

SOUTH AFRICA / JUDGMENT

ACME Salvage (Pty) Ltd v Smith Salvage Brokers CC (7271/11) [2012] ZAWCHC 230 (14 November 2012) [2012] ZAWCHC 230

COURT

Western Cape High Court, Cape Town

BEFORE

T C Ndita

CASE / FILE NUMBER

7271/11

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THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT)

Case

no: 7271/11

In

the matter between:

ACME

SALVAGE (PTY) LTD

.....Applicant

and

SMITH

SALVAGE BROKERS CC

.....Respondent

JUDGMENT

delivered this 14th day of November 2012

NDITA; J

- [1] This is an unopposed application for the provisional winding up of the respondent on the basis that it is unable to pay its debts in terms of s 68(c) and 69 (1) of the Close Corporations Act 69 of 1984 read with sections 344 (f) and 345 (1) of the Companies Act 61 of 1973 as amended by Act 71 of 2008. The applicant brought this

application as the creditor in respect of a liquidated claim. Its claim to the relief sought is based on the non-payment of a debt for an amount of R393, 364.15 for goods sold and delivered over a period of time. The debt is alleged to arise from a sale of wrecked motor- vehicles by the applicant to the respondent, who is a salvage broker. According to the applicant the respondent is factually unable to pay its debts based on its failure to tender due payment and the fact that cheques it tendered for payment were not honoured by the bank and were ‘returned to drawer’.

[3] The respondent in its opposing affidavit admitted being indebted to the applicant but disputed the amount owed. In its version the amount of the debt is R129 988.91 and it had tendered in full and final settlement of the debt an amount of R114 988.91 which it had paid into its attorney’s trust account. The respondent further avers that the dishonoured cheques were tendered out of fear or under duress as it had been threatened one of the applicant’s representatives with the Russian mafia.

[4] At the hearing of this application on 13 November 2012, there was no appearance for the respondent. However, the Registrar of this Court had issued a notice of set down to both the applicant and respondent’s attorneys. The said notice was issued on 30 May 2012 and specifically set out that the hearing was set down on the ‘opposed motion court roll of this Court on Tuesday 13 November 2012 at 10h00’. Be that is it may, this Court in considering whether the winding up of the respondent is justified is bound to consider the respondent’s

affidavit filed in opposition of this application.

[5] With regards to the alleged duress, Corbett CJ in *Arend and another v Astra Furnishers* 1974 (1) SA 289 (C) stated thus:

“[1] It is clear that a contract may be vitiated by duress (metus), the raison d’etre of the rule apparently being that intimidation or improper pressure renders the consent of the party subtracted to duress not true consent. . . Duress may take the form of inflicting

physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based on fear, the following elements must be established:

- (i) The fear must be a reasonable one.
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
- (iii) It must be the threat of an imminent or inevitable evil.
- (iv) The threat of intimidation must be unlawful or contra bonos mores.
- (v) The moral pressure used must have caused the damage.

It is virtually impossible to assess the respondent's duress in this matter. This is largely because the opposing affidavit makes a sweeping reference to it without giving any particular detail or explaining the circumstances of the duress. There is no direct allegation in the affidavit stating that it was fear or pressure, in line with the aspects mentioned above, that caused the respondent to issue the dishonoured cheques. In a nutshell, the affidavit lacks particularity regarding the material facts relied upon. This court cannot therefore exercise its discretion on the basis of mere conjecture or speculation. (See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229 F.

- [6] The respondent disputes the extent of its indebtedness to the applicant and avers that there is genuine and bona fide dispute was to the amount. In *Kalil v Decotex (Pty) (Ltd)* 1988 (1) SA 943 (A) at 980 B-D it was held that:

"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 a winding up order. The onus on the respondent is not 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."

- [7] In these proceedings, the respondent, by its own admission is indebted to the applicant, albeit for a lesser amount. Where a

defendant admits unequivocally that it does owe the applicant, it cannot be said that the existence or validity of the debt is in dispute. (See *Ebrahim (Pty) Ltd v Pakistan Bus Service (Pty) Ltd* 1964

- (4) SA 146 (N) at 146 G-H. What remains to be considered is whether the respondent's tender in full and final settlement amounts to payment in law. Mr Steenkamp, in my view, correctly submitted that a tender in full and final settlement is not a defence to the

application for a winding up. To this end Counsel, referred the court to *Body Corporate of Fish EAGLE Group Twelve Inv (Pty) Ltd* 2003 (5) SA 414 (W) where it was held that:

*"The tender to pay the aforesaid amount of R77 755,04 is clearly on the papers, not an unconditional tender of payment, but is tendered in full and final settlement of all indebtedness of the respondent towards the applicant. Should the applicant accept this tender, the applicant will, by doing so, waive its right to claim any other amounts from the respondent. Since the tender by the respondent to pay the amount is conditional the tender by the respondent does not amount in law to payment of the aforesaid sum of R77 755,04 and that that sum accordingly remains due and payable by the respondent to the applicant. A tender subject to a condition does not constitute payment. The law distinguishes between a payment and a conditional tender (*Reilly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) at 849H-851C) Section 345 (1) and s 344 (f) of the Companies Act intend that an unconditional payment must be made by a company in order to avoid liquidation, not that conditional tenders may be made and liquidation in that way avoided."*

It follows therefore that none of the defences raised in the opposing papers are sustainable.

[8] In the result the draft order marked “X” is hereby made an order of this court.

T. C NDITA

JUDGE: WESTERN CAPE HIGH COURT

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