IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6767/2012

NEDBANK LTD (formerly trading as NEDCOR BANK LTD) Intervening Party

In the matter between:

GARTH STEWARD MACINTOSH ROBERT Applicant
(Identity number)

and

NO 1 BOLUSSI CLOSE CC Respondent

Registration number: 1999/0.09694/23
Registered Address: 1 Bolussi Close,
Gordon Bay, Western Cape

JUDGMENT

Nyman A.J.

1. This is an application for the final winding up of the respondent. ! refer hereinafter to the respondent as “the Close Corporation”. On 5 April 2012 an order was granted placing the Close Corporation under provisional liquidation on the ground that it is unable to pay its debts. The rule *nisi* issued with the order called upon interested parties to show cause why a final order of liquidation should not be granted. On 11 May 2012 Nedbank Ltd launched an application seeking leave to intervene as a party in the liquidation proceedings and affording it the right to oppose the winding up application. I refer to Nedbank Ltd hereinafter as “the Bank”.

2. Pursuant to an agreement concluded by the Bank and the applicant, an order was granted on 16 made .2012, granting the Bank leave to intervene in the liquidation proceedings.

3. The applicant seeks an order of liquidation in terms of subsections 344 (f) and (h) and 345 (1)(c) of the Companies Act No. 61 of 1973 read with subsection 69(1)(c) of the Close Corporations Act No. 69. of 1994. I refer to the Close Corporations Act hereinafter as “the Act”. The applicant relies on a liquidated debt in the sum of R600;000-00 which money was advanced and lent by the applicant to the Close Corporation in terms of an oral .agreement. As proof of the applicant's claim, a copy of an Acknowledgement of Indebtedness, is annexed to the founding affidavit in support of the liquidation application, which Acknowledgement of Indebtedness is signed by Hilton Michael La Vita who is a sole member of the Close Corporation. The Acknowledgement of Indebtedness reads as follows:

> “I, the undersigned,
>
> HILTON MICHAEL LA VITA
>
> duly authorised thereto by 1 BOLUSSI CLOSE CC
> of c/o 1 Bolussi Close, Gordon's bay do hereby
> acknowledge as follows:

1. GARTH MACKINTOSH lent and advanced the Close Corporation a sum of R600 000.00 on

2. No 1 Bolussi Close CC is truly and lawfully indebted to Garth Mackintosh in the said sum.

3. I undertake to pay the said sum within 10 days of the finalisation of arbitration proceedings with a Mrs Erasmus, being held:in• Cape Tovyn,

4. I agree that the outstanding balance from time to time will attract ; interest at a rate .of 5% per annum; until the full sum will ;haye b§en: fully paid.

5. I am liable in addition for costs on an attorney and client scale, as well: as.collection costs.

6. I agree that in the event of my default, judgment may be :eht6redr against me in term of Section 57 of the Magistrate's Court Act."

4. Payment of the loan was effected in three instalments into the bank account of Mr La Vita respectively on 15 June 2009, 3 July 2009 and 29 July 2009.; No repayments were made of the loan, despite demand made by the applicant in a meeting with Mr La Vita on 3 April 2012, and hence the liquidation application.

5. It is common cause that the Close Corporation is indebted to the Bank in the amount of R5 578 144 under a mortgage bond in respect of certain immovable property. On 12 April 2011 the Bank obtained judgment against the Close Corporation. A warrant of execution was issued against the immovable property and the immovable property was duly attached by the Sheriff on 19 May 2011. In consequence, the Bank is a creditor

who holds a secured claim, against the Close Corporation and therefore enjoys a real and substantial interest in the liquidation, application. The Bank's opposition to the liquidation application is based on the following two grounds:

5.1. The applicant lacks *locus standi* to launch the liquidation application; sind

5.2 It is not just and equitable to liquidate the Close Corporation.

6. It is the Bank's contention that the applicant lacks *locu$ standi* because firstly, the payments of the loan were; made into the personal bank account of Mr La Vita and not the Close Corporation, and secondly, .clauses 2 and 3 to 6 of the Acknowledgement of Indebtedness record that it is Mr La Vita and not the Close Corporation, who is liable to the applicant for the repayment of the debt.

