

SOUTH AFRICA / JUDGMENT

Brits Vleis (Pty) Ltd v Aspigon 175 CC (32669/14) [2017] ZAGPPHC 32 (3 February 2017) [2017] ZAGPPHC 32

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

32669/14

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NUMBER: 32669/14

DATE:

3 February 2017

Reportable:

No

Of

interest to other judges: No

Revised.

BRITS

VLEIS (PTY)

LTD Applicant

v

ASPIGON

175

CC Respondent

JUDGMENT

MABUSE J:

- [1] This is an application by the applicant, Brits Vleis (Pty) Ltd, for the liquidation of the respondent, Aspigon 175 CC.
- [2] The applicant is a company with limited liability duly registered as such in terms of the provisions of the company statutes of this country. The respondent is a Close Corporation registered as such in terms of the Close Corporation Statutes of this country. The respondent conducts business of a butchery at 265 Botha Street, Northam, under the name and style** of Roots Bakery.
- [3] The application for the liquidation of the respondent is brought on the basis that the applicant has locus standi in that it is the creditor of the respondent as set out in s. 346 of the Old Companies Act 63 of 1971 ("the Old Companies Act") whose application was extended to the Close Corporations by the provisions of schedule 5 of the New Companies Act 71 of 2008 ("the Companies Act").
- [4] The applicant contends that it has locus standi to bring this application on the following grounds that:
- 4.1 it is the creditor of the respondent in the sum of R125,000.00 being in respect of a cheque dated 6 September 2013 which the respondent had given to the applicant but which was subsequently dishonoured by the bank on 7 September 2013. The said amount of R125,000.00 represented part of the respondent's indebtedness to the appellant of the total sum of R559,787.86 which was for goods sold and delivered by the applicant to the respondent. The amount of R559,787.86, which included the sum of the dishonoured cheque of R125,000.00, was only in respect of the respondent's account 1; in the books of account of the applicant
- 4.2 the respondent was indebted to the applicant in a further amount of R226,121.65 in respect of invoice INA26303; a further sum of R190,646.50 in respect of invoice INA26330 and another sum of R48,397.59 in respect of invoice number INA26384;
- 4.3 a sum of R246,143.93 in respect of account 1038;
- 4.4 a certain Anibe, who had introduced herself as the manager of Roots Butchery admitted, during a telephone conversation she had with the representative of the applicant, that the respondent was under tremendous financial pressure. It is quite clear from the foregoing, that the applicant is indeed the respondent's creditor and for that reason the applicant would be entitled to bring the application.

- [5] During January 2014, the applicant decided to demand payment from the respondents of its liabilities. On the applicant's instructions its attorneys sent a notice in terms of section 69 of the Close Corporations Act to the respondent. The said notice was delivered by the sheriff of the High Court to the respondent on 3 February 2014. It referred in particular to the amount of the dishonoured cheque. It stated as follows:

"ONS KLIËNT: BRITS VLEIS (EDMS) BPK

KENNISGEWING IN TERME VAN ARTIKEL 69 VAN DIE WET OP BESLOTE KORPORASIES

Skrywer tree hierin op namens Brits Vleis (Edms) Bpk.

Dit is ons instruksies dat u aan ons kliente die bedrag van R125,000.00 (EEN HONDERD VYF EN TWINTIG DU/SEND RAND) plus rente daarop verskuldig is ten opsigte van 'n tjek gedateer 6 September 2013 wat u aan ons klient gelewer het vir betaling, welke tjek deur u finansiële instelling terugverwys is as "refer to drawer".

U word hiermee aangemaan in terme van die bepalings van Artikel 69 van die Wet op Beslote Korporasies, Wet 69 van 1984, om hierdie bedrag binne een-en-twintig (21) dae aan ons kantore te betaal.

Sou u weier of versuim om hierdie bedrag te betaal, of sekuriteit vir die behoorlike namkoming van u verpligtinge te stet, sal dit geag word dat u insolvent is en nie in staat is om u krediteure te kan betaal nie.

Ons wens in hierdie verband u aandag te vestig op die bepalings van Artikel 69 van die Wet op Beslote Korporasies, Wet 69 van 1984, wat soos volg lees:

- (1) by die toepassing van Artikel 86(C) word 'n Korporasie geag nie sy skulde kan betaal nie, indien-
 - (a) 'n Skuldeiser, by sessie of andersins, aan wie die korporasie reeds opeisbare bedrag van nie minder ss R200 verskuldig is, 'n aanmaning waarvan die korporasie aangesê word sldus die bedrag opeisbaar te betaal, aan die korporasie bestel het deur dit by sy geregistreerde kantoor af te lewer, en die korporasie vir 21 dse dsama nsgelst het om die bedrag te betaal of tot die redelike bevrediging van die skuldeiser dssrvoor sekerheid ts stel of ten opsigte dasrvan 'n akoord aan te gaan; of
 - (b) 'n balj, of 'n geregsbode van die landroshof, in sy relaas op 'n prosesstuk of ander bevel skrif uitgersik ingevolge vonnis of bevel van die hof ten gunste van 'n skuldeiser van die korporasie, verklaar dat hy onvoldoende vervreembare goed gevind het om te voldoen aan die vonnis of bevel, of dat die gevonde vervreembare goed by verkope onvoldoende was om te voldoen aan sodanige prosesstuk; of
 - (c) tot bevrediging van die hof bewys word dat dis korporasie nie sy skulde kan betaal nie.

