only member of the close corporation (applicant). As such, she is acting *nomine officio* and as a result, she is the only member of the Close Corporation for all interest and purposes and such, she is the only person capable of deposing to the founding affidavit.

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[1] Common Wealth Shippers Limited v Meyland Properties (Pty) Ltd 1978 (1) SA 70 D 72

[2] Section 344 (f) and 345 of the Companies Act

[11] In my view, the authority of Pieterse to depose to the founding affidavit is beyond reproach. Pieterse is the person who has a direct and substantial interest in the matter and has the necessary legal standing and this defence should fail and is consequently dismissed.

Applicant's *Locus Standi*

[12] It is contended on behalf of the respondent that the applicant lacks *locus standi* due to the applicant being in the process of deregistration at the time when the application was launched. Respondent's counsel relied on **Juliana and Associates CC v Fikeni N.O. and Others (25388/2013) [2015] ZAGP PHC 734 (22 May 2015)** that is trite that corporate entities in deregistration do not have *locus standi*. In my view, this case is distinguishable from this application.

[13] It is common cause *in casu* that when the application was launched, applicant was not deregistered but was in the process of deregistration due to outstanding annual returns[3]. Applicant's counsel submitted that although the applicant was listed as being in the process of deregistration, the CIPC Disclosure Certificate issued on 15 March 2016 listed the applicant as being "*in business*" as the annual returns were subsequently submitted and the deregistration process terminated. In my opinion, the respondent's defence in this regard has no merit and should fail. There is a fundamental difference between the concepts of *deregistered* and being in *the process of deregistration*; the former denoting the corporate personality ceasing to exist, the latter denoting where the entity is still vested with corporate personality. I am satisfied that at no stage was the applicant deregistered and at all relevant times, applicant was registered and in business.

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[3] Bundle page 44, Annexure "AA1"

Valid Cause of Action

[14] As the status of the debtor is involved in winding-up proceedings, the applicant creditor must clearly establish his claim. Consequently, if a Court is left in any doubt as to the validity or *bona fides* of the applicant creditor's claim, it will refuse to order the winding-up of the respondent[4].

[15] This application is based upon a claim by the applicant seeking payment of R210 398, 40 from the respondent. The respondent materially disputes any obligation to pay the debt for the following reasons:

> 15.1 respondent has paid an amount of R35 066, 40 into its attorneys' trust account during March 2016 and holds same until a valid tax invoice from the applicant and a tender to pay the respondent's costs on an attorney and own client scale are received;
>
> 15.2 the remaining amount outstanding is *bona fide* disputed as there is no basis in contract or otherwise for the applicant to claim payment for accommodation as no persons for or on behalf of the respondent resided at the applicant's guesthouse for the period in which monies are levied;

[16] Respondent's counsel submitted that on 7 December 2015, the respondent did answer the applicant's letter in terms of section 345 of the Act[5] and contended that the applicant knew of the dispute of fact in advance but notwithstanding such knowledge, elected to launch the liquidation application. The applicant's counsel on the other hand argued that the alleged dispute was only fabricated after the statutory letter was sent to the respondent and is not *bona fide*.

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[4] Minooden v Ahard 1933 TPD 281
[5] Bundle page 51 Annexure "AA4"

[17] A creditor who resorts to enforce a claim by way of winding-up proceedings, which claim is *bona fide* disputed by the debtor, lacks the necessary *locus standi.* (See **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD) at 980 A-980 I**). The approach to be adopted by a Court where a provisional or final order is sought where a claim is disputed was set out by Fourie J (as part of a Full Court) in **Helderberg Laboratories CC v Sola Technologies (Pty) Ltd**[6], where he stated the following:

> *"[20] . . . . Where an applicant, as in the instant case, relies on section 346 (1) (b) of the Companies Act, it has to satisfy the court that it is a creditor within the meaning of the said subsection. It follows that, on the return day of a provisional winding-up order, the onus is on the applicant to prove on a balance of probability that it has the necessary locus standi as a creditor. See Henochsberg on the Companies Act vol. 1 at 728-30 and the authorities there cited.*
>
> *[21] If however, a respondent opposes an application for its liquidation on the basis of a dispute as to the existence of the alleged debt, a difference in approach is called for. If the alleged debt is genuinely disputed on reasonable grounds, the attitude of our courts is that it would be wrong to allow such dispute to be resolved by utilizing the machinery designed for winding-up proceedings, rather than ordinary litigation. In this event the court ought to refuse the granting of a winding-up order, whether it be a provisional or final order which is sought by the applicant. See Kalil v Decorex (Pty) Ltd and Another 1988 (1) SA 943 (A); Wolhuter Steel (Welkom) Pty Ltd v Jatu*