7. In answer to the above point in *limine,* the applicant alleges that the reason why payment of the loan was made into the personal bank account of Mr La Vita is because the Close Corporation does not have a bank account. The true position is that La Vita bound the Close Corporation and that by operation of law, La Vita attracted personal liability. The applicant furthermore alleges that the funds were intended for use and were in fact used by the Close Corporation.

8. I am in agreement with the Bank's submission that the applicant does not enjoy *locus standi* to institute the liquidation application. In terms of section 2 of the Act, a close corporation constitutes a separate juristic person, separate from its members. This separation is confirmed in section 52 of the Act which prohibits the making of loans and furnishing of security to members and others by the corporation.

9. Contrary to paragraph 1 of the Acknowledgement of Indebtedness which records that

the applicant lent and advanced the Close Corporation a sum . of R600 000.00, in fact, the money was paid into the bank ..account of Mr La Vita. The applicant's allegation that the funds were intended for use and were, in fact used by the Close Corporation is not sustainable because there is no evidence on the papers that the money was used by the Close Corporation. In any event, it is difficult to see how the money could have been used, under the name of the Close Corporation, given the applicant's contention that the Close Corporation does not have a bank account: I might add that in my opinion, this contention is far-fetched and clearly untenable within the meaning of the *Plascon Evans* decision.

10. It is my viewpoint that the applicant has not discharged the *onus* resting on him to show that he is a creditor in good standing of the Close Corporation, since it is Mr La Vita and not the Close Corporation who received payment of the loan into his bank account. I am therefore satisfied that the applicant has failed to prove on a balance of probabilities that he has the necessary *locus standi* as creditor (See: *Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd* 2008 (2)

11. While it is not necessary for me to consider whether it is just and equitable to wind up the dose corporation, in the light of my finding that the applicant lacks *locus standi*, I will nevertheless consider whether it is just and equitable to grant such an order.

12. lt is the Bank's case that it is not just and equitable to liquidate the Close : Corporation because no other creditors will, benefit from the sale of the immovable property due to the. discrepancy between the forced sale value and ; the market value thereof and the amount outstanding to the bank, being the ; bondholder, as no free residue will be available for distribution to concurrent creditors. Accordingly, in the event that the Close Corporation is wound up, the cost of the liquidation and of selling the property will not only greatly reduce

any benefit that could be received by the Bank from the sale of the immovable property, but the Bank will also be forced to pay a Contribution to the costs of the liquidation.

13. The applicant's counsel conceded in argument that if the Close Corporation is i finally wound up, the total proceeds of the sale of the immovable property will be paid to the Bank who enjoys a secured claim. He however submitted that all that the applicant enjoys is a *spes* that he will receive a benefit in respect of his unsecured loan. In my viewpoint, this *spes* will remain unfulfilled.

14. It is not in dispute that if the immovable property is sold, the price that it will fetch on the open or closed market will be between R2,2 to R2,7 million, well below the amount of the Bank's claim. In these circumstances, the applicant will not receive any benefit from the liquidation. Given the prospective costs of the liquidation proceedings, it does not make economic sense to place the Close Corporation under liquidation. As correctly contended by the Bank, the liquidation will unnecessarily diminish the estate of the Close Corporation. Accordingly, I am of the viewpoint that it will not be just and equitable to wind up the Close Corporation.

15. I therefore make the following: order:

(a) The provisional order of liquidation made on 5 April 2012 is discharged.
(b) Applicant is to pay the intervening party's costs of suit; including the costs of the postponement of 31 July 2012.

Nyman AJ
Date of Judgment: 8 August 2012