REPUBLIC OF SOUTH AFRICA

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:

24 February 2022

[redacted]

……..

DATE SIGNATURE

Case number 39913/20

In the matter between:

THUSANYO INVESTMENTS (PTY) LTD
(Registration Number: 2006/017170/07) APPLICANT

And

MADUO SUPPLY & PROJECTS CC RESPONDENT
(Registration Number 2007/154285/23)

JUDGEMENT

BOKAKO AJ

INTRODUCTION

1. This is an application for the winding-up of the respondent. The application is brought in terms of the provisions of s 69 of the Close Corporations Act 69 of 1984 ("the Close Corporations Act"), as read with subsection 344(f) and 346(1)(2)(3) and 4A of the Old Companies Act 61 of 1973 ("the Old Companies Act"), read with item 9 of Schedule 5 of the Companies Act 71 of 2008 ("the Companies Act"), which defines circumstances under which a close corporation is unable to pay its debt.

2. The applicant, THUSANYO INVESTMENTS (PTY) LTD seeks an order in terms of which the respondent MADUO SUPPLY & PROJECTS CC a Close Corporation registered as such in terms of the Close Corporation Act be wound up.

3. The applicant contends that the respondent is either insolvent or may be deemed as such as it failed to respond to the section 69 notice within 21 days after it had been served on it. This is because of the provisions of s 69(1)(a) of the Close Corporation Act.

4. As to the *onus* to be discharged by an applicant when it applies for the winding up of a respondent, it is important to note that at the stage of a provisional winding up order being granted that the applicant only needs to show *prima facie* that it is a creditor of the respondent. At the stage when a final winding up order is sought the *onus* resting on the applicant is to show on a balance of probabilities that the debt is not bona fide disputed on reasonable grounds[1].

FACTUAL BACKGROUND

5. It is contended by the applicant that it has locus standi to launch this application by reason of the fact that the applicant is the creditor of the respondent as envisaged by s 346 of the Old Companies Act, which applies to the Close Corporations by reason of the provisions of schedule 5 of the Companies Act. Section 346(1)(a) of the Companies Act provides that:

   "An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made:

[1] Orestisolve (Pty) Ltd t/a Essa Investments v NFDT Investment Holdings (Pty) Ltd 2015 (4) SA 429 (WCC) at para 7-13.

(b) by one or more of the creditors (including contingent or prospective creditors)."

Section 68 of the Close Corporations Act provides that:

"A corporation may be wound up by a Court, if-

(c) the corporation is unable to pay its debts; or

(d) it appears on application to the Court that it is just and equitable that the corporation be wound up."

Section 69 of the Close Corporations Act provides that:

(1) For the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if-

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts."

6. The applicant's case is established on the contention that the respondent is indebted to it in the sum of R828 401.97 together with interest thereon and costs: that the respondent be deemed to be unable to pay its debts by reason of its failure to respond to the notice in terms of s 69 of the Close Corporations Act, within a period of 21 days after delivery thereof.

7. The respondent opposed the application and filed opposing papers. The Applicant conducts business as a labour broker in the oil, gas and power sector. Various business dealings were concluded between the parties during the period 2018 - 2020 which dealings form the basis of the Respondent's liability. The Respondent was a 46% shareholder of the Applicant before a resolution was made for her to be removed as a shareholder of the Applicant. Apart from being a shareholder and director of the Applicant, she was also employed by the Applicant as a joint CEO from October 2017 to 2019. The birth of the application is that the Applicant demands that the Applicant should make payment to the Applicant of various sums which was due and payable to the Applicant at the time. The Respondent has however for a period of 21 days neglected to pay the sum or to secure or compound for it to the reasonable of the Applicant, by operation of law the Respondent is deemed to be unable to pay its debts in that the Respondent is indebted to the Applicant in the following amounts: an amount of R91 ,875.47 in respect of PAYE and VAT payments made on behalf of the Respondent, an amount of R235,000.00 in respect of two loan agreements and an amount of R651 ,526.50 in respect of the TW Stene contract.

