REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4859/2016

In the matter between:

NATION UNLISHED TRADING CC

t/a ENGINEERING DRAWING AND DESIGN Applicant

(Registration number: 2010/012748/23)

And

BULK PETROLEUM SUPPLIES (PTY) LTD Respondent

(Registration number: 2013/104799/07)

Heard on: 09 June 2016

Delivered on: 10 June 2016

JUDGMENT

BOQWANA, J

Introduction

[1] This is an application for the provisional liquidation of the respondent. This application was preceded by an application for condonation for the late filing of the

answering affidavit and the respondent's heads of argument which were submitted in Court during the hearing of the matter.

Condonation application

[2] Dealing with the condonation application, the applicant's counsel, Mr Brown indicated that the applicant did not oppose the condonation application in respect of the late filing of the heads of argument; however his instructions were to oppose the condonation application in respect of the answering affidavit.

[3] The liquidation application was lodged in March 2016 and set down for 21 April 2016. The respondent filed a notice of intention to oppose. The matter was then postponed by Yekiso J, by agreement between the parties, to the opposed roll on 9 June 2016 (which is the date this matter was heard). In terms of Yekiso J's Order the respondent was to file its answering papers on or before 9 May 2016 but failed to do so necessitating the applicant to bring a Chamber Book application seeking to compel filing of the answering affidavit. On 16 May 2016 an Order was granted by Mahomed AJ ordering the respondent to file its answering papers within 3 days of the service of the Order. Mahomed AJ's order was served on the respondent's correspondent's attorneys, on 18 May 2016. It is not clear from the papers when the answering affidavit was filed but it was deposed on 24 May 2016 and served on 27 May 2016 which is four days outside the period by which it should have been filed.

[4] The reason offered by the respondent's attorney for the late filing of the answering affidavit is that certain issues pertaining to the mandate to represent the respondent and the way forward, surfaced during the drafting of the answering affidavit. These issues, according to Mr Jason Demetroudes, of the respondent attorneys, could not be dealt with expeditiously. Neither are these alleged difficult and meritorious circumstances explained nor any dates upon which these occurred are provided, to substantiate such claims. An issue of geographical problems between where the respondent and its attorney are located is also raised, which it is alleged impacted on the manner in which the manner was dealt with and the

speediness in dealing with this matter. In a further affidavit, also submitted in Court during the course of the hearing of the proceedings, Mr Demetroudes alleges that he never received the Order granted in terms of the Chamber Book application and only became aware of it after the receipt of the replying affidavit which was on 3 June 2016. This is strange if one takes into account that the correspondent attorneys were served with this Order on 18 May 2016 and that is admitted by the Mr Demetroudes. An explanation from the correspondent attorneys has not been given.

[5] In regard to the issue of the lateness of the respondent's heads of argument, the explanation given is that the respondent only received the replying affidavit on 2 June 2016 and because of its counsel's workload it could only be finalised later upon consideration of the applicant's supplementary heads of argument which were only filed on 6 June 2016. The manner in which the respondent has conducted these proceedings is dilatory and the explanation given is not adequate. There had been no correspondence between it and the applicant's attorneys to explain its situation or to seek any form of indulgence. It is unfortunate that the Court, in these circumstances, could not show its displeasure by awarding costs against the respondent as costs become costs in the liquidation, even if the answering affidavit were to be admitted for other reasons.

[6] Despite the scant explanation, I am of the view that the degree of delay is not excessive and given the ramifications of liquidation proceedings, I will allow the late filing of the answering affidavit. Same goes with the respondent's heads argument.

Provisional liquidation application

Applicant's case

[7] Turning to the merits of the case, the applicant alleges that it is a creditor of the respondent in that it is owed an amount of R486 600.00 by the respondent resulting from an oral agreement that it entered into with the respondent for the purchase and delivery of diesel.

[8] It is alleged by the applicant that on or about 26 March 2015 the parties entered into an agreement at Boksburg or alternatively in Mossel Bay with the applicant duly represented by Jacobus Johannes Bezuidenhout ('Bezuidenhout') and Michael Neil De Koning ('De Koning') and the respondent represented by *inter alia* David Myburgh ('Myburgh').