- (2) by die vasstelling van die doeleindes vir sub Artikiel (1) of 'n korporasie sy skulds nie kan betaal nie, neem die hof ook die voorwaardelike en vetwagte verpligtinge van die korporasie in aanmerking.”
- [6] Although the respondent did not respond to the said notice in terms of s 69 several payments commencing on 10 January 2014 up to 6 March 2014 were made by the respondent to the applicant towards the liquidation of the respondent's debt. After taking all the payments made by the respondent to the applicant into account, the total amount still due and payable by the respondent to the applicant was, so it was contended by the applicant, as at 6 March 2014, a sum of R662,681.79. After a period of 21 days referred

in the s 69 notice had come and gone, the applicant instructed its attorneys to launch this application. It is accordingly contended by the applicant that on the basis of the foregoing, the respondent may be deemed to be insolvent by reason of the respondents' failure to respond to the s 69 notice within 21 days of the date of delivery of the said notice and considering that the cheque the respondent had paid the applicant with was dishonoured by the bank.

- [7] The application is opposed by the respondent. The affidavit of one, Gabriel de Sousa ("de Sousa"), a member of the respondent is used to oppose the application. He states that all facts in this affidavit and all the dealing between the applicant and the respondent fell within his personal knowledge. He states furthermore and specifically that he was at all relevant times responsible for and involved in all orders that were placed by the respondent with the applicant, invoices that were submitted by the applicant to the respondent and to all the payments that the respondent made to the applicant.
- [8] According to his testimony the respondent conducted business as a butchery in Northam since 2011. The majority of the respondent's customers were mineworkers employed at the mines around Northam. During the years 2013 and 2014 and due to the strikes at the mines the respondent suffered a dip in its monthly turnover. The turnover dipped from R3.5 million per month to R1.4 million per month. Despite all these challenges the respondent continued to trade whilst others around it folded. In the period of two months after the strikes had ceased, the respondent's business picked up. There were improvements in its turnover. The turnover picked up to R2 million per month. The respondent admitted that because of the factors mentioned above it fell into arrears with the payments of its creditors. De Sousa contends that despite all such challenges the respondent continued to trade and to make regular payments to its creditors of any overdue amounts.
- [9] With regard to these overdue amounts, the respondent's total creditors were R2.2 million, the bulk of which about 95%, were rendered in less than 3 days and were not due and payable. It was contended again, on behalf of the respondent, that it has assets in excess of R9 million consisting, among others, of refrigerators, generators, forklifts and automated guard system. On the basis of the aforementioned it is denied by the respondent that it is unable to pay its debts.

[10] The respondent admits that the applicant is its creditor. The respondent admits furthermore that a cheque for the sum of R125,000.00 that It had given to the applicant as payment of its debts was dishonoured. On the contrary the respondent states that the applicant has failed to disclose that subsequent to the dishonour of the cheque, payment was made to the applicant by the respondent on 13

September 2013 in the sum of R135,000.00. In addition, it is contended on behalf of the respondent, that the applicant has failed

to disclose to the Court that in September 2013 several other payments were made by the respondent to the applicant with the result

that as at 26 September 2013 the respondent was not indebted to the applicant at all. On the basis of the foregoing, the respondent

contends that the amount of the dishonoured cheque, being the debt upon which the applicant relies to liquidate the respondent, was therefore extinguished long before the applicant brought the application in April 2014 for the liquidation of the respondent.

[11] The applicant pleaded that Annexure "RA1" attached to the replying affidavit, being the latest account statement of the respondent, showed that the respondent was still indebted to the applicant; that the payment of R135,000.00 on 13 September 2013 did not extinguish the respondent's indebtedness to the applicant and that even after the said payment, the said sum of R135,000.00 the respondent still owed the applicant the sum of R286,405.75. The applicant admitted in its replying affidavit that the sum of R125,000.00 as per the dishonoured cheque dated 6 September 2013 was indeed settled. It added though that the respondent was, even after settling the amount of R125,000.00 still indebted.

