

SOUTH AFRICA / JUDGMENT

Herman and Another v Set-Mak Civils (5495/2011) [2012] ZAFSHC 58; 2013 (1) SA 386 (FB) (5 April 2012) [2012] ZAFSHC 58

COURT

Free State High Court, Bloemfontein

BEFORE

J P Daffue

CASE / FILE NUMBER

5495/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 5495/2011

In the case between:-

KRUGER HERMANFirst Applicant

UTOPIA CONSTRUCTION CCSecond Applicant

Reg no 2002/001529/23

en

SET-MAK CIVILSRespondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 22 MARCH 2012

DELIVERED ON: 5 APRIL 2012

INTRODUCTION

- [1] Applicants instituted winding-up proceedings against respondent, claiming the provisional winding-up of respondent close corporation

and ancillary relief. Respondent opposes the application and filed an opposing affidavit to which applicants responded in a replying

affidavit. It is applicants' case that respondent is unable to pay its debts. In addition to several allegations in this regard, they rely on respondent's failure to settle their claim on receipt of a written demand in terms of section 69 of the Close Corporation Act, 69 of 1984 (the CC Act). Applicants aver that the respondent is deemed unable to pay its debts. Alternatively, it is alleged that it is just and equitable for respondent to be wound up. Oral arguments were presented to me on 22 March 2012. Mr P J J Zietsman appeared for applicants and Mr C D Pienaar on behalf of respondent.

IDENTIFICATION OF ISSUES

[2] The following issues appear from the papers and need to be adjudicated:

2.1 Whether second applicant has locus standi in these proceedings. It was deregistered prior to institution of the proceedings although its registration has been restored a few days before the hearing of the application.

2.2 Whether respondent's alleged indebtedness to applicants is disputed on bona fide and reasonable grounds.

2.3 In the event of a finding that applicants' claim is not so disputed, whether it is still possible to obtain a winding-up order based on the deeming provision in section 69 of the CC Act, particularly if the respondent is a solvent close corporation.

2.4 On the basis of a finding that the claim is not so disputed, whether a proper case has been made out for winding-up of respondent based on the just and equitable ground.

I shall firstly deal with the applicable law, then the facts and finally I shall apply the law to the facts.

APPLICABLE LAW

[3] The approach in dealing with factual disputes in winding-up applications differs from applications in general and it is apposite

to quote the dictum of Brand J (as he then was) in *PAYSLIP INVESTMENT HOLDINGS CC v Y2K TEC LTD* 2001 (4) SA 781 (CPD) at 783 G – I:

“Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in KALIL v DECOTEX LTD AND ANOTHER 1988 (1) SA 943 A. According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's

version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the

dispute referred for oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness,

the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that applicant has made out a case on the probabilities. The stated exception regarding

disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

[4] The Companies Act, 71 of 2008 (the 2008 Act) commenced on 1 May 2011. It changed our company law extensively and several sections of the CC Act have been amended, repealed and/or substituted. Chapter 14 of the Companies Act, 61 of 1973 (the 1973 Act) dealing with liquidation of companies is however still applicable in respect of winding-up of companies after introduction of the 2008 Act, but subject to item 9 of Schedule 5 of the 2008 Act. This schedule deals with transitional arrangements to which I shall later return.

[5] The relationship between the CC Act and the 1973 Act on the one hand and the 2008 Act on the other, must be considered. Section 66(1) of the CC Act, prior to its amendment, stipulated that the provisions of the 1973 Act relating to the winding-up of a company with the exception of the sections quoted, applied *mutatis mutandis* insofar as they could be applied to the liquidation of a close corporation in respect of a matter not specifically provided for in the CC Act. Subsection 66(1) has now been amended to read as follows:

"66. Application of Companies Act, 1973 –

(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."

Furthermore, a new section 66(1A) has been inserted which reads as follows:

"(1A) The provisions of Chapter 6 of the Companies Act, read with the changes required by the context, apply to a corporation, but any reference in that Chapter to –

a company must be regarded as a reference to a corporation; or

a shareholder of a company, or the holder of securities issued by a company, must be read as a reference to a member of a corporation."

Chapter 6 of the 2008 Act deals with business rescue and compromise with creditors.

[6] Section 68 of the CC Act dealing with liquidation by the court and the grounds for liquidation has been repealed. Section 68(c) provided that a corporation might be wound-up by a court if it was unable to pay its debts. This subsection imitated section 344(f) of the 1973 Act.

