IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 13845/2022
REPORTABLE

In the matter between:

CHAVONNES BADENHORST ST CLAIR COOPER NO	**1ST APPLICANT**
TIRHANI SITO DE SITOS MATHEBULA NO	**2ND APPLICANT**
CAPE BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION)	**3RD APPLICANT**

And

MARKERT FISHERIES (OUDTSHOORN) CC	**RESPONDENT**

(Registration Number: b[...])

Registered Address: No: 8[...] C[...] Street
Oudtshoorn
Western Cape

JUDGMENT HANDED DOWN 9 MARCH 2023

KUSEVITSKY J

[1] This is an application for costs pursuant to the settlement of winding-up proceedings brought by the Applicants against the Respondent. The parties are *ad*

idem that the application be withdrawn and same is accordingly ordered. The only issue left for adjudication is the issue of costs.

[2] According to the Applicants, the question for adjudication is whether the Respondent is liable for costs up until 7 September 2022, which is when the Respondent tendered the payment of same in an email to the Applicants during settlement negotiations ("the tender"). It is the Applicants' case that the Respondent is liable for all of the costs.

[3] The Respondent on the other hand, despite the aforesaid tender, disputes that it is liable at all for the costs of the winding-up proceedings. They say that these proceedings should never have been instituted in the first place, since the Respondent was unaware of the *causa* in the form of a judgment ("or the declaratory order") against it that triggered the winding-up proceedings. They argue that in the first instance, had the judgment come to its knowledge, it would have paid the judgment debt. Secondly and in any event, the Applicants were fully aware of the Respondent's principal place of business and that all they had to do was serve the process, in other words, the proceedings that culminated in the declaratory order, on both the registered address of the Respondent, as well as the address where the member of the Respondent was eventually located.

[4] The background facts are not disputed. They are the following: The winding-up proceedings emanate from the Respondent's non-payment of a judgment debt in the amount of R 271 196.56 plus interest and costs, which was granted on 16 February 2022 ("the judgment debt"). The aforesaid judgment debt was granted as a result of certain payments made to the Respondent by an insolvent company, the Third Applicant, which payments were declared to be void in terms of s 341 (2) of the Companies Act No. 61 of 1973 ("the 1973 Act/Old Act).

[5] It is common cause that these proceedings for the winding up of the Respondent was served on the Respondent via the Sheriff at the Respondent's registered address being 8[...] C[...] Street, Oudshoorn on 24 August 2022. According to the sheriff's return of service, it was noted that the occupants at the registered address were a Guest House and stated that 8[...] C[...] Street, (being the

registered address of the Respondent), used to be the address of accountants Acker & Meloney, who had since relocated to 1[...] J[...] Street.

[6] On the same day, the application was also served on an admin manager of the Respondent at 4[...] V[...]Street, Oudshoorn. This address is stated as the Respondent's principal place of business and also the address upon which the Applicants caused a witness summons to be served on the sole member of the Respondent on 26 August 2021.

[7] On 31 August 2022, a notice of intention to oppose was served and on 14 September 2022, the Respondent's answering affidavit was filed. It is not disputed that the parties entered into settlement negotiations after the winding-up application was served. It is also not disputed that on 7 September 2022, an email was sent by the Respondent to the Applicants in terms of which a tender was made to settle the matter by payment of the capital, interest and costs. It is common cause that payment was only made on 21 December 2022 and communicated to the Applicants via a supplementary affidavit filed on 31 January 2023.

[8] The gist of the Respondent's argument is that the Applicants had to serve the judgment debt on both the registered, as well as the Respondent's principal place of business. Had they done so, they would have paid and there would have been no need for the liquidation proceedings. This is disputed by the Applicants. They aver that the judgment was attached to several statutory demands sent to the Respondent, which were all ignored. Thus they dispute that the knowledge of the judgment debt only came to the Respondent when the liquidation application was served on the member of the Respondent.