8. During 2017, the Applicant approached the Respondent in her personal capacity to join the Applicant and be the Shareholder, Director and Co-CEO. The basis upon which the Applicant approached the Respondent, reason being the Applicant was doing work for Sasol as a subcontractor. The Applicant was at that time not compliant with BBBEE requirements due to the fact that Marinus (Applicant) was a white male and did not fall within the category of persons who fulfilled the BBBEE requirements. It all started when the Applicant advanced and lent the amount of R91 875.47 to the Respondent which would enable the Respondent to pay certain tax liabilities of the Respondent and enable the Respondent to obtain a tax clearance certificate. The second transaction relates to a loan of RI35 000.00 which had been advanced to the Respondent by the Applicant. The Respondent has however failed to repay the amount of the loan. In the third transaction the Respondent loaned an amount RI00 000.00 which loan became due and payable. In the fourth transaction the Applicant rented certain equipment and staff to the Respondent at the Respondent's special instance and request. The amount invoiced amounted to R238 211.00 and R263 315.50 respectively. The total indebtedness of the Respondent in respect to this debt amounts to R501 526.50. Despite demand the for the payment of the above amount the Respondent has failed to make any payment towards these invoices, the total liability of all debts of the Respondent.

THE ISSUES TO BE DECIDED

9. The Court was called upon to decide the following three issues:

   whether the respondent was indebted to the applicant in the amount claimed as stipulated above,

   whether or not the respondent was or is unable to pay its debts; and whether the respondent should be wound-up.

10. The application for the liquidation of the Respondent was issued on the 25th of August 2020. This was done in terms of Section 69 of the Close Corporations Act and after the Respondent failed to pay the debts owing to the Applicant and further failed to set security for the amounts owing.

SUBMISSIONS

APPLICANT`S CONTENTIONS

11. The Applicant contends that sale of shares agreement was entered into with the Respondent during 2017. The Respondent breached the sale of shares agreement as she never paid for the shares with the result that the sale of shares agreement was duly cancelled. Further contending that the Respondent was not removed as a shareholder by way of resolution. Such an act would, in any event, have been meaningless as one cannot remove a shareholder by way of resolution.
12. It was also submitted that neither the Respondent nor Ms Matlala are shareholders as both sale of shares agreements has been duly cancelled. The employment with Ms Matlala as joint CEO and/or employee of the Applicant was lawfully terminated on 10 June 2020 and she was removed as a director on 30 June 2020. Further submitted that the question as to whether or not Ms Matlala is a shareholder, director or employee of the Applicant is not relevant in the application for the liquidation of the Respondent, which is solely based on the inability of the Respondent to pay its debts. the Respondent has never made any payment whatsoever for the shares.
13. It was further argued by the Applicant that the test for a final order of liquidation is different to that of a provisional order, in that the applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. It was submitted that no genuine disputes of facts that have been raised by the Respondent.
14. Section 344(f) states that a company may be wound up by the court if the company is unable to pay its debts as described in section 69 of the Closed Corporations Act, 1984. Section 69 of the Closed Corporations Act, 1984 sets out three circumstances in which a company shall be deemed to be unable to pay its debts. In casu the first circumstance, namely non-payment in response to a statutory demand. As to statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured: what must be shown is that the company has neglected to pay or secure the claim. Contending that once one of the three circumstances in section 69 is established, the ground for winding-up specified in s 344(f) is satisfied.
15. Further argued by the Applicant that on the affidavits filed, the Respondent has failed to show that it is disputing the claim on bona fide grounds and that the grounds are reasonable. Further submitted that the Respondent has not raised any credible defence in respect to the claims of the Applicant or put differently the respondent has not shown that the applicant's claim is disputed either bona fide or on reasonable grounds.
16. In response to preliminary issues submitted by the Respondent. The Respondent rebutted such as follows : The first preliminary point is bad in law

as the only shareholders of the Applicant at the time of the launching of the application are current directors being Mr Ferreira and Mrs P Mofokeng.

17. The second point in limine is the alleged failure to set security with the Master for costs. The allegation is baseless as the security was indeed set and forms part of the founding papers.
18. The third point in limine is the purported failure of the Applicant to serve the application on the employees and their Union as well as the failure to serve on SARS. The allegations are baseless as the service affidavit clearly sets out that service had been effected as required by the Act.
19. The fourth point in limine is based on the purported failure of the Applicant to institute the action section 69 of the Close Corporations Act, 1984 read with section 344(f) of the Companies Act,1973. The point in limine is not understood.
20. The current application is brought in terms of s 69 of the Close Corporations Act, which defines circumstances under which a close corporation is unable to pay its debt.

