REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 11/3/16 SIGNATURE

CASE NO: 17991/2015

11/3/2016

In the matter between:

LIFEHOUSE INVESTMENTS 17 (PTY) LTD Applicant

and

DCL INTERIORS CC Respondent

JUDGMENT

J W LOUW, J

[1] The applicant applies for the winding up of the respondent in terms of s 344(f) of the Companies Act 61 of 1973 read with s 69 of the Close Corporations Act 69 of 1984 on the ground that the respondent is unable

to pay its debts. The applicant relies for its *locus standi* to bring the application on the fact that it is a creditor of the respondent. The respondent disputes that it is indebted to the applicant.

[2] The applicant is the registered owner of the immovable property situate at 242 Premier Street, Waterkloof, Pretoria. On 27 July 2014, the applicant and the respondent concluded a written agreement in terms whereof the applicant sold the property to the respondent for a purchase price of R3,3 million. In terms of an addendum to the agreement concluded on 6 August 2014, it was agreed that the respondent would take occupation of the property on 1 September 2014 at an occupational rent of R25 000.00 per month, payable monthly in advance, pending registration of transfer of the property into the name of the respondent. In terms of the sale agreement, the property was sold voetstoots.

[3] The applicant alleges that the respondent breached the sale agreement by failing to provide bank guarantees for the full purchase price by the stipulated date, by failing to pay the transfer costs or sign the transfer documentation as required by the agreement and by failing to pay the agreed occupational rent.

[4] On 16 January 2015, the applicant's attorneys addressed a letter to the respondent in terms of s 69 of the Close Corporations Act. The letter was served by the sheriff on the respondent on 19 January 2015 at its

registered address. The letter demanded that the respondent remedy its breaches of the agreement, including a demand that the respondent pay the arrear occupational rental of R25 000.00 which had become due on 1 January 2105. The respondent failed to comply with the demand and by the time when the applicant's replying affidavit was filed, the respondent was in arrear with the payment of occupational rent in the amount of R175 000.00. The respondent vacated the property on 8 August 2015.

[5] For the allegation that it is a creditor of the respondent, and therefore has *locus standi* to apply for the winding-up of the respondent, the applicant relies on the respondent's failure to pay the agreed occupational rent.

[6] The respondent does not dispute that it failed to pay the occupational rent as alleged in the applicant's founding affidavit, but alleges that the applicant itself breached the agreement and that the respondent, as a result, elected to cancel the agreement. The alleged breaches were that the applicant did not place the respondent in possession of building plans for the patio on the property, that there was no borehole which the estate agent had said was there, that the applicant failed to provide the respondent with a certificate of electrical compliance, that run-off rain water had been directed into the sewerage system, that gutters were beyond repair, that the perimeter wall was affected by tree roots and that the electrical system was in a bad state. The respondent therefore

contended that it was not obliged to comply with any of its obligations in terms of the agreement until the applicant had rectified the alleged breaches.

[7] The applicant dealt with the alleged breaches in its replying affidavit and denied that it had committed any breach of the agreement. It was, however, submitted by Adv. Bergenthuin SC, who appeared for the applicant, that the obligations of the applicant which had allegedly been breached by the applicant were not reciprocal to the respondent's obligation to pay the agreed occupational rent. He submitted that the only obligation of the applicant which was reciprocal to the respondent's obligation to pay the occupational rent was to give the respondent occupation of the property. It was common cause that this had been done.

[8] Reference was made in this regard to the judgment of the SCA in *Grand Mines (Pty) Ltd v Giddey NO*[1] where the following was said in regard to the principle of reciprocity, also referred to as the *exceptio non adimpleti contractus*, at 965F-H:

"*The mere non-performance of an obligation would not per se permit of the exceptio; it is only justified where the obligation is reciprocal to the performance required from the other party. The exceptio therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one*

[1] 1999 (1) SA 960 (SCA)

being the intended exchange for the other. ..... Furthermore, for the exceptio to succeed the plaintiff's performance must have fallen due prior to or simultaneously with that demanded from the defendant. ..... Whether or not obligations in terms of a contract satisfy these requirements and are reciprocal in the above sense (being the strict sense in which the word is used in this judgment) is ultimately a matter of interpretation."

[9] Reference was also made to the decision of the SCA in *MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and BUSAF*[2] where the following was said at 233G-I:

"But reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required..... The overriding consideration is the intention of the parties; and the question whether the performance of respective obligations was reciprocal, depends upon the intention of the parties as evident from the terms of their agreement seen in conjunction with the relevant background circumstances."