[9] As a starting point, as I pointed out to Ms Tait for the Respondent, these are not rescission proceedings where the service of the process would be at issue and when knowledge of the debt would be of relevance. In fact, it has been the stance of the Respondent up until 7 September 2022, that the judgement debt was admitted, and moreover, in terms of the supplementary affidavit, the Applicant admits that pursuant to delivery of the Applicants' bill of costs in relation to the declaratory order, that same was settled between the parties on 25 November 2022. In my view, it is

most certainly not competent for a party who has admittedly settled a portion of the costs to then claim in later proceedings that it is not liable for same. This would indeed make a mockery of the settlement process.

[10] It is not in dispute that certain statutory requirements have to be complied with by a creditor in seeking a company's winding-up as contemplated. In *casu*, the application for the compulsory winding-up of the Respondent was brought on the basis that it is unable to pay its debt as contemplated in sections 66 and 69 of the Close Corporations Act, No 69 of 1984, read with sections 344(f) and 345(1) of the 1973 Companies Act, and/or that it would otherwise be just and equitable for the Respondent to be wound up.

[11] Section 25 of the Close Corporations Act No. 69 of 1984 provides:

> "(1) Every corporation shall have in the Republic a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed.
>
> (2) Any –
>
> (a) Notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any consideration or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by registered post to the registered office or postal address, of the corporation; and
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> (b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it." (annotations omitted)("my emphasis")

[12] Section 69 of the Close Corporations Act provides the circumstances under which a corporation is deemed unable to pay debts. In terms of subsection (1)(a), for the purposes of section 68 (c), a corporation shall be deemed to be unable to pay its

debts if a creditor 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 secure or compound for it to the reasonable satisfaction of the creditor.

[13] According to Mr Newton for the Applicants, a section 69 demand was sent to the registered address of the Respondent at 8[...] C[...] Street Oudshoorn on 6 July 2021. Furthermore, if one has regard to the Respondent's answering affidavit, it is admitted that the attorneys for the Respondent, following the receipt of the witness summons on 26 August 2021, responded to the Applicants in a letter dated 29 September 2021. In this letter, the Respondent categorically denied its indebtedness to the Applicants. They further stated that any action by the Applicants would be defended. It is therefore factually incorrect that the Respondent only came to know about the debt when the liquidation application was served on 24 August 2022.

[14] I am also in agreement with the contention advanced by Mr Newton that service on the registered address of a corporation is the trigger event to the deeming provisions of the Act. In fact, it is a peremptory requirement, absent which, no winding-up proceedings may begin. These were confirmed in the cases relied upon by the Applicants. In *Van Zyl NO v Look Good Clothing CC 1996 (3) SA 523 (SE)*, the section 69 letter of demand was posted to an incorrect address, not having been the registered address. The court held that the requirements of section 69(1)(a) were not complied with and that the applicant could not rely on the deeming provision contained therein in order to establish that the respondent is unable to pay its debts.

[15] Similarly, in *Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004 (1) SA 35 (N),* the court found non-compliance with section 69 in circumstances where the applicant failed to cause the letter to be delivered to the registered office of the respondent. The court stated in that case that no demand was admittedly served at the registered address of the respondent and no attempt had been made to deliver it or leave it at the registered office.[1] The court stated that if the respondent was no

[1] at p44

longer at the address, the applicant could have the demand left at the registered office either by delivering or sending it by prepaid registered post. The provisions of section 69 (1) are peremptory in nature and strict compliance with service requirements are essential for operation of the deeming provision.

[16] On 20 May 2022, a section 69 letter of demand was again sent to the registered address of the Respondent. As stated, this followed upon the 6 July 2021 section 69 letter of demand. Both notices went unanswered. On 24 August 2022, these proceedings were initiated.

[17] With regard to first issue, I am in agreement, and it was not disputed, that service on the registered address of the Respondent is a peremptory requirement. I am however not in agreement with the contention advanced by Ms Tait for the Responent that the Applicants were obliged to also serve the section 69 letter of demand on the principal place of business of the Respondent. In *Sibakhulu Construction v Wedgewood Village Golf Country Estate 2013 (1) SA 191*, Binns-Ward J, in a matter that dealt with the dual jurisdiction principle, stated *obiter* that section 23(3) of the 2008 Companies Act ("the New Act") makes it clear that the registered office must be an office maintained by the company and not the office of a third party used for convenience as a registered office.[2] He stated that it was evident that the 2008 Companies Act retains the institution of registered office, being an address at which the outside world can transact with the company effectively.

