

SOUTH AFRICA / JUDGMENT

Components only Proprietary Ltd v Joroy 0011 CC (4692/2022) [2023] ZAFSHC 87 (22 March 2023)

[2023] ZAFSHC 87

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

4692/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4692/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

COMPONENTS ONLY PROPRIETARY LTD

Applicant

and

JOROY 0011 CC

Respondent

(REG. NO. B2004/006273/230)

CORAM: VAN RHYN, J

HEARD ON:

23 FEBRUARY 2023

DELIVERED ON: 22 MARCH 2023

- [1] This is an application for the winding-up of the respondent on the basis that it is unable to pay its debts as envisaged in section 344(f) of the Companies Act[1] (the “Companies Act”), read with the provisions of section 66(1) and 69(1)(a) of the Close Corporations Act[2] (the “CC Act”).
- [2] The applicant is Components Only Proprietary Limited, a private company with limited liability incorporated as such in Australia and with its business situated at Queensland, Australia. The respondent is JOROY 0011CC trading as Ferro Sales & Service, a close corporation with its registered address at Ribblesdale, Bloemfontein, Free State Province.
- [3] The application for its liquidation is opposed by the respondent on the basis that it acted as an agent for the applicant to purchase goods from Hitachi Construction Machinery Africa (“Hitachi”), the manufacturer of the goods. Respondent’s indebtedness to the applicant has therefore been disputed on bona fide and reasonable grounds.
- [4] The following facts are either common cause or undisputed. On or about 13 January 2022 the applicant placed a purchase order for two traction motors at a unit price of R6 660 924.52 each with the respondent. The applicant paid the sums of R6 660 924.52 on 20 January 2022 and the amount of R6 660 549.52 on 7 March 2022 as payment for the two traction motors. The applicant received one traction motor. The respondent failed to supply the second traction motor where after the applicant cancelled the purchase order on 29 March 2022 and demanded repayment of the amount paid in respect of the second traction motor.
- [5] During January 2022 the applicant purchased three blower motors in respect whereof the respondent issued tax invoices in its name and addressed to the applicant for the total amount of R 331 200.00. Applicant paid the amount as per the invoices for the three blower motors to the respondent on 18 January 2022. Applicant received two of the blower motors. The respondent failed to deliver the third blower motor to the applicant and has also failed to repay the amount
- of R 110 400.00 in respect of the third blower motor to the applicant.
- [6] The respondent undertook to repay the amount of R110 400.00 to the applicant in respect of the third blower motor. Shortly prior to the hearing of this matter the respondent repaid the amount of R110 400.00 in respect of the third blower motor. The parties are ad idem that the claim in respect of payment in the amount of R 110 400.00 in respect of the third blower motor has been settled.
- [7] The only amount owing, as contended by the applicant, is the amount of R6 660 549. 52 in respect of the second traction motor which has not been delivered by the respondent.

- [8] The respondent's main defence is that it acted as an agent on behalf of the applicant. The respondent alleges that it paid the purchase price of the second traction motor to Hitachi, however Hitachi refuses to provide the second traction motor to the respondent and refuses to repay the purchase price of the second traction motor to the respondent. On the basis that the respondent acted as the applicant's agent, it is contended that the applicant should institute action against Hitachi to recover payment of the amount of R6 660 549.52.
- [9] Mr Lotz SC, counsel on behalf of the applicant argued that the onus to prove that a relationship of principal and agent existed between the applicant and the respondent, rests upon the respondent. Not only does the respondent carry the onus on a balance of probabilities in respect of the defence of agency but also to persuade the court on a balance of probabilities that it had indeed paid over the amount of R6 660 549.52 to Hitachi.
- [10] As no delivery of the second traction motor was received nor repayment in respect of the second traction motor, applicant caused a statutory demand^[3] to be served upon the respondent on 18 July 2022 in which it called upon the respondent to pay its indebtedness to the applicant within 21 days of receipt of the demand. Despite the lapse of 21 days, no payment was forthcoming or secured to the reasonable satisfaction of the applicant.
- [11] The winding-up of a close corporation is regulated by section 66 of the CC Act. The applicability of the Companies Act to the winding up of close corporations is set out as follows in section 66 of the CC Act:
- "(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act."*
- [12] Section 69(1) of the CC Act provides that for the purposes of section 68(c), a corporation shall be deemed to be unable to pay its debts, if-
- "(a) a creditor, by cession or otherwise, 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 to secure or compound for it to the reasonable satisfaction of the creditor; or*
- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the corporation is returned by a sheriff, or a messenger of a magistrate's court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or
- (c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.
- (2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation."