RESPONDENT`S CONTENTIONS

FIRST POINT *IN LIMINE* – *LOCUS STANDI* OF THE APPLICANT AND LACK

OF AUTHORITY TO INSTITUTE LEGAL PROCEDINGS BY THE DEPONENT

ON BEHALF OF THE APPLICANT

21. The Respondent argued that according to clause 22.1.21 of the shareholders 'agreement[2] dated 01 November 2019 provides as follows: *"Despite anything to the contrary in this Agreement or in the memorandum and articles of association of the Company, no resolution on any of the material issues listed below, shall have any effect, unless agreed to by 100% (one hundred percent) of the Shareholders and 22.1.22 entering into any legal disputes or proceedings…".*
22. Further contending that the applicants failed to prove that the action taken against the respondent was authorized. In the founding affidavit the deponent, on behalf of the applicants, tersely avers that he has been authorized to depose to the affidavit on behalf of the applicant. No supporting documents were attached.
23. The applicant however failed to produce the manner in which the meeting of 10 July 2020 was called as well as the minutes of the said meeting. Instead an "extract" of the said meeting is produced dated 29 October 2020. This extract is only produced after the respondent has challenged in its answering affidavit the locus standi and the authority of the deponent to institute these proceedings.

2 See **Annexure "MM1***"*at page 001 – 201 to 232 of CaseLines.

24. The respondent has objected to the introduction of annexure "**REP1**"[3] in the replying affidavit. In this regard it has instituted interlocutory proceedings for its striking out.
25. In any event the resolution attached in "**REP1**" to institute legal proceedings against the respondent who is the shareholder, was taken in a meeting of the Board of Directors contrary to the provisions of the shareholders' agreement which requires that the resolution should be that of the shareholders. The applicant together with the deponent to the founding affidavit have failed to produce a resolution in which 100% of the shareholders have agreed that these legal proceedings be instituted and authorizing the deponent to institute these proceedings on behalf of the applicant. Annexure "**REP1**" is null and void ab initio and therefore any actions taken in compliance with the said resolution is a nullity.
26. Steps to recover the "*monies*" owed to the applicant were taken before the so-called resolution in Annexure "REP1" was taken. The steps were taken in the form of the letters of demand, allegedly, in terms of section 69 of the Close Corporations Act which were served on the respondent and issued. As a result, the applicant does not have locus standi to even issue the letters of the demand as well as the notice in terms of section 69 of the Close Corporations Act. In paragraph 12.8 of the replying affidavit the applicant alleges that the shareholder's agreement was cancelled on 4 August 2020.The applicant failed to indicate in which meeting the shareholders' agreement was cancelled and in which meeting of the shareholders, in which it was agreed that the shareholders agreed to terminate the shareholding of the respondent. In terms of the shareholders' agreement a shareholders' meeting has to be convened in accordance with clause 11.3. The applicant fails to produce evidence that the meeting in which it alleges that the respondent's shareholding was cancelled was in accordance with the provisions of clause 11.3 despite the fact that the respondent in its answering affidavit disputes the validity in which resolutions of the applicant's shareholders and those of the Board of Directors.[4] As a result, any meeting which was held by the applicant culminating in the institution of these proceedings, cancellation of the shareholders' agreement and cancellation of the respondent's shareholding in the applicant is void *ab initio*.

SECOND POINT *IN LIMINE* – FAILURE TO MAKE PROVISION FOR

SECURITY FOR COSTS CERTIFICATE BY THE MASTER OF THE HIGH COURT

3 See **Annexure REP1** at page 001 - 329 of CaseLines.

4 See paragraphs 4 and 8 of the answering affidavit in pages 001- 181 to 183 and 001 – 185 to 190 of CaseLines respectively.