[10] On a proper interpretation of the agreement of sale, it could not have been the intention of the parties that the respondent's obligation to pay the agreed occupational rent was reciprocal to the applicant's obligations (in so far as they can be said to be obligations arising from the sale agreement) which the respondent alleges were breached by the applicant. I agree with the applicant's submission that the only obligation of the applicant which was reciprocal to the respondent's obligation to pay

[2] 2004 (5) SA 226 (SCA)

the occupational rent was the obligation to provide the respondent with the occupation of the property.

[11] I find, therefore, that the applicant is a creditor of the respondent for the amount outstanding in respect of the agreed occupational rent and that the applicant therefore has the necessary *locus standi* to apply for a winding-up order.

[12] In terms of s 69(1)(a) of the Close Corporations Act, a corporation is deemed to be unable to pay its debts if a creditor to whom the corporation is indebted in a sum of not less than R200 which is due, has served on the corporation, by delivering at its registered address, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum. It is common cause that such demand has been served on the respondent at its registered address and that it has failed to pay the amount of the occupational rent then due.

[13] The respondent is accordingly deemed to be unable to pay its debts. In an attempt to rebut the presumption, the respondent has attached a copy of an *"account balance enquiry"* from its bank to its answering affidavit which was deposed to on 4 May 2015. The document shows a credit balance of R118 568.74 as at 20 April 2015. If anything, the document confirms that the respondent is unable to pay the amount

owing to the applicant in respect of the occupational rent. No other evidence, such as its financial statements or proof of income, was placed before the court by the respondent in order to rebut the presumption.

[14] It was submitted by Adv. Greeff, who appeared on behalf of the respondent, that the applicant was not entitled to bring an application for the winding up of the respondent as it was bound by clause 9.1 of the sale agreement which provides that, in the event of the respondent committing any breach of the agreement, the applicant shall be obliged to give the respondent written notice to remedy such breach within seven days and, in the event of the respondent failing to do so, the applicant shall have the right to either cancel the sale, sue for specific performance or cancel the agreement and retain the deposit paid by the respondent as *rouwkoop.*

[15] In my view there is no merit in the submission. The applicant has a statutory right as a creditor of the respondent to apply for the winding up of the respondent if the respondent is unable to pay its debts. The premise of the argument appears to be that the applicant has, by concluding the sale agreement, waived that right. The agreement contains no such waiver.

[16] A number of what was called points *in limine* were raised by the respondent in its answering affidavit. I deal only with those which were

argued by Adv. Greeff. The first is that the respondent has a damages claim against the applicant in respect of the alleged breaches by the applicant in respect of which there are factual disputes, that the applicant should therefore have sued the respondent for damages and that the matter should go to trial. I have found that it is not necessary to resolve those disputes in view thereof that the respondent's obligation to pay the occupational rent is not reciprocal to the obligations of the applicant which the respondent alleges have been breached.

[17] The next point was that the respondent has a counter claim against the applicant for amounts of money which it has spent on the property. All that is said in this regard by the respondent in its answering affidavit is that it has expended a great deal of money on the property and that it is formulating its claim for damages against the applicant. No attempt was made to quantify the alleged claim. Such an unspecified and unliquidated counter claim cannot be an answer to a liquidation application where the applicant's claim is undisputed.

[18] The last point raised was that the application was not served on the respondent's employees. The applicant stated in its founding affidavit that, to the best of its knowledge, the respondent did not have any employees. The respondent stated in its answering affidavit that its employees are "*inter alia*" Mr. Mokoena, Mr. Sam Moji and Mr. Ezekiel Moima, two of whom are paid in cash. The respondent did not provide

any address where the application should have been served on these employees. The applicant stated in its replying affidavit that it could not reasonably have been aware of any employee of the respondent, but that a copy of the complete application would be served on those employees at the respondent's registered address by the sheriff. This was then done. Although the point regardiung service of the application on the respondent's employees was raised by Mr. Greeff during argument, he did not argue it with any enthusiasm. No other address where the application could and should have been served on the employees was proffered during argument. The only other address to be found in the papers is on a letter which the respondent directed to the applicant's attorney and which is attached to the respondent's answering affidavit. The address which appears in the letterhead, which is presumably the respondent's place of business, is 42 Colinton Road, Blairgowrie, Johannesburg.

[19] In the result, I find that the application must succeed. I accordingly grant the following order:

[a] The respondent is hereby placed under provisional winding up.

[b] A rule *nisi* is hereby issued calling upon anyone to appear and show cause on 18 April 2016 why the respondent should not be placed under final winding-up order.

[c] The order shall forthwith be published once in each of the Government Gazette and the Citizen newspaper and be served upon the respondent at its registered address.

[d] A copy of the application and of this order must be served on the respondent's employees at 42 Colinton Road, Blairgowrie, Johannesburg.

Counsel for applicant: Adv. J G Bergenthuin SC

Instructed by: Van der Merwe du Toit Inc, Pretoria

Counsel for respondent: Adv. J J Greeff

Instructed by: Jay Inc, Pretoria