[9] In terms of the agreement no order will be processed unless full payment of the order was received by the respondent. The applicant received a pro-forma invoice dated 26 March 2015 from the respondent.

[10] On 27 March 2015 the applicant settled the full outstanding amount of R756 600. The applicant alleges that it fully and duly complied with all its obligations under the agreement pursuant to payment it made to the respondent. It further alleges that the respondent failed to comply with its obligations under the agreement and failed to deliver the purchased diesel either timeously, fully partially or at all. The respondent having failed to deliver the diesel undertook to repay the purchase price to the applicant but has to date paid back only a portion, to wit R270 000. The respondent made three payment, to wit R70 000 on 28 April 2015, R100 000 on 5 May 2016 and R100 000 on 26 June 2015. In the result, the applicant alleges that it is owed by the applicant an amount of R486 600.

[11] On 19 January 2016 a letter of demand was sent in terms of section 345 of the Companies Act No. 61 of 1973 ('Companies Act'), demanding payment in the sum of R486 600 within 21 days after receipt thereof.

Respondent's case

[12] The respondent admits that it received the amount, *via* its director, Myburgh. It admits that on or about 26 March 2015, it directed a *pro-forma* invoice to the applicant to confirm the amount of R756 600 that was due and owing to the respondent for the procurement and delivery of 70 000l of 500ppm diesel.

[13] After having received the pro-forma invoice the respondent received proof of payment of the amount R756 600 on 27 March 2015. The respondent alleges that it does not stock petroleum nor does it purport to do so. It alleges that on or about January and March 2015 allocation holders such as Kish Gas Petroleum (Pty) Ltd C & C Pat Log (Pty) Ltd were contracted and paid to deliver the fuel. The fuel was ordered and paid for by itself. It attaches notices of payment in the amounts of R712 880 and R354 818.10, which were actioned on 8 January 2016 and 27 March 2015 respectively.

[14] The orders having been placed, the allocation holder was required to deliver the fuel. The respondent, according to it, complied with its obligations in terms of its agreement that had been entered into and in the circumstances to fulfil its obligations except for the petroleum having not been delivered by the subcontractor. According to it the applicant was fully aware of the fact that this is the way in which the respondent conducted its business. It alleges that the party to whom the money was paid in order for the fuel to be delivered failed, alternatively refused to deliver the petroleum product.

[15] As soon as Myburgh, who deposed to the answering affidavit, became aware of this, he demanded that the money be repaid, this was not done and it subsequently resulted in these proceedings.

[16] From the date of when the order was placed by him, that is Myburgh, with the allocation holder to purchase and deliver the fuel in question, he was in contact with the applicant's duly authorised representative Bezuidenhout. He and Bezuidenhout were in consistent discussion and negotiations pertaining to the non-delivery of the fuel indicating to him that there is an issue and the respondent was trying to resolve it. Myburgh then approached the applicant informing them of problem in good faith and tendered payment of the amount which had been paid to him for the fuel.

[17] The purpose of him engaging with the applicant at the stage when the fuel was not delivered was merely an attempt to settle the issue and restore good

relations while pursuing the party who misappropriated the funds for the petroleum. This attempt was merely done for purposes of settlement and was not to be misconstrued as an acknowledgment alternatively admission of any debt.

[18] Bezuidenhout and Myburgh approached the police station in Boksburg in order to open a case of fraud against the party who did not deliver the fuel. Bezuidenhout himself spoke to the transporter of Kish who indicated to him that he would not be delivering the fuel. During the period from when the last payment was made up until the date the affidavit was deposed to, Myburgh had been in continuous negotiations with the applicant in order to resolve the matter. Upon receipt of the section 345 notice he directed the said notice to his newly appointed attorneys of record, S Roux Incorporated, requesting them to contact the attorney for the applicant informing him of the situation and to stay the winding up proceedings. Myburgh's attorney only managed to get hold of the applicant's attorneys on 2 March 2016 to inform them about the situation which had arisen.