27. It was further argued that in terms of section 9(3)(b) of the Insolvency Act, the applicant shall give sufficient security for the payment of all the fees and charges necessary for the prosecution of all winding – up proceedings and all the costs of administering the close corporation in liquidation until a provisional liquidator has been appointed, or if none is appointed, of all the fees and charges necessary for the discharge of the close corporation from the winding up. This application was not accompanied by a certificate issued by the Master of the High Court not more than 10 days before the date of the application to the effect that the security for costs has been given. Even Section 346(3) of the 1973 Companies Act stipulates that *"Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the proceedings and of all costs of administering the company in liquidation until provisional liquidator has been appointed, or if no provisional liquidator is appointed of all fees and charges necessary for the discharge of the company form winding up".*
28. In paragraph 15.4 of the founding affidavit, it is clear that at the time of the issuance of the application, being 19 August 2020[5] and its service to the respondent being September 2020[6], the certificate of security had not been obtained at the time. The certificate of security is dated 16 September 2020.[7] This was therefore obtained after the date of the application and therefore does not comply with the provisions of section 346(3) of the 1973 Companies Act. Even if the applicant states that the Certificate from the Master was issued before the date in which this application is to be had, the certificate is invalid as it does not comply with the provisions of section 346(3) of the 1973 Companies Act. The date of the application for provisional winding up is the date upon which the application was issued by the Registrar of the High Court. In this matter the application was issued on 19 August 2020. The applicant's failure to provide security for costs and for the certificate as provided for in the Insolvency Act, is fatal to this application. It was submitted during the hearing of the matter that compliance with the provisions of Insolvency Act as well as the applicable sections of the 1973 Companies Act in this regard are peremptory.

THIRD POINT *IN LIMINE* – FAILURE TO SERVE RESPONDENT'S

EMPLOYEES OR THEIR UNION AND SARS WITH THE APPLICATION

5 See page 001-03 of CaseLines.

6 See page 001-69 of CaseLines.

7 See page 001 – 68 of CaseLines.

29. The applicant has failed to comply with the provisions of section 346(4A) of the 1973 Companies Act, it failed to serve the employees and their registered trade union/s in the manner prescribed, the applicant further failed to serve the application to SARS at all. It was further submitted during the hearing of the matter that compliance with the provisions of Insolvency Act as well as the applicable sections of the 1973 Companies Act in this regard are peremptory.

FOURTH POINT *IN LIMINE* – APPLICANT'S FAILURE TO INSTITUTE THIS APPLICATION IN TERMS OF SECTION 69 READ WITH SECTION 344 OR 345

OF THE COMPANIES ACT OF 1973

30. Section 68 of the Close Corporation Act 69 of 1984 has been repealed and as a result section 69 of the Close Corporation Act cannot on its own be a ground for liquidation or winding up of a close corporation. Section 68 of the Close Corporation Act is an empowering provision, which means that section 69 of the Close Corporation Act finds its application on the basis of section 68. The failure of the applicant to cite the provisions of sections 344 and 345 of the companies Act of 1973 renders the application defective.[8] The applicant addressed letters to the respondent in terms of Section 69 of the Close Corporation Act and did not make any reference to sections 344 or 345 of the 1973 Companies Act.
31. The Respondent disputes that the applicant has *locus standi*; further denies that the Applicant has the authority of the deponent in the proceedings on behalf of the applicant to act on behalf of the applicant; also disputing that the debts are due and payable as contemplated in section 69 read with section 344 and 345 of the 1973 Companies Act , further denies that she is unable to pay debts and lastly the applicant has not satisfied the requirements for the granting of a provisional winding up.
32. The Respondent contends that she was a 46% shareholder of the Applicant before a resolution was made for her to be removed as a shareholder of the Applicant. Apart from being a shareholder and director of the Applicant, she was also employed by the Applicant as a joint CEO from October 2017 to 201, in 2017, Marinus approached her in her personal capacity to join the Applicant and be the Shareholder, Director and Co-CEO. The basis upon which Marinus approached her was that the Applicant was doing work for Sasol as a subcontractor. The Applicant was at that time not compliant with BBBEE requirements due to the fact that Marinus was a white male and did not fall within the category of persons who fulfilled the BBBEE requirements.

8 First Rand Bank Ltd v Lodhi 5 Properties Investment CC 2013 (3) SA 212 (GNP) at 35, Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carrier CC, Absa Bank Ltd v Fernofire Bethlehem CC (2012) ZAFSHC 148 (19 July 2012).

33. The Respondent submitted that on the 21st of April 2020 Rika Deidrick's, the chief financial officer of the Applicant communicated with the Respondent as the shareholder of the Applicant. He requested the Respondent to fill in the documents for BBBEE verification for the interest free loan for the financial year of 2019/2020. She was informed that the Applicant would qualify for interest free loan if the Applicant complied with BBBEE. The Applicant had printed a letter that the Respondent had to sign but she refused to sign. Subsequently on the 21st of April 2020 she received an email with a content of a loan certificate in an amount of R 391 875.47 which had allegedly been signed by the Respondent. On the said date of the signing of the loan certificate, the Respondent was in arcadia, Pretoria at the Bank. The Respondent argued that she never signed the loan certificate as she had refused to sign same. This seemed as a pattern in that at some stage she was once again asked to acknowledge supplier development support of R 250 000.00. She also refused to sign because she had never entered into such an agreement.

