REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 260/2013

In the matter between:

ORION COLD STORAGE (PTY) LTD **APPLICANT**

and

DEEP CATCH TRADING (PTY) LTD **RESPONDENT**

Orion Cold Storage (Pty) Ltd v Deep Catch Trading (Pty) Ltd (A 260/2013) [2014] NAHCMD 72 (5 March 2014)

Coram: Smuts, J
Heard: 26 February 2014
Delivered: 5 March 2014

Flynote: Question of costs in an opposed liquidation application which was withdrawn. The applicant had launched its application on the basis of a statutory demand contemplated by s350 of the Companies Act. But it also instituted an action for the same claim a few days later which became defended. This was not disclosed in the liquidation application. The respondent established that it

bona fide disputed the claim on reasonable grounds. It followed on an application of the test articulated in *Kalil v Decotex* 1988 (1) SA 943 (A) that the application would not have succeeded with its liquidation application. The respondent thus entitled to its costs.

ORDER

(a) The applicant is to pay the respondent's costs of opposition to this application.
(b) These costs include the costs of one instructing and one instructed counsel.

JUDGMENT

Smuts, J

[1] The only issue to be determined in this opposed liquidation application is the question of costs. After the respondent had filed an answering affidavit and a supplementary answering affidavit, the applicant decided to withdraw the application. The applicant claims however that it is entitled to an order of costs in its favour whilst the respondent claims that the applicant should pay its costs.

[2] The contestation around costs in this application arises in the following way.

[3] The applicant launched its application for the provisional winding up of the respondent on 2 August 2013. It was set down for hearing on 16 August 2013. The liquidation application was based upon a statutory letter of demand served upon the respondent in terms of s350 of the Companies Act.[1] In the statutory demand, served by the Deputy-Sheriff, the applicant demanded

[1] 28 of 2004.

payment of the sum of N$3 170 039. This statutory demand was dated 25 June 2013 and served on 1 July 2013.

[4] The applicant stated under oath that the respondent failed to pay the amount claimed in the demand and that it had also not made any attempt to secure or compromise the debt to the applicant's satisfaction. The applicant contended in the circumstances that the respondent was unable to pay its debts as is deemed in s350 of the Act (by reason of the failure on the part of the respondent to pay the debt or to respond to the notice).

[5] Although there was also reference in the founding affidavit to it being just and equitable to place the respondent under a provisional order of liquidation, no supporting factual material was provided for the application being granted on this ground. The applicant has also in argument before me only relied upon the failure to pay or even respond to the statutory letter of demand as the basis for the liquidation application.

[6] The respondent filed an answering affidavit which was served on the date of the initial hearing and subsequently applied to file a supplementary affidavit which was not opposed. Certain preliminary points were taken in opposition concerning authority and lack of compliance with rule 6. These are no longer proceeded with and correctly so.

[7] The respondent in opposition points out that the applicant had on 3 July 2013 instituted an action for the same debt against it and attached a copy of combined summons to the initial answering affidavit. It is apparent from that combined summons that the particulars of claim had already been signed on 26 June 2013, the day after the statutory notice. The date of service of that summons is not provided by either party. The respondent entered an appearance to defend it. What is however clear is that the applicant acknowledged in reply that the liquidation application was launched after it had become known that the respondent had defended the action.

[8] The respondent contended in the answering affidavit that the applicant

failed to disclose the institution of the action and the fact that it was defended in the founding affidavit and submitted that this constituted a material non-disclosure and an abuse of process.

[9] The respondent also in the answering affidavit set out a defence to the applicant's claim. It is set out in some detail. I do not propose to provide a full synopsis of it. It is common cause that the claim related to the importation of frozen chicken to Namibia by the respondent. The respondent stated that the transactions had risen as a consequence of a cancellation of a transaction involving the importation of frozen chicken by the applicant to Zimbabwe. This had involved one of the respondent's sister companies registered in Zimbabwe as importer. The respondent contended that there was a meeting in Cape Town on 27 February 2013 with representatives of the applicant and it was then agreed that the respondent would purchase approximately N$3 million worth of frozen chicken from the applicant. This gave rise to the claimed sum of N$3 170 039. But the respondent stated that, in terms of the agreement, it was only required to make payment of this sum to the applicant on condition that the applicant made payment to the respondent's sister company in Zimbabwe which, it stated, had not occurred. The respondent contended that the amount was thus not due and payable.

[10] The respondent also attached its most recent annual financial statements to its answering affidavit. These which revealed assets in excess of some N$64 million with liabilities of N$52, 8 million. The respondent also stated that it had been doing business with the applicant since May 2008 and that the total purchases during the period May 2008 to August 2013 totalled N$28 967 593. It was also stated on behalf of the respondent that during that period there had never been any difficulty on the part of the respondent to pay for goods received from the applicant.

[11] Many of these facts were not put in issue in reply although the applicant disputed the terms of the agreement contended for by the respondent (of 27 February 2013).

[12] The applicant however accepted in reply that the respondent 'is probably not insolvent' with reference to the financial statements which had been provided with the answering affidavit. The applicant decided then to withdraw the application but submitted that it would be entitled to its costs because, so it contended, it was entitled to have launched the liquidation application in view on the failure on the part of the respondent to have responded to the statutory notice served upon it in terms of s350 of the Act.

[13] The matter was then set down for argument on the question of costs.