[19] The respondent alleges that it has operated successfully in the market since commencement of its operation and it has maintained good relations with its clients and this is the only matter that has been brought to court.

[20] It further alleges that it will not be just and equitable to liquidate the respondent for a number of reasons:

a) It renders unique service in the manner in which it operates business and the ethical approach that it has adopted.

b) It is well managed and all employees and creditors are paid with the exception of the applicant, however the full amount outstanding, although it is not dispatched, the respondent has paid R270 000 in the period of 3 months. This is surely an indication of a non-insolvent company.

c) The respondent has been and will be able to attempt to and continue with its main objective for which it was incorporated.

d) The respondent in executing its business does so within the law.

[21] The respondent further alleges that it is not made up of large and valuable unencumbered assets which can be liquidated and distributed to the creditors, the value of the respondent is its goodwill and by winding it up and not allowing the respondent to trade, the applicant will shut the door on any potential possibility of the applicant pursuing the money it claims is due and owing. Further that thereto will shut the door on any other creditors receiving any monies which may be due and owing to them.

Legal principles

[22] The law with regards to an opposed application for provisional winding up of a company is established. As was held in *Kyle and others v Maritz and Pieterse Inc.* 2002 (3) All SA 223 (T) at para 12, in these kinds of proceedings, the onus is on the applicant to establish that he or she is a creditor with requisite *locus standi* to apply for the winding up of the respondent. The applicant must first establish that it is entitled to a provisional order on a *prima facie* basis. It must also show that the balance of probabilities on affidavits is in its favour.

[23] It was held in *Orestisolve (Pty) Ltd t/a Essa Investments vs NDFT Investments Holdings (Pty) Ltd & Another* 2015 (4) SA 449 (WCC) at para 8 that, 'even if the applicant establishes its claim on a *prima facie* basis, the Court will ordinarily refuse the application if the claim in *bona fide* disputed on reasonable grounds'. Where the applicant has shown the debt *prima facie* exists, the onus is on the respondent to show that it is *bona fide* disputed on reasonable grounds. (See *Badenhorst vs Northern Construction Enterprises* (Pty) Ltd 1956 (2) SA 346 (t) at 347 H – 348 C).

[24] Moseneke J (as he then was) observed as follows in Kyle supra at para 13 :

> '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.'

He further held that:

> '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 which is inherently improbable or patently false or dishonest would not qualify as a bona fide dispute:
>
> > 'a debt is not bona fide disputed simply because the respondent company says that it is disputed. A 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 'serious question to be tried.'
> >
> > (I underline for emphasis)

[25] I accept Mr Ferreira's contention that in these proceedings, as stated in *Robson v Wax Works (Pty) Ltd and Others* 2001 (3) SA 1117 (C) at para 14, quoting a passage in *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219F-220A, 'what the respondent must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under the direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They...do not have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their claims are not unreasonable. …'

[26] The dispute must be genuine in the sense that the applicant must still provide a plausible contention requiring the same sort of consideration as a 'serious question to be tried' as was held by Moseneke J in the *Kyle* matter supra.

The claim and whether it bona fide disputed on reasonable grounds

The relationship

[27] It is not disputed that an oral agreement was entered into between the applicant and the respondent and pursuant to that, the applicant paid to the

respondent an amount of R756 600 on or before 26 March 2015 for the procurement and delivery of the diesel.

[28] The diesel was never delivered and the respondent admitted that the delivery would not take place. The respondent however alleges that non-delivery was due to a third party, a subcontractor,'s failure to deliver the diesel.

[29] It is borne out by the papers that the respondent held itself out to be a supplier of petroleum products. This is alleged in paragraph 20 of the answering affidavit and is also apparent from an email dated 19 January 2016 attached to the founding affidavit written by Myburgh to Dimitri Paleologu. In this email, the signature recorded the respondent as a licenser and exporter of all petroleum products. This information also appears from the *pro forma* invoices.

[30] The respondent submits that it contracted with a subcontractor to deliver the diesel ordered by the applicant, but avers that the subcontractor's failure to deliver did not create any liability on its part because it simply acted as an intermediary. According to it the applicant should have taken up its case against the subcontractor because it, as a respondent, had fully complied with the obligation under the agreement.