34. On the 4th of May 2020, The Respondent received an email from Marinus asking her to sign the documents required as the Applicant could not issue the BBBEE certificate if the information required from her was not received. On 06 May 2020, she received another correspondence from Marinus requesting her to send the documents as requested, on the 8th of May 2020, she received another email from Marinus still requesting documentation from her. He indicated that if she did not sign the documents, the Applicant would have to close its doors. Subsequent to that on the 14th of May 2020 she was informed by her attorneys that the Applicant asserts that she has appallingly failed to discharge her duties as a shareholder of the Applicant. The content of the correspondence further alleges that she is indebted to the Applicant an amount of R 91,875.47 in respect of PAYE and VAT payments made on behalf of Maduo Supply, an amount of R 235, 000.00 in respect of two loan agreements, an amount of R 651,526.50 in respect of the TW Stene contract. In the same letter the Applicant proposed to write off the above amounts and pay her an amount of R 500 000.00 provided she signed over all of her shares to the Applicant or the Applicant's nominees and return all items belonging to the Applicant, including but not limited to the vehicle and the laptop. On the 20th of May 2020 she further received an email from Mark indicating that on that day it was the deadline for response of the enterprise development. On 21 May 2020 during hard lockdown, she received an email from Marinus requesting her to report for work and threatened her that if she failed to report for work, then he would proceed with the disciplinary action against her. She did not did not report for work.

35. To date the Respondent have not received any dividends from the Applicant. The Applicant refused to provide financials. The First loan agreement was concluded on 27 January 2020 in an amount of R 135 000.00 and the second loan agreement was concluded on 13 March 2020. in an amount of R 135 000.00. An

amount of R 100 000. 00 All loan agreements were signed on 13 March 2020. The loan agreements were back dated. On the date alleged on the loan agreements she was not available to sign. The alleged loan of R 135 000.00 was the money transferred in on or during January 2020 after the round table meeting between Respondent's attorneys and the Applicant as it was supposed to be an increase to her salary as a director and co CEO of The Applicant. The payment was transferred to the Respondent. Applicant is adamant that money was transferred to Respondent`s account in reference to a WhatsApp communication wherein Marinus confirms the transfer of the RI 35 000.00.

36. The Applicant has not provided proof of payment of the above amounts to Maduo or into her personal account. The alleged loan amounts have already prescribed if proven that they were paid to Maduo as they were transferred in 2017.

37. The payment of R 91 875.47 by Marinus was made out of Marinus's own free will. Same was paid in 2018. The Respondent does not dispute signing the loan agreements but she signed the agreements after Marinus convinced her that the signing was just a formality for the purposes of tax and audit.

38. It was further submitted that the loan of R 600 000.00 was in respect of the project that the Respondent had from ESKOM. The project could not be done without the assistance of machinery therefore the Applicant connected the Respondent with TW Stene (Pty) Ltd. The hiring of the machinery cost R 600 000.00. The Respondent paid the money directly to TW Stene even though the Applicant asked her to pay the Applicant directly and not TW Stene.

39. The Respondent further argued that ever since she became a shareholder from 2017 to May 2019, she has never earned any dividends. She was simply told that the company was not making money. There was no transparency at all during all the years. All these fights emanated from her plea for transparency in the company. During year 2019 the Respondent was offered a salary of R 31 000.00, in December 2019, Salaries and bonuses were paid to employees.

40. Further contending that she does not owe the Applicant the alleged amounts claimed since she was informed by Marinus that he would scratch out the amounts as the loan agreement was just a formality. Marinus also informed the Respondent that he was also entitled to the directors' withdrawal. Arguing that the Respondent was not indebted to the Applicant, her refusal to pay the alleged amounts is not as a result of an inability on my part on behalf of Maduo to pay its debts, bringing this Application, the Applicant has abused the process of the Court.

THE LAW

41. In terms of s 69, a close corporation would be deemed unable to pay its debts, when, inter alia, a creditor to whom an amount of no less than R200 is due, serves a demand upon the close corporation at its registered office and pursuant thereto "the close corporation has for 21 days thereafter, neglected to pay the sum *or to secure or compound for it to the reasonable satisfaction of the creditor*". These two provisions (the latter being known as the deeming provision) were mirrored in the old Act under s 344(f) as read with s 345. Thus, save for the differences in respect of the minimum debt which must be due and payable, close corporations and companies could be wound up by courts on substantially similar grounds, namely when the entity was deemed to be commercially insolvent.