[13] In order to establish the requirement that the respondent is unable to pay its debts, the applicant relied upon the respondent's inability to pay its debt within the statutorily allowed period of 21 days after receiving the statutory demand. Section 344 of the Companies Act is the source of authority that vests a court with the power to liquidate a company.[4] Subsection 344(f) provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345, which in turn provides, that:

"345. (1) A company or body corporate shall be deemed to be unable to pay its debts if-

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
- (i) Has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or
- (b) It is proved to the satisfaction of the court that the company is unable to pay its debts... "

[14] In *Imobrite (Pty) Ltd v DTL Boerdery CC*[5] the Supreme Court of Appeal, with reference to the so-called Badenhorst rule, summarised the principles to be applied in cases

where a debt is disputed as follows:

"[14] It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.

[15] A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation.[6] It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights.[7]"

[15] Subsequent to the applicant's demand for return of the funds in respect of the traction motor on 29 March 2022, respondent replied, per email dated 25 April 2022, that respondent had paid the monies to Hitachi and provided proof of such payment in an amount of R1 160 924.52. On respondent's version it should therefore have still been in possession of the balance, namely R 5 500 000.00. The following day, on 26 April 2022, the applicant addressed an email to the respondent stating the aforementioned fact and requested repayment of the amount of R 5 500 000.00.

[16] Respondent failed to reply to such request where after the applicant, on 28 April 2022, addressed a further email to the respondent requesting a reply. On 28 April 2022 respondent replied and indicated that it requested a refund from Hitachi where after the monies will be repaid to the applicant. Since 28 April 2022 the respondent has not repaid the amount of R5 500 000.00 nor has the amount of R1 160 924.52 been refunded to the applicant.

[17] Mr Lotz SC argued that the purchase orders by the applicant, addressed to the respondent, is indicative of a relationship of purchaser and seller between the parties, both acting in their own right as principals. Annexure “AF4” to the founding affidavit is the purchase order by the applicant dated 13 January 2022 addressed to Ferro Sales and Service, the respondent, for the two traction motors in the total amount of R13 321 849.04.

[18] The purchase order provides that the purchase is subject to the terms and conditions of purchase which is available on the specified website of the applicant. Clause 14.5 provides as follows:

“ 5. The relationship of the parties is one of principal and independent contractor only”

Clause 5 reads as follows “Warranties and Exclusion of Liability. 1. The seller warrants that the goods when delivered to Components Only will comply with any description for the goods contained in the relevant Purchase confirmation, the Standard Specifications and with the information otherwise provided by the Seller and the original equipment manufacturer in respect of the goods. Components Only is not required to accept goods with any specifications or characteristics that are outside any such description for the goods”.

[19] In clause 6, regarding the indemnities and insurances, the terms and conditions applicable to the purchase provides that the seller shall indemnify the applicant inter alia of the following: against all costs, claims demands, expenses and liabilities of whatsoever nature including claims of death and personal injury. On behalf of the applicant it was therefore argued that no agent would accept these responsibilities if it acted as an agent.

[20] Subsequent to the statutory letter of demand the respondent replied per email on 15 August 2022 that both companies knew the risks involved to “... get parts from Hitachi South Africa and that Hitachi can shut the door or adjust the price at any time the part is available at an adjusted price. However we at Ferro Sales will return the funds as soon as it is recovered from Hitachi, until we have recovered the funds we can offer a R100 000.00 payment per month until the funds are returned.” The applicant contends that in the event of an agency relationship the respondent would have, already at this stage during August 2022, responded to the statutory demand that it acted as an agent and that the applicant should proceed to demand repayment from Hitachi and not from the respondent, being the agent. The respondent would furthermore not have made an offer to repay the amount in instalment of it acted as an agent.

[21] Mr Groenewald, counsel on behalf of the respondent argued that the respondent disputes the indebtedness to the applicant on bona fide and reasonable grounds. The applicant was desirous to purchase goods from Hitachi in South Africa because it was more affordable than purchasing the goods from Hitachi in Australia. Due to the fact that Hitachi does not allow the purchase of goods by foreign companies directly from Hitachi South Africa, the respondent acted as the applicant’s agent. Since November 2021 the applicant and the respondent concluded several purchase deals on the basis that the applicant places the orders through the respondent to purchase goods from Hitachi South Africa.