- [7] Section 69 dealing with the circumstances under which a close corporation is deemed unable to pay its debts, the counterpart of section 345 of the 1973 Act, has not been repealed. In short and in terms of this section and for the purposes of section 68(c) (prior to its repeal) a corporation shall be deemed to be unable to pay its debts if a creditor with a claim of not less than R200 has served a demand on the corporation and it has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, secondly in the event of a nulla bona return being issued or thirdly if it is proved to the satisfaction of the court that the corporation is unable to pay its debts. The *raison d'être* of section 69 was obviously to assist an applicant in its endeavour to obtain winding-up of its debtor on the basis of section 68(c), being its inability to pay its debts. In the light of the provisions of the 2008 Act it might be argued that there is no valid reason for section 69 to be retained. This shall be considered later herein.
- [8] Prior to the substitution of section 26 of the CC Act, subsection 26(7) provided that in the event of the restoration of the registration of a close corporation by the Registrar (after it has been deregistered earlier), it “shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered”. Section 26 in its present format does not refer to this deeming provision at all and merely reads as follows:

“26. Deregistration –

Sections 81(1)(f), 81(3), 82(3) to (4) and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.”

- [9] Prof. JJ Henning published an article prior to the commencement of the 2008 Act wherein he indicated that the Department of Justice and Constitutional Development had been developing uniform insolvency legislation for a considerable period of time which might conflict with the regime set out in the 1973 Act for dealing with and winding-up insolvent companies. He submitted that in order to avoid any future conflict, the 2008 Act provides for transitional arrangements that retain the current disposition set out in chapter 14 of the 1973 Act for the winding-up and liquidation of companies until such time as the new uniform insolvency legislation is enacted. See *The Impact of South African Company Law reform on Close Corporations: Selected issues and perspective*, 2010 *Acta Juridica*, 456 at 478.
- [10] The continued application of Chapter 14 of the 1973 Act to winding-up and liquidation is specifically provided for in item 9(1) of Schedule 5 to the 2008 Act, subject to sub-items (2) and (3) which read as follows:

“(2) Despite sub-item 1, sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.”

(Emphasis added)

- [11] It is immediately apparent from sub-item 9(2) above that section 344 dealing with the grounds upon which a company may be wound up and in particular sub-section 344(f) pertaining to a company being unable to pay its debts, is not applicable to solvent companies. Also Part G of Chapter 2 of the 2008 Act, being sections 79 – 83 thereof, deals specifically with the winding-up of solvent (not insolvent) companies and the deregistering of companies.
- [12] Although a close corporation that has not been converted in terms of Schedule 2 of the 2008 Act is not defined as a company in this Act, the amendment of section 66(1) of the CC Act to which I have referred above, makes it clear that a close corporation shall be dealt with in the same manner as a company and therefore item 9 of Schedule 5, read with Part G of Chapter 2, being sections 79 – 83 of the 2008 Act are applicable to close corporations as well.
- [13] As stated earlier section 68 of the CC Act and in particular section 68(c) referring to the inability of a close corporation to pay its debts as a ground for winding-up, has been repealed. At this stage of our jurisprudence a solvent close corporation can only be wound-up and liquidated by a court order as contemplated in section 81 of the 2008 Act, to wit on application by (a) the close corporation upon a special resolution that it be wound-up by the court; (b) the business rescue practitioner of such close corporation on the grounds that no reasonable prospects of it being rescued exist; (c) one or more of its creditors on the grounds that its business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances, or if it is otherwise just and equitable for it to be wound-up; (d) one or more of its directors or shareholders on the basis that the directors are dead-locked in the management of the company in certain circumstances or when the shareholders are dead-locked in certain circumstances; (e) a shareholder, with leave of the court, on the grounds that the directors or prescribed officers of other persons are acting in a manner that is fraudulent or otherwise illegal or if assets are being misapplied or wasted; (f) the Commission or Panel in certain circumstances.
- [14] If the 2008 Act is considered in context the legislature most probably intended to provide for efficient rescue of financially distressed companies, including close corporations, in order to ensure that winding-up and liquidation should be a creditor’s last resort. A solvent close corporation can therefore only be wound-up by the court on application of a creditor thereof if business rescue proceedings have ended and it is just and equitable, alternatively if it is otherwise just and equitable to be wound-up.