42. In Scania Finance Southern Africa (Pty) Ltd) v Thomi-Gee Road Carriers CC and Another 2013 (2) SA 439 (FB), the court held otherwise. In this case the court reasoned that the amendment of s 66(1) of the CC Act has the effect of extending the provisions of the old Act, which relate to the winding up of companies, to the winding up of close corporations, specifically in the instance where the CC Act neglects to address a particular matter. The court held that in order to give effect to the legislative intent, s 344 of the old Act must fill in the gap and operate in conjunction with s 69 of the CC Act to form the basis upon which to liquidate a close corporation which is deemed to be commercially insolvent. Essentially, "the grounds for winding-up 'insolvent' close corporations by order of court are now the same as the grounds for winding-up of 'insolvent' companies".

43. In HBT Construction and Plant Hire CC v Uniplant Hire CC 2012 (5) SA 197 (FB), the court held that an application for the liquidation of a close corporation could not be based on s 69 of the CC Act alone. The court reasoned that s 68(c) had been the empowering provision pursuant to which a close corporation could be liquidated, and that s 69 had merely qualified the meaning of 'unable to pay its debt' under s 68. Thus, according to the court, s 69 of the CC Act did not constitute an independent ground upon which to liquidate a close corporation. Accordingly, and in the absence of s 68, s 69 could not be relied upon to liquidate a close corporation. The court held that an applicant seeking to liquidate a close corporation must instead prove that the close corporation is actually insolvent or persuade the court that liquidation is just and equitable in the circumstances.

CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVIT

44. The respondent has applied for condonation of the late filing of the answering affidavit. This is an indulgence that the Court, after consideration of all the relevant factors, may exercise either in favour or against the respondent. The

respondent has furnished reasons why this application should be granted. The delay on their side was nor intentional but they were busy gathering all the proof that would be necessary for the Respondent to oppose this application. Also some of the alleged loan amounts dates back to 2017 and 2018. The Applicant only came to Court to enforce them in 2021.The Respondent had therefore misplaced some of the communication and documentation that needed to be attached to. It will be in the interest of justice if this matter is heard as it involves the Respondent`s status as the director of Maduo and was not intentional on her part to serve the answering affidavit late. It is also contended that the application should be granted by reason of the fact that the respondent has an unassailable *bona fide* defence. This is one of the considerations the Court must look into in deciding whether to grant the application for the late filing of the answering affidavit. This court is content that the respondent has satisfied these requirements and that the affidavit should be allowed. The respondent's application for the condonation for the late filing of its answering affidavit is hereby granted.

APPLICATION OF THE LAW TO THE FACTS

45. Winding-up proceedings of close corporations by a Court are governed by the provisions of Part IX of the Close Corporations Act 69 of 1984, in part by Chapter XIV of the Companies Act 61 of 1973 and certain provisions of the Insolvency Act 24 of 1936 and finally the Companies Act 71 of 2008, despite the repeal of section 68 of the Close Corporations Act, and the amendments to section 66 and 67 thereof, and the repeal of the Companies Act 61 of 1973, section 66(1) of the Close Corporations Act provides that the laws mentioned in Item 9 of Schedule 5 will apply to the winding-up and liquidation insolvent close corporations, until the date to be determined in terms of Item 9(4).

46. This court upon hearing argument on the request deemed it prudent that the points in limine should rather be considered as part of the main application so as to not frustrate the adjudication of the matter in its entirety. For the purposes of this judgment this will be a convenient point of departure.

47. In Kyle and Others v Maritz & Pieterse Incorporated 2002 (3) All SA 223 (T) Moseneke J (as he was then) considered the dispute of an applicant's claim in a liquidation application and found as follows:

"Where the claim of the applicant is disputed the respondent bears the onus to establish the existence of a bona fide dispute on reasonable grounds. See Porterstraat Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA

598 (C) at 606. The dispute raised by the debtor company must be in good faith. It must be genuine and honest. The dispute so raised must of course be based on reasonable grounds. Therefore, a defence that is inherently improbable or patently false or dishonest would not qualify as a bona fide dispute:

48. The Respondent argued that the applicant is bound by the provisions of the shareholders' agreement and that the underlying principle of the law of contract is that agreements seriously entered into should be enforced.[9] The respondent has raised several defences against the application. Firstly, the respondent denied that the Applicant had a locus standi; secondly it denied vehemently that it was in any way indebted to the applicant; thirdly it contended that there existed no underlying contractual relationship or liability to the applicant at all; and fourthly and finally it contended she was a shareholder at the time and that the applicant could not bring an application for its liquidation based on the said shareholder's agreement.