[6] 2008 (2) SA 627 (CPD) at [20] and [21]

Construction (Pty) Ltd (in provisional liquidation) 1983 (3) SA 815 (O); Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C); and Payslip Investment Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C)".

[18] This reasoning and approach (concerning the creditor's claim and other issues) was also followed in **Payslip Investment Holdings CC v Y2K Tec Ltd**[7] where the following was stated:

"With reference to the disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by the respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities".

[19] In determining whether a creditor's claim is *bona fide* disputed on reasonable grounds the following legal principles are relevant:

19.1 The well-known *"Badenhorst rule"* viz that where a respondent disputes liability on *bona fide* grounds, it is improper for an applicant to seek to recover the disputed debt by way of sequestration proceedings rather than by way of the usual action procedure and was set out by Corbett J (as he then was) in **Kalil v Decotex supra at 980 B-D** as follows:

"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 applicant: it is merely to

[7] 2001 (4) SA 781 (C)

show that the indebtedness is disputed on bona fide and reasonable grounds" *(own emphasis).*

19.2 The test to be applied was set out by Thring J in **Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd supra at 219 F 220 B** as follows:

"They do not, in this matter, have to prove the company's defence in such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the companies disputing these claims are not unreasonable".

[20] In *casu*, I am of the view that the respondent genuinely disputes the applicant's debt on *bona fide* and reasonable grounds. In response to the applicant's section 345 letter of demand dated 24 November 2015, the respondent in a letter dated 7 December 2015 disputed the debt on the basis that the respondent's employees never utilized the applicant's guesthouse during the period claimed. The applicant therefore knew, or should reasonably have foreseen that the debt was disputed on *bona fide* and reasonable grounds at the time of the institution of the winding-up proceedings. The **Badenhorst** rule constitutes a principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is *bona fide* disputed otherwise it is an abuse of the winding-up process.

Failure to establish grounds of winding-up

[21] The applicant relies on a statutory demand for its assertion that the deeming provision contained in the old Companies Act applies. The applicant chooses to neglect the response by the respondent dated 7 December 2015. The deeming

provisions accordingly does not find application as the claim foreshadowed in the statutory demand is disputed. The applicant argues that the respondent failed to take the Court into its confidence and to disclose its financial situation and is therefore commercially insolvent.

[22] It was submitted on behalf of the respondent that the respondent has been actively trading for many years, has approximately 75 employees, has assets of considerable value and in particular a claim against Eskom Limited arising from the Medupi Project which in itself is worth millions of rand.

[23] It is not in my view sufficient for an applicant to merely allege insolvency of the respondent; there must be evidence advanced in order to prove the allegation[8]. Essentially, the applicant is asking this Court to wind-up a solvent Company based on a debt which is disputed on *bona fide* and reasonable grounds. This in my view, is the abuse of the winding-up process.

[24] The applicant then relies on the ground of just and equitable ground as if it is some form of *"catch all"* phrase. There is no grounds to rely on just and equitable and accordingly, no case whatsoever has been made out in the founding papers.

Costs

[25] The applicant, in bringing a final winding-up application where its claim is disputed on *bona fide* and reasonable grounds and where no case is made out that the respondent is unable to pay its debts or that it is just and equitable that the respondent be wound up, warrants a costs order.

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[8] HBT Construction and Plant Hire CC v Uniplant Hire CC 2012 (5) SA 197 (FB)

[26] In the circumstances, I make the following order:

The application is dismissed with costs.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv. C Richard**
Instructed by	:	**Lewies & Associates**
Counsel on behalf of Respondent	:	**Adv. P Marx**
Instructed by	:	**Dewey Hetzberg Levy Inc.**
Date Heard	:	**22 November 2016**
Date Delivered	:	**15 December 2016**