[22] The respondent required upfront payment from the applicant of the purchase price. The applicant would then issue an invoice addressed to the respondent where after the respondent would issue a tax invoice for the purchase of the goods. Each of the tax invoices issued by the respondent was addressed to the applicant. As before, the respondent issued two tax invoices in respect of the two traction motors on 13 January 2022, each in the amount of R6 660 924.52 with number IN 10486 and IN 10487 respectively. Appended to the respondent's answering affidavit is annexure "OP13", the sales quotation issued by Hitachi in Johannesburg to Ferro Sales & Services at Bloemfontein (the respondent) dated 17 November

2021 in respect of one of the traction motors.

[23] On 20 January 2022 the applicant paid the purchase price of the first traction motors into the Investec Bank account of the respondent. According to the respondent the amount was paid in three payments to Hitachi, namely an amount of R 3 000 000.00 on 21 January 2022, an amount of R2 500 000.00 on 24 January 2022 and the balance in the amount of R 1 160 924 .52 on 8 March 2022.

[24] On 7 March 2022 the applicant paid the purchase price in respect of the second traction motor into the respondent's bank account. The respondent effected payment in the amount of R 6 660 924.52 in three payments to Hitachi, namely R 3 000 000.00 on 13 January 2022, R660 924.52 on 17 January 2022 and R3 000 000.00

on 18 January 2022. According to the respondent Hitachi refuses to deliver the second traction motor as it discovered that the applicant is the actual purchaser of the goods and now insists on a purchase price of R11 000.000.00 in respect of the second traction motor.

[25] The application for liquidation of the respondent was issued by the applicant on 26 September 2022. On 13 October 2022 the respondent issued summons against Hitachi under case number 5066/2022 in this court for recovery of the purchase price of the second traction motor. In respondent's particulars of claim it is alleged that during November 2022 the respondent, represented by Mr Thomas Ferreira and Hitachi concluded a partly written and partly verbal agreement in terms whereof the respondent purchased a motor from Hitachi in the amount of R 6 660 924.52. No mention is made of the agency agreement between the applicant and the respondent.

[26] Mr Groenewald contended that the action against Hitachi was erroneously instituted based on the instructions received from Mr Ferreira. Mr Ferreira was unaware of the legal implications of the agency agreement which entailed that the agent was not entitled to recover the amount for the second traction motor from Hitachi. The summons issued against Hitachi has subsequently been withdrawn.

- [27] Mr Lotz SC argued that the institution of the legal action against Hitachi would only have followed after a detailed consultation with the respondent's legal representative. It can therefore be assumed that Mr Ferreira did not mention any agency agreement that existed between the applicant and the respondent.
- [28] Whoever relies upon an agency must allege and prove its existence and the scope thereof.[8] Clearly the respondent did not indicate to Hitachi that it acted as the applicant's agent. If the version of a relationship of principal and agent was true, the respondent would have replied to the statutory demand that it merely acted as an agent on behalf of the applicant and that the applicant had to institute action for the recovery of the purchase price against Hitachi.
- [29] None of the purchase orders invoices issued by the applicant or any of the tax invoices issued by the respondent refer to the respondent acting as an agent on behalf of the applicant. The same applies to the sales quotations issued by Hitachi and addressed to the respondent. There is not a single iota of documentary evidence submitted by the respondent to corroborate the version proffered by the respondent that it acted as an agent on behalf of the applicant.
- [30] I agree with the submission made on behalf of the applicant that, to the contrary, all the documentary evidence, which include the email messages between the applicant and the respondent in respect of the cancellation of the agreement and repayment of the purchase price of the second traction motor, points to the fact that the respondent did not act as the applicant's agent. The respondent, apart from a bald allegation that a relationship of agency existed, failed to discharge the onus of proof that it acted as the applicant's agent. I am of the view that the respondent acted as a principal in its own right as provided for in the terms and conditions of sale which the applicant appended to the founding affidavit.
- [31] A further worrying aspect is the allegations by the applicant that the respondent's averments that it had paid the amount of R6 660 924.52 for the purchase of the second traction motor to Hitachi is not only improbable but patently untruthful. With reference to the proof of payment documents tendered by the respondent and appended as "OP18", "OP19" and "OP20" in respect of the three payments made on 13, 17 and 18 January 2022 respectively, compared to annexures "OP22.2", "OP22.3" and "OP22.4" as well as annexure "AF7", it is evident that the Investec Bank account number from which payment was allegedly made differs. Secondly, under the heading "Transaction Details" the reference changes where it refers to "Hitachi" on "OP 22.2, OP22.3 and OP 22.4 while on "OP18", "Op19" and "OP20" the reference is "Thomas Loan". The Investec Bank Logo, a zebra, is not displayed on annexures "OP18", "Op19" and "OP20" compared to "Op12", "OP22.2", "Op22.3", "Op22.4" and "AF7".
- [32] Further discrepancies appear on these statements and annexures as comprehensively referred to by the applicant in its replying affidavit and highlighted by Mr Lotz SC during argument. Mr Groenewald replied that it appears as if the payments were made from different bank accounts held by the respondent at Investec Bank.