47. In Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) Corbett JA explained the nature of the onus which rests upon the respondent in winding-up proceedings as follows:

"In regard to locus standi as a creditor, it has been held, following certain English authority that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. 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 the winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds."

49. The applicant`s contention that the said indebtedness arose from a debt of loans advanced to the Respondent, a business owned by the same member as the respondent. It will be recalled that the respondent admitted having been given the money as a shareholder, it was the respondent's case that the said money emanates from the Respondent asserting that she is a 46% shareholder in the Applicant. In view of the above and, on a proper interpretation of the shareholder's agreement, the Applicant is precluded from instituting the present application. The Respondent contended that the Applicant advanced and lent the amount of R91 875.47 for payment of tax liabilities so that the Respondent can obtain tax clearance certificate. Further loaned the Respondent R135 000.00. again the Applicant loaned an amount RIOO 000.00 to the Respondent The fourth transaction had to do with certain rented equipment and staff to the Respondent at the Respondent's special instance and request. The amount

[9] See the Law of Contract in South Africa – Dale Hutchison et al: Oxford Press Second Edition: Chapter 7 at pages 175. *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); *Brisley v Drotsky* [2002] ZASCA 35, 2002 (4) SA 1 (SCA).

invoiced amounted to R238 211.00 and R263 315.50 respectively. The Respondent argued that the email dated 21 April 2020 of a loan certificate in an amount of R 391 875.47 which had allegedly been signed by her she is refuting it on the bases that on the said date of the signing of the loan certificate, was in arcadia, Pretoria at the Bank she is adamant that she never signed the loan certificate. Further stated in her papers that chief financial officer of the Applicant sent an email to her as the shareholder of the Applicant and requested her to fill in the documents for BBBEE verification for the interest free loan for the financial year of 2019/2020, she indicated that the Applicant would qualify for interest free loan if the Applicant complied with BBBEE. From the above it is as clear that: The Respondent did not deny that the Applicant made three payments that are referred as loans in their founding affidavit and secondly, the applicant was unable to deny that at some stage the Respondent was a shareholder of the Applicant and such payments were intended to make good of the BEEE status of the Applicant and for business sustainability or profitability. It is, in my view, not sufficient to base the application on unsigned agreements. Moreover, the respondent is a 46% shareholder of the applicant. It is also not in dispute that on the 09th of November 2019, the applicant issued a share certificate to the respondent wherein it is indicated that the 46% shareholding is fully paid[10]. Now the question remains if the Applicant complied with the provisions of the shareholder's agreement, clause 22.1.21 of the shareholders' agreement. This court is not called to determine the validity of the shareholder's agreement, will focus on issues of liquidity.

50. The liability of the respondent on the said sum of R828 401.97 is, in my view, disputed on *bona fide* and reasonable grounds. It is clear that on the Plascon Evans Rule, the applicant has not succeeded to prove its *locus standi*[11]*. In casu* on evidence before Court it is clear that the debt is not simply disputed because the respondent claims so. The dispute is not only *bona fide* but, in my view it is reasonable and founded on substantial grounds. The Applicant submitted that A party challenging an application for the winding-up of a company on the grounds that the applicant's claim against the company is disputed must therefore show (a) that the claim is disputed; (b) that it is bona fide disputed; and (c) that the

[10] See **Annexure "MM3"** at pages 001-234 of CaseLines

[11] LAWSA Vol.4 AD 3 paragraph 113 which dealt with the meaning of *"bona fide* dispute" on reasonable grounds. In this book it was stated that:
"A debt is not bona fide disputed simply because the respondent company says that it is in dispute. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression "genuine dispute: connotes a plausible contention requiring the same sort of consideration as a 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis of an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context means not fabricated for the purposes of the proceedings or not just thought up or brought forward without genuine belief. There can be no genuine dispute if there are not substantial grounds for disputing the debt "

grounds for disputing the claim are reasonable. In my view the Respondent has succeeded to show that its dispute for its indebtedness is based on good and reasonable grounds. The Respondent was a 46% shareholder of the Applicant before a resolution was made for her to be removed as a shareholder of the Applicant. Apart from being a shareholder and director of the Applicant, she was also employed by the Applicant as a joint CEO from October 2017 to 2019 before she was removed.