[31] This third party relationship between the respondent's clients and its so-called allocation holders, the subcontractors has not been made out by the respondent on the papers nor have the terms of this alleged relationship been alleged. What the papers reveal is an agreement that existed between the respondent and the applicant, its client, where an order was placed for delivery of the diesel and payment made.

[32] The fact that the respondent contracts with allocation holders to supply it with the petroleum and facilitates the transport and loading and offloading of the petroleum product has nothing to do with the applicant. The arrangement which exists between itself and its client is that upon payment of the invoice, the client would collect the product so ordered or alternatively it gets delivered by the respondent to the client.

[33] In this connection it is clear that the relationship exists between the client and the respondent and there is no direct nexus between the applicant and the third party subcontractors. The term '*subcontractor*' itself spells-out the nature of the relationship as it denotes a firm carrying out work as part of a larger project (See Concise Oxford English Dictionary, Eleventh Edition). The fact that the respondent proceeded to pay money to the subcontractor but the subcontractor failed to supply it with petroleum is of no consequence to its relationship with the respondent.

[34] The respondent's liability to the client is direct and based on the contract entered into between them. Orders are placed with the respondent by clients and the respondent gets paid. It is the respondent that procures product from sub-contractors chosen by it, based on the relationship and the agreement that it has with them. Arrangements on how the relevant subcontractor would be paid and how the diesel would be supplied to the respondent are between the respondent and such subcontractor. The client has no involvement on how that relationship is structured and managed. At least that has not been shown in these papers.

[35] Mr Ferreira conceded that the alleged intermediary relationship is not clearly set out on the papers. He attempted to argue that this intermediary relationship was also akin to an agency relationship. That proposition was advisedly withdrawn as it is not supported by the papers. The respondent simply could not advance any plausible contention demonstrating this alleged intermediary relationship.

[36] The debt itself is acknowledged in many parts of the respondent's answering affidavit. Myburgh admits that he approached the applicant and tendered payment of the amount which had been paid to him for the fuel, (i.e. the R756 600). He once again admitted averments pertaining to the undertaking to repay the purchase price. The excuse that he did not understand the legal ramifications when he did that does not assist him, instead it strengthens the notion that the respondent laboured under the knowledge that it was indebted to the applicant and obliged to

pay that debt. This payment could not be *in lieu* of a settlement as he alleges. In any event, on what basis would he tender to repay such a large sum of money, if the respondent did not owe the applicant? There is also no indication that the alleged holders knew that repayments were made on their behalf nor was there any indication that the respondents was pursuing payments from them on behalf of the applicant. At no stage did he advise the applicant to pursue the allocation holders directly, he instead, tried to settle the amount owing, as he alleges, whilst pursuing those misappropriating the funds.

[37] The respondent attempted to make repayments to the applicant of the amount that it owed. The explanation given that it was doing so in order to maintain relationship between it and the applicant does not hold water. The amount that was tendered was the debt of R756 600. The respondent does not mention any lesser amount that it had approached the applicant to pay as a form settlement. The respondent admits allegations made by the applicant that there is an outstanding debt in various parts of its answering affidavit, albeit mentioning at some stage that the alleged debt is in dispute. In this regard the respondent contradicts itself.

[38] In the circumstances, I agree with submission made on behalf of the applicant that on the respondent's own version, the respondent acknowledged its indebtedness to the applicant by offering to pay the amount of R756 600, even if the applicant's version of the contractual arrangement were to be rejected. If that was not the case, the respondent would have directed the applicant to the relevant subcontractor to be paid by it and for that subcontractor to fulfil its obligations towards the applicant.

[39] For these reasons, I am satisfied that the applicant has established that it is a creditor of the respondent and that the respondent is indebted to it. I am not persuaded that the respondent has a *bona fide* defence which is disputed on reasonable grounds. I cannot find on the papers that the respondents are genuine in disputing the claim and that the claim was *bona fide* disputed on reasonable

grounds. The dispute is based on vague, ambiguous and contradictory statements and it is difficult to find it reasonable. The respondent in my view seeks to create a dispute merely to avoid being wound-up; it has not discharge its onus in my view to show that the indebtedness is disputed on reasonable grounds as required by law.