[18] He further found that, whereas the 1973 Companies Act made a distinction between a registered office and a principal place of business, he was of the view that the 2008 New Act required the registered address and the principal place of business to be the same and that the result of that is that pre-existing companies are obliged to change its registered address in terms of section 23(3) of the Act if the address of the office does not coincide with that of the principle place of business.

[2] *Sibakhulu* at 198B

[19] In a full Bench decision in *Van der Merwe v Duraline (Pty) Ltd*[3], Gamble J reaffirmed the dual jurisdiction principle, stating that for the winding-up of a company to occur on the basis of its inability to pay its debtors, it must take place in terms of section 14 of the Old Act, i.e. the 1973 Act. This entitles a creditor to approach a court in whose jurisdiction the main or principle place of business was located in circumstances where the registered office is located elsewhere. Thus as long as the liquidation procedure is governed by the Old Act, the dual jurisdiction principle is applicable. What this therefore means is that there is no obligation on the Applicant to have served any of the requisite statutory notices on both the registered and principal place of business, bearing in mind that section 66 of the Close Corporations Act No. 69 of 1984 (as amended) incorporates the relevant insolvency provisions of the 1973 Old Act. The dual jurisdiction principle therefore also remains available to creditors of a close corporation.

[20] It is also my respectful view, that sight should not be lost on the objectives of the New 2008 Act with reference to the registered office of a company and more specifically to pre-existing companies that have previously conveniently chosen their registered address as that of their auditors for example, and which is not the same address as that of the administrative office of the company. In my view, it is desirable that where such addresses are different, that companies change their registered address in terms of section 23(3) of the 2008 Companies Act so that this would give certainty to transacting third parties of the company.

[21] The last question is whether the Applicant is entitled to all of its costs, or for costs only up until the date on which costs were tendered, that being 7 September 2022. It is common cause that these proceedings were launched on 23 August 2022. The Respondent disputed liability in a letter addressed to the Applicant on 29 September 2021. The Respondent also filed its notice to oppose on 31 August 2022. It is not in dispute that settlement negotiations were under way between the parties that culminated in the so-called tender of 7 September 2022. However, in my view, this tender and the content thereof in relation to the offer of costs up until that date carries no weight in these proceedings since we know that the matter was not settled

[3] (7344/2013) [2013] ZAWCHC 213 (23 August 2013)

on that day and in fact, the matter proceeded with the Respondent's filing of its answering affidavit on 14 September 2022.

[22] It is also common cause that the Respondent caused a supplementary affidavit to be filed. It in, the sole member of the Respondent advised that various payments had been made, including payments for the declaratory order, which had ostensibly been settled by the parties on 25 November 2022 and payment of the four amounts as claimed for in the declaratory order. This affidavit was only filed on 31 January 2023. It goes without saying that by the end of January 2023, the matter was still very much alive.

[23] The general rule in matters of costs is that a successful party should be given their costs and this rule should not be departed from except where there are good grounds for doing so. Various grounds have been advanced in circumstances where this has been deviated from, such as misconduct on the part of the successful party in exceptional circumstances.[4] The question that first needs to be asked is who is the successful party? In this instance, the Respondent is of the view that they were the successful party since it is the Applicants that are requesting the application for the winding-up to be withdrawn. The Applicants on the other hand are of the view that the winding-up application had the desired result of obtaining the repayment of monies from the Respondent that it had unlawfully received from the insolvent.

[24] In my view, given the fact that by virtue of the declaratory orders, all monies claimed therein, including the costs thereof, had been paid, there can be no question that the successful party are the Applicants herein and there is no reason why the usual order for costs should not follow in their favour.

Order

1. The Application is withdrawn.

2. The Respondent is to pay the costs of the winding-up application.

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[4] Erasmus, Superior Court Practice; Costs in General, D5-7

D.S. KUSEVITSKY

JUDGE OF THE WESTERN CAPE HIGH COURT

ADV. AR NEWTON	APPEARANCE FOR APPLICANTS
ADV.C TAIT	APPEARANCE FOR RESPONDENT