51. The Respondent submitted during hearing that she refused and asked for proof that the Respondent ("Maduo Supply") was an enterprise development as claimed that the Applicant assisted Maduo Supply with an amount of R 391, 875.47. Such was never refuted by the Applicant. They submitted that the Respondent signed a loan certificate in an amount of R 391 875.47, she was adamant in that she never signed the loan certificate.

52. This court further notes that It was never refuted by the Applicant that on the 14th of May 2020 sent correspondence to the Respondent alleging the Applicant have terribly failed to discharge her duties as a shareholder of the Applicant.

53. Ironically in the same letter the Applicant proposed to write off the debts as set out above and offered to pay Applicant an amount of R 500 000.00 if she signed over all her shares to the Applicant or the Applicant's nominees and return all items belonging to the Applicant, including but not limited to the vehicle and the laptop. The offer was limited until 20 May 2020.The irony is why would the Applicant make an offer to the Respondent whilst she is indebted to them. At the time of the above mentioned correspondence, the Applicant did not make any financial demands in the contrary they offered to settle with the Respondent. It is also not clear whether the loans were personally intended or for the company. In light of the recent change in legislation a solvent Close Corporation may therefore no longer be wound-up purely because of the fact that it is indebted to a creditor and it is unable to pay its debts.

54. It is now trite that an application for winding up of a CC shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding up proceedings and of all costs of administering the CC in liquidation until a provisional liquidator had been appointed. A copy of the application for winding up a CC together with the supporting affidavits must be served on the Master prior to filing same with the Court in order for the Master to consider whether it should apply to Court for postponement of the hearing of the matter. It is also not disputed by the Applicant that this application was instituted prior serving the

Master which is contrary to the rules[12]. The general Rules of Application, as set out in Rule 6 of the Uniform Rules of Court, apply to winding up proceedings[13].

55. This has been confirmed in the Free State division in the recent unreported judgments of Daffue J in Herman v Set-Mak Civils (5495/2011) [2012] ZAFSHC 58 (5 April 2012) and Zietsman AJ in HBT Construction and Plant Hire CC v Uniplant Hire CC 2012 JDR 0334 (FB). In these judgments it is confirmed that a solvent CC can only be wound up by the Court on application of a creditor thereof if business rescue proceedings have ended and it is just and equitable that the CC be wound-up, alternatively if it is otherwise just and equitable for the CC to be wound up. The mere fact that a CC is not paying the creditor's debt is, however, not ground which makes it just and equitable for a CC to be wound-up and a creditor will have to prove factual insolvency of the CC.

56. The applicant has failed to validate that the winding up of the respondent will be to the advantage of the creditors. In this regard the applicant merely made an unsupported averment.

57. Further nothing that the applicant bears the onus to prove that the debt in which a section 69 of the Close Corporation Act is applicable, has to prove that the debt is due and payable. In this case the Applicant did not satisfy the court that the debt is due and payable.
58. In my view there is no evidence that either the respondent was unable to pay its debts. In my view, on the evidence before the Court, application for the liquidation of the Respondent cannot succeed.

59. It is concluded in that the applicant has failed to make a proper case for the winding up of the respondent and has failed in persuading this court that liquidation is just and equitable in this circumstances.

ORDER

60. In the result the application for liquidation of the respondent is hereby dismissed with costs.

[12] In terms of section 348 of the Companies Act the winding-up of the company is deemed to have commenced at the time of the presentation of the application to court, that is at the time the application is filed with the Registrar of the High Court.
[13] Venter v Farley 1991 1 SA 316 (W). See also Cilliers Corporate Law par 27.58 512 and the authority cited in fn 152.

[redacted]

BOKAKO. TP

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances

Date of Hearing	: 23 August 2021
Date of Judgment	: 24 February 2022
Counsel for the Applicant	: Adv. L Kellermann SC
Attorney for the Applicant :	: HATTINGH & NDZABANDZABA ATTORNEYS
Counsel for the Respondent	: Adv. MG Makhoebe
Attorney for the Respondent	: RAMAFOKO ATTORNEYS

Judgment transmitted electronically.