Inability to pay its debts and the court's discretion

[40] The applicant relies on the presumption created by section 345(1) (a) that the respondent allegedly was unable to pay its debts cause after it was called upon to pay the remainder of its indebtedness within 21 days of receiving the demand. It failed to do so and accordingly was deemed to be unable to pay its debts for the purposes of section 345(f).

[41] Section 345(1) (a) creates only a rebuttable presumption, one would need to investigate whether the presumption has been rebutted by evidence that the respondent is not commercially insolvent. Alternatively the question would be whether despite the deemed inability to pay debts, the court's discretion should nevertheless be exercised. (See Orestisolve supra at para 71).

[42] The respondent has placed no facts before this Court to show that notwithstanding the deeming provision it is in fact able to pay its debts and thus not commercially insolvent.

[43] The respondent has failed to place any fact before this court to provide any insight into it financial position except a bald statement that it has operated successfully since the commencement of its operations until the date of the answering affidavit and has potential to grow further only in the event of it being able to trade.

[44] In fact it admits it has other creditors, which it does not name and which it has paid except for the applicant. It has not stated the amounts it has paid to these creditors and over what period. The last payment of the three tranches paid to the applicant was R100 000 made in June 2015. Since then no amounts has been paid.

No financial statements or any financial records of any kind have been brought for the Court to ascertain the respondent's financial position or even allegations pertaining to the respondent's finances.

[45] The respondent admits not to have any substantial assets which can repay its indebtedness. In the circumstances, the respondent has not been able to rebut the presumption that it is unable to pay its debts. It has instead strengthened the opposite.

[46] I have not been persuaded either that it will not be just an equitable to wind-up the respondent. The respondent has not put up any sufficient grounds on this score as can be seen from its case that has been outlined above.

Conclusion

[47] In conclusion, no facts have been made out to gainsay the case that has been placed by the applicant *prima facie* before this Court that would persuade the Court to exercise its discretion in favour of the respondent by not granting the provisional winding-up order sought. The applicant has been able to show that it is a creditor and I have not been persuaded that a *bona fide* defence exists on reasonable grounds to dispute the applicant's claim. Nothing has been placed before this Court to upset the deeming provision that the respondent has been unable to pay its debt in terms of section 345(1)(a) of the Companies Act and that it would not be just and equitable to wind it up. In the circumstances provisional order winding-up the respondent must succeed. The applicant sought relief in terms of 3.1 to 3.4 of the notice of motion, correctly, so in my view. I will add that in view of the fact that there are creditors mentioned in the respondent's papers, service of the provisional Order must be done to known creditors as well as publication in the newspapers. The applicant has not made provision for that in its notice of motion.

[48] I therefore make an order in the following terms:

1. Late filing of the answering affidavit and respondent's heads of argument is condoned.

2. The respondent is placed under provisional liquidation in the hands of the Master of the High Court.

3. A Rule Nisi is issued calling upon the respondent and any other interested parties to show cause to this Court on 29 July 2016 why the respondent should not be placed under a final winding up order.

4. This order is to be served forthwith on:

   4.1 The respondent's registered physical address;

   4.2 The respondent's employees, if any;

   4.3 Trade union, if known by the Applicant in terms of section 346 (2) read with section 346 (1) (a) of the Insolvency Act;

   4.4 The offices of the South African Revenue Services, Cape Town;

   4.5 The Master of the Western Cape High Court, Cape Town;

   4.6 By one publication in each of the Cape Times and Die Burger newspapers;

   4.7 By registered mail to all known creditors whose claims are in excess of R20 000;

5. That the costs of this application be the costs in the liquidation.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicants: Adv G Brown

Instructed by: D Paleologu Attorneys c/o De Klerk & Van Gend Inc., Cape Town

For the Respondents: Adv A Ferreira

Instructed by: S Roux Inc. c/o Strauss Daly Attorneys, Cape Town