- [33] The respondent was invited and challenged to disclose its bank statements covering the period from 12 January 2022 to 18 January 2022 but failed to do so. It furthermore appears that the respondent, on its own version paid over the purchase price for the second traction motor almost two months prior to the applicant having made payment to the respondent.
- [34] What appears from the respondent's bank statements is that at the stage when the applicant paid the sum of R6 660 924.52 into the respondent's bank account on 20 January 2022, as payment for the first traction motor, the respondent had an amount of R 8 819.38 in its bank account. The respondent paid R5 500 000.00 to Hitachi for the first traction motor and then, save for an amount of R43 000.00 proceeded to use the balance of the amount paid by the applicant, to make payments to third parties. The conduct of the respondent in failing to make payment of the applicant's monies to Hitachi, is not reconcilable with it acting as an agent on behalf of the applicant.
- [35] I am convinced that the respondent did not act as an agent on behalf of the applicant and that the respondent is liable to the applicant in the amount of R6 660 924.52, alternatively R6 660 549.52 in respect of the monies paid by the applicant to the respondent. In any event the respondent repaid the monies in respect of the third blower motor without any reliance upon an agency agreement.
- [36] The respondent's only response to the applicant's letter of demand in terms of section 69(1) (a) of the CC Act, for repayment of the amount of R6 660 924.52, was an offer to repay the applicant in instalments of R100 000.00 per month. The applicant rejected the offer. I am satisfied that the respondent's indebtedness has, prima facie, been established. Furthermore, once the respondent's indebtedness to the appellant had been shown, the discretion to refuse a winding-up order was a narrow one[9].
- [37] The exercise of discretion in favour of not granting a liquidation order must be based on a solid factual foundation. The respondent failed to present such a factual foundation and did not raise a bona fide defence to the applicant's claim.
- [38] In the result it is ordered that:
1. The respondent is hereby placed under PROVISIONAL LIQUIDATION in the hands of the Master of the High Court.
 2. A PROVISIONAL LIQUIDATION ORDER is hereby issued calling upon all interested parties to show cause, if any, to the court on the 4th day of May 2023 at 09h30 why a FINAL ORDER OF LIQUIDATION should not be granted against respondent close corporation.
 3. Service of this rule nisi and a copy of the notice of motion and annexures shall be effected on the respondent close corporation at its registered office or its principal place of business within the court's jurisdiction.
 4. This order shall, without delay, be published once in a daily

newspaper circulating in Bloemfontein and in The Government Gazette.

5. The sheriff shall ascertain whether the employees of the respondent are represented by a trade union and whether there is a notice board on the premises to which the employees have access.

6. A copy of the provisional liquidation order shall be served on -

6.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the respondent close corporation.

6.2 The employees of the respondent close corporation by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the respondent close corporation's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the respondent close corporation conducted any business.

6.3 The South African Revenue Services.

7. The costs of the application shall be costs in the liquidation proceedings.

VAN RHYN, J

On behalf of the Applicant:

ADV G M E LOTZ SC

Instructed by:

KRAMER WEIHMANN ATTORNEYS

BLOEMFONTEIN

On behalf of the Respondent:

ADV W GROENEWALD

Instructed by

SYMINGTON & DE KOK ATTORNEYS

[1] Act 61 of 1973.

[2] Act 69 of 1984

[3] Notice in terms of section 69 of the Close Corporation Act read with item 9 of schedule 5 of the Companies Act.

[4] Ex Parte Muller NO: In Re P L Myburgh (EDMS) Bpk 1979 (2) SA 339(N) at 340.

[5] (1007/20) [2022] ZASCA 67 (May 2022), paras 14 and 15.

- [6] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T).
- [7] Henochsberg on the Companies Act Issue 23 at 694.
- [8] Terblanche v Notnagel 1975 (4) SA 405 (C).
- [9] Afgri Operations Limited v Hamba Fleet (Pty) Ltd [2017] ZASCA 24; 2022 (1) SA 91 (SCA) para 12-13.
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Prepared on 13 October 2026 · Esheria