- [15] A creditor who cannot prove any of the two grounds stated in section 81(1)(c) and referred to in the previous paragraphs, will probably have to resort to prove factual insolvency. However factual insolvency is not a ground for winding-up in terms of section 344 of the 1973 Act. See: *EX PARTE DE VILLIERS AND ANOTHER NNO v IN RE CARBON DEVELOPMENTS* 1993(1) SA 493 (AD) at 502 C – E. It has been accepted that factual insolvency may be indicative of a respondent’s inability to pay its debts and it may also be a relevant and material factor in deciding whether a court should exercise its discretion to grant a winding-up order. See: *JOHNSON v HIROTEC (PTY) LTD* 2000(4) SA 930 SCA at par 6, 933-4. In my view the just and equitable ground will have to be construed more widely to cater for a situation where a close corporation, or a company, even if it cannot be proved to be factually insolvent, continues to trade in dire financial circumstances and/or with total disregard to the rights and claims of its creditors and/or is shown to be unable to pay its debts in certain circumstances. For other examples see: *SUNNY SOUTH CANNERS (PTY) LTD v MBANGXA* [2001] 1 ALL SA 474 (SCA) at 481 and *KIA INTERTRADE JOHANNESBURG (PTY) LTD v INFINITE MOTORS (PTY) LTD* [1999] 2 ALL SA 268 (W) at 276-7. It should therefore still be possible to rely in certain circumstances on the inability of a respondent to pay its debts. If not, the logic of retaining section 69 of the CC Act and section 345 of the 1973 Act escapes me. In saying this I am mindful of the case law warning against regarding the just and equitable ground as a catch-all ground. Fact is that factual insolvency has never been a separate ground for winding-up and now the respondent’s inability to pay is also not a ground to rely on anymore, particularly in respect of solvent close corporations and companies.
- [16] Subsections 81(1)(c)(ii) and (d)(iii) read exactly the same i.e. “it is otherwise just and equitable for the company to be wound-up”. An alternative ground for winding-up is created in both subsections which strengthens my viewpoint that, save for those situations which have been identified thus far in our case law as just and equitable, other situations may very well arise in future. Again it must be borne in mind that the mere inability of a solvent company/close corporation to settle the debts of creditors is not sufficient for winding-up purposes and is rather indicative of a financially distressed company/close corporation that needs to be rescued and placed under business rescue.
- [17] It is not necessary for a respondent in winding-up procedure to prove that it is not indebted to the applicant. It merely needs to prove that the debt is disputed on bona fide and reasonable grounds. See: *DESSERT STAR TRADING 145 (PTY) LTD AND ANOTHER v FLAMBOYANT EDLEEN CC & ANOTHER* 2011 (2) SA 266 (SCA) at par 16, 273-4.

THE FACTUAL MATRIX

Applicants’ undisputed allegations

- [18] Few of the allegations made by applicants are undisputed. First applicant and respondent’s particulars are not in dispute and it is also not disputed that this court has jurisdiction to adjudicate the application. It is not disputed that some of the amounts payable to first

applicant were paid into second applicant's bank account and that for purposes of payment, second applicant presented invoices, not to respondent, but a joint venture of which respondent is a partner. It is also not in dispute that applicants complied with the formalities pertaining to winding-up proceedings.

Respondent's version and facts in dispute

- [19] The letter of demand in terms of section 69 of the CC Act served on respondent on 25 August 2011 indicates the creditor as Herman Kruger, the first applicant in this application. It is alleged that the debt of R95 521,64 is due and payable to him personally without any reference to his close corporation, the second respondent. The amount claimed in the letter of demand is not reconcilable with the invoices attached to the founding affidavit. Furthermore it is applicant's case in this application that the amount claimed is due and payable to both applicants and not to first applicant only.
- [20] The respondent's case is that first applicant was appointed as site agent by the Border Kei/Set-Mak Joint Venture of which joint venture respondent is one of the partners. The employer is thus the joint venture and not respondent. The appointment as site agent related to a contract for the construction of the Butterworth Public Transport Interchange. Respondent not only relies on documentation in support of its version, but its version is also confirmed under oath by Mr Fourie, the project manager of the joint venture who was involved in the appointment of first applicant as site manager. For clarity, the Amathole District Municipality awarded the contract for the aforesaid construction to the joint venture.
- [21] Although salaries were initially paid directly into the account of first applicant, at his request, payments were later on deposited into second applicant's bank account. For purposes hereof second applicant provided the joint venture with tax invoices. It is not disputed that some payments were made by respondent, but it was explained on behalf of respondent that these payments were made on behalf of the joint venture and that the parties later on settled the issue insofar as payments or transferrals were made by the joint venture to respondent's account.
- [22] Respondent not only disputes the identity of the debtor, but also the amount of the claim. On his resignation first applicant sent an e-mail to the joint venture on the 18 July 2011, indicating that an amount of R29 328,00 only was due and payable. The amount consisted of salary of R21 026,36 and petty cash due in the amount of R8 293,64. All amounts due to first applicant (and/or second applicant) were paid to it by the joint venture and the last amount of R11 048,00 was paid after institution of the present proceedings. It is emphasised that the amount was owed by the joint venture to first applicant and was duly paid.
- [23] Confronted with the allegations contained in the answering affidavit, applicants dealt in reply in detail with the amount allegedly due. Contrary to the invoices relied upon in the founding affidavit, being in respect of salaries only, the claim is now compounded as follows: R21 668,00 for salary, short payment of salary in the amount of R18 780,00, petty