[12] THE LAW

The application for the liquidation of the respondent is based on the amount of the dishonoured cheque of R125,000.00. This is evident from the evidence of the applicant as contained in both paragraphs 5 and 6 of the applicant's founding affidavit. In paragraph 5 of the founding affidavit the applicant states that:

"Die Applikant is 'n skuldeiser van die Respondent in die bedrag van R125,000.00 soos blyk uit aanhangsel 'BV3' synde 'n afskrif van 'n tjek wat ten gunste van die Respondent getrek is op die Bank van Athene. gedateer is 6 September 2013. Die betrokke tjek is op 6 September 2013 aangebied by die applikant se bank, Mnre Standard Bank, en is die tjek soos blyk uit aanhangsel 'BV3' onteer en terug gestuur as onbetaald. Die bankier van die Applikant het hulle stempel verwys na trekker (refer to drawer) op die betrokke staat aangebring."

Paragraph 6 states as follows:

"Hierdie R125,000.00 verteenwoordig deel van die verskuldigheid van die Respondent aan die Applikant en heg ek hierby 'n uittreksel uit die Grootboek van die applikant as aanhangsel BG4' waaruit die verskuldigde bedrag soos op die 11de Januarie 2014, die bedrag van R559,787.86 blyk."

- [13] That the applicant relied on the said amount of R125,000.00 is made even clearer by the notice in terms of s 69 of the Close Corporations Act. No singular demand or notice was made in respect of another amount. The applicant would have failed to comply with the provisions of s 69 of the Close Corporations Act in respect of any amount other than the R125,000.00 of the dishonoured cheque. Section 69 prescribes that the creditor must in the notice demand a payment "for the sum so due".
- [14] The respondent admits that it paid the applicant by means of a cheque for the sum of R125,000.00; that the said cheque was dishonoured but contends that the amounts of the said cheque was made good by the respondent paying the sum total of R135,000.00. This payment has been admitted by the applicant.
- [15] Since January 2014 to 29 September 2014 the respondent made a total payment of R446,550.00. These payments resulted in the debt being reduced to R347,981.00 As far as it concerns the respondents, the said payments clearly showed that it was not correct as alleged by the applicant, that the respondent was unable to pay its debts. No other demand in terms of s 69 of the Close Corporations Act was made.
- [16] Furthermore, the respondent disputes the correctness of the applicant's records. Where the applicant had stated that the respondent had paid R20,050.00, on 24 January 2014, the respondent pointed out that it was not correct and that the correct amount that it paid was R240,050.00. Secondly, the respondent, furthermore, pointed out that an amount of R11,800.00 that the respondent had paid on 30 January 2014 was not reflected in the list of payments the applicant admitted that the respondent had made. On this basis it was claimed by the respondent, firstly, that the applicant's reconciliation was faulty, and secondly, that it did not reflect the payments made after March 2014.
- [17] In particular, the respondent states that the debt of R125,000.00 as per cheque dated 6 September 2013 was paid and the respondent's entire debt to the applicant was extinguished on 20 September 2013, long before the applicant sent to the respondent a notice in terms of s 69 of the Close Corporations Act. Despite the fact that the said amount had been paid, the applicant persisted

with not only the s 69 notice but also with the application to liquidate the respondent. The applicant continued to supply the

respondent with meat until January 2014. The respondent denies that it is insolvent and also that it is unable to pay its debts. Quite clearly there is a dispute of facts relating to whether or not the respondent has made payments to the applicant and whether those payments settled its debts to the applicant. In my view, the respondent has raised a bona fide dispute. On the principle set out in *Kalil v Oecotex (Pty) Ltd and Another* 1988(1) SA 943 AD at page 980 where the Court stated

that: "Consequently, where the respondent shows on a balance of probabilities 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 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: I am of the view that the application for the liquidation of the respondent in the face of such disputes cannot succeed.

[18] The applicant admitted that as at 28 October 2015 the respondent was still indebted to it in the sum of R48,005.25. The respondent admitted being indebted to the applicant in the sum of R794,531.79; that it made payments to the applicant between January 2014 to September 2014 in the amount of R446,550.00 that there was at one stage the outstanding balance of R347,981.79. It is clear that as at 28 October 2014 the outstanding amount was R48,005.25. The importance of this evidence lies in the fact that despite the fact that the applicant stopped furnishing the respondent with meat, the respondent, somehow, managed to continue conducting its business, and more importantly to make payments of its debts. The mere fact that from the huge amount of R794,531.79 as at January 2014 to the outstanding balance of R48,005.28 as at October 2014 is indicative of the ability of the respondent to pay its debts. I am therefore satisfied that the respondent's evidence shows that it is able to pay its debts. On the facts before the Court, the application for the liquidation of the respondent cannot succeed.

[19] Accordingly, I make the following order:

1. The application for the liquidation of the respondent is hereby dismissed with costs.

P. M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Adv. Z Schoeman

Instructed by:

Strydom Bredenkamp Inc

Counsel for the first respondent:

Adv. D Meyer

Instructed by:

Gemeke & Potgieter

Date Heard:

23 August 2016

Date of Judgment:

3 February 2017

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