[14] Mr Strydom who appeared on behalf of the applicant contended that the failure on the part of the respondent to have paid or made any response at all to the statutory notice entitled the applicant to proceed with the liquidation application after the expiration of the 15 day period provided for in the notice. He submitted that once it is accepted that the applicant was entitled to apply for the liquidation of the respondent on this basis, then the applicant should be entitled to its costs. He submitted that it became common cause in the application that the respondent was indebted to the applicant in the sum claimed in the notice and that the only issue in dispute was whether the sum claimed was yet due and payable. He submitted that once the period in the statutory notice had elapsed, then *prima facie* an application for liquidation could be brought on the grounds that the respondent was unable to pay its debts as deemed under s350.

[15] Mr Corbett SC who appeared on behalf of the respondent submitted that the failure to disclose that the applicant had instituted an action against the respondent and that it was defended constituted a material non-disclosure. He submitted that it was material because the debt relied upon in the statutory notice was the very same debt which was the subject of the action instituted against the respondent. The fact that it had become defended and was thus disputed by the respondent was, he submitted, material to the cause of action relied upon by the applicant for the provisional winding up for the respondent.

[16] Mr Corbett also submitted that the applicant would not have been entitled to an order of provisional sequestration because of the fact that the debt, which

was the subject of the statutory notice relied upon for the liquidation application, was *bona fide* disputed on reasonable grounds. He submitted that the applicant thus lacked *locus standi* to bring the liquidation application and that the respondent was entitled to its costs as a consequence.

[17] The test to be applied to establish an applicant's claim in liquidation proceedings and whether it is *bona fide* disputed on reasonable grounds was crisply set out in *Kalil v Decotex (Pty) Ltd* and Another[2] as follows:

> '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 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.'

[18] Mr Corbett also referred to the application of this test in *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd*[3] where the following was stated:

> 'Apart from the fact that they dispute the applicant's claims, and do so *bona fide*, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they rely at such trial. This is not an application for summary judgment in which . . . a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the court that he has a *bona fide* defence to

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[2] 1988 (1) SA 943 (A) 980 B-D.

[3] 1998 (2) SA 208 (C) at 219F-220A.

> the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefore" . . It seems to me to be sufficient for the trustees in the present application, as long as they do so *bona fide*, . . .to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company.'[4]

[19] Mr Strydom countered that it was not incumbent upon the applicant to disclose the institution of the action and that it was defended because the applicant was entitled to elect and pursue the remedies open to it. He further argued that the application was not *ex parte* and that it was open to the respondent to place those facts before the court. That approach is plainly incorrect. The institution and particularly the defence of the very claim relied upon in the statutory demand is indeed a most material fact. That is because, as Mr Corbett rightly pointed out, an application for liquidation should not be resorted to in order to resolve a claim which is *bona fide* disputed on reasonable grounds by a respondent company.

[20] Having considered the facts raised by the respondent in the answering affidavit and approaching that affidavit on the basis of the applicable test to disputed facts in motion proceedings as set out in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*[5] and recently cogently reaffirmed by the Supreme Court in *Rally for Democracy v Electoral Commission for Namibia,*[6] it is clear that the respondent has established that it *bona fide* disputes on reasonable grounds the issue as to whether the debt claimed by the applicant was due and payable. Once that is accepted, as it should be on an application of the approach set out in *Kalil v Decotex,*[7] then it becomes clear to me that the applicant would not have succeeded with this application for liquidation based upon the failure to respond to the statutory notice relied upon by it.

[21] Mr Strydom's conclusion in his argument that the cause of action relied

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[4] Supra at 219F-220A; See also *GATX-FULLER v Shepherd and Shepherd* 1984 (3) SA 48 (W).

[5] 1984 (3) SA 623 (A).

[6] 2013 (3) NR 664 (SC) at 711G-712B.

[7] Supra.

upon by the applicant would have been successful in obtaining the relief sought is thus entirely unsound and negates the test for *locus standi* articulated in *Kalil v Decotex* by reason of the fact that it was *bona fide* disputed on reasonable grounds. The applicant would thus not have succeeded with it. That is demonstrated by the withdrawal of the application, even though the applicant had indicated that it did so with reference to the financial statements.

[22] It is clear to me on the papers that the applicant would thus not have succeeded with an order for provisional winding up based upon the reliance of the statutory notice in view of the fact that the debt which formed the subject of that notice was *bona fide* disputed on reasonable grounds as was established in the answering affidavit. Once that becomes clear, it follows that the respondent is entitled to its costs of opposition to the application.

[23] Mr Corbett in his heads of argument submitted that costs should be awarded on a punitive scale as between attorney and client by reason of the fact that there had been the material non-disclosure in the applicant's founding affidavit. Whilst I agree that there was a material non-disclosure, as I have already indicated, I also weigh up the fact that the respondent had not made any response to the statutory notice. Mr Corbett pointed out that the statutory notice had been served on 1 July 2013 and that this was followed shortly thereafter by the service of a summons. He submitted that the respondent was thus entitled to infer that the applicant had elected to institute an action against the respondent instead of proceeding by way of a liquidation application. Mr Strydom correctly pointed out that a party is not limited to proceeding by way of action and that this would not in principle preclude a liquidation application. It seems to me that the failure to respond to the statutory notice is factor I may take into account in my discretion as to the scale of the costs order. In the circumstances, I decline to make an award of cost on a punitive scale, despite the non-disclosure. The parties were in agreement that any order as to costs should include the costs of one instructing and one instructed counsel.

[24] I accordingly make the following order:

(a) The applicant is to pay the respondent's costs of opposition to this

application.

(b) These costs include the costs of one instructing and one instructed counsel.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	JAN Strydom Instructed by MB De Klerk & Associates
RESPONDENT:	AW Corbett SC Instructed by Ellis Shilengudwa Inc.