cash of R8 573,64 and overtime and travel of R46 500,00. This is in total contrast with the claim respondent had to meet. It is not even applicants' case in the founding affidavit that they would be entitled to overtime. It is apparent from the papers that there is a serious dispute as to what amounts, if any, are due and who are the creditor(s) and debtor.

- [24] Respondent took a point in limine to the effect that when these proceedings were instituted, second applicant was deregistered as close corporation. In the replying affidavit applicants alleged that restoration of second applicant's registration has taken place since filing of the answering affidavit. It was therefore contended that second applicant's status has been restored and that it has locus standi in judicio.
- [25] Although several allegations were made in the founding affidavit to show that respondent could not meet its obligations, even relying on summonses and correspondence as so-called proof, it is apparent that these claims related to the joint venture and not respondent, but in any event, as shown, all creditors were duly paid.

EVALUATION OF THE EVIDENCE AND APPLICATION OF LEGAL PRINCIPLES

- [26] Mr Zietsman submitted that once it has been shown that second applicant's registration has been restored, its locus standi cannot be attacked with success. I considered his submission, but must point out that section 26 has been substituted as set out above. Neither the present section 26, nor the sections of the 2008 Act referred to therein, contain a provision similar to the deeming provision previously found in section 26(7). Mr Zietsman's argument would have been sound prior to the amendment, but it does not seem to be so anymore. However I do deem it is necessary to make any pertinent finding in this regard, save to mention that the deeming provision of the former section 26(7) has been done away with and not substituted. For purposes hereof I'll accept however that second applicant has locus standi in judicio.
- [27] I do not have to find that respondent is not indebted to applicants. Respondent merely has to prove that the debt is disputed on bona fide and reasonable grounds. I am so satisfied. The different versions referred to above speak for themselves.
- [28] Even if I am wrong in my conclusion that the debt is disputed on bona fide and reasonable grounds, the inability of a solvent close corporation to settle its debts is not a ground for winding-up anymore. As indicated section 68 of the CC Act has been repealed and section 344 of the 1973 Act does not apply to solvent companies or close corporations. Mr Zietsman has conceded this and accepted the correctness of the conclusions arrived at by Zietsman, AJ in an unreported judgment of this Division in the matter between HBT CONSTRUCTION & PLANT HIRE CC v UNIPLANT HIRE CC, case number 5083/2011 delivered on 1 December 2011.
- [29] Mr Zietsman argued that the deeming provision found in section 69 of the CC Act pertaining to a respondent's inability to pay its debts might be of assistance in finding that it is just and equitable to wind-up such respondent. The following should be recorded. This deeming

provision cannot assist applicants in casu. Firstly, first applicant only is identified as creditor in the letter of demand. Secondly, the debt is disputed on bona fide and reasonable grounds. It might have been argued with success that the respondent's inability to settle its debts, which I indicated earlier is not the case in casu, should be taken into consideration to prove that it is just and equitable to be wound-up. If such a finding could be made, a winding-up order might have been issued even if it was found that respondent is solvent. However no acceptable evidence is available to make such a finding in casu. The applicant's have not made out a case for winding-up based on the ground of just en equitable or any other ground.

[30] Mr Zietsman wisely declined to argue factual insolvency. The acceptable evidence demonstrates quite the opposite and that is that respondent is solvent. Much was made in the replying affidavit of the cancellation of the contract between the joint venture and the Amathole District Municipality and penalties to be incurred by the joint venture due to breach of contract. These are irrelevant now in that the parties by agreement handed in a letter from the said Municipality indicating that the termination of the contract was withdrawn.

[31] My finding does not close the doors of the court for applicants. They would be fully entitled, if so advised, to institute action in the Magistrate's Court to claim what they believe is due and payable to them. The costly machinery of winding-up procedure is not available to them in casu.

ORDER

[32] Therefore the application is dismissed with costs.

J. P. DAFFUE, J

On behalf of applicants: Adv. P J J Zietsman

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. C D Pienaar

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