**IN THE HIGH COURT OF SOUTH AFRICA**
**(TRANSVAAL PROVINCIAL DIVISION)**

**NOT REPORTABLE** **CASE NO: 27084/05**
**DATE: 26/4/2006**

In the matter between:

**CONNOISSEUR ELECTRONICS (PTY) LTD** Applicant

and

**DISCOUNT TOY CASH & CARRY CC** Respondent

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**JUDGEMENT**

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**MURPHY J**

1. The applicant seeks a final winding up order against the respondent in terms of the provisions of section 68 and 69 of the Close Corporations Act 69 of 1984.

2. The applicant is a supplier of, *inter alia*, car radios and accessories and is an agent for Kenwood Audio Systems and Accessories. During the course of 1999, the applicant and the respondent concluded an oral agreement in terms of which the applicant would supply audio systems and accessories to the respondent. Further in terms of the agreement, it was agreed that the applicant would give the respondent a 9.5% rebate and that the account invoiced by the applicant to the respondent in respect of goods

purchased would be payable within 30 days. Pursuant to the agreement being concluded, the applicant supplied goods to the respondent on a running account in terms of which the respondent became indebted to the applicant in varying amounts.

3. The applicant contends that the respondent still owes it the balance on the account in the alleged amount of R54 355,44. It further contends that this amount is due, owing and payable, yet the respondent refuses or neglects to pay.

4. Because the respondent failed to make payment to the applicant, the applicant handed the matter over to its attorneys of record for collection. On 13 June 2005 the applicant's attorneys addressed the following letter to the respondent:

> "RE: CONNOISSEUR ELECTRONICS (PTY) LTD
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> 1. We act on behalf of Connoisseur Electronics (Pty) Limited.
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> 2. Your client, our instructing correspondent, Brian Schneider, and your attorneys have had numerous discussions regarding your indebtedness to our client.
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> 3. Your attorneys advised our client on 3 June 2005 that they needed some two weeks to reconcile the records. It appears that your client is playing "ducks and drakes" with our client and that you are attempting to create a dispute when none exists.

4. Consequently, our client has instructed us to demand from you, as we hereby do, payment in the sum of R54 355.44, being the balance owing in respect of goods sold and delivered by our client to you at your special instance and request and in and during 2002 and August 2003, together with interest to date in the sum of R24 912.91. The whole sum i.e. R79 268.35 is due, and payable and which, despite demand, you have failed to pay. The above amount is to be paid by you in cash, alternatively suitably secured or compounded to the reasonable satisfaction of our client within twenty-one days after the date upon which this demand is delivered to you at the address set forth above.

5. Although not obliged to do so, we point out that this demand is intended to be, and in fact constitutes, a demand of Section 69 of the Close Corporation Act of 1984 as amended.

6. A copy of this demand has, this day been addressed to you at your postal address, P O Box 2034 Brooklyn Square 0075 and to Corporate Accountants, P O Box 2034 Brooklyn Square 0075."

5. On 29 June 2005 the respondent's attorneys addressed a reply to this letter as follows:

"**RE: CONNOISSEUR ELECTRONICS (PTY) LTD // DISCOUNT TOY CASH & CARRY CC**

I acknowledge receipt of your letter dated 13th June 2005. My failure to deal with each and every allegation arising therein is not to be construed as an admission thereof and my client's rights to reply more fully thereto in the appropriate forum and at the appropriate time are and remain fully reserved.

1. The contents of paragraph 1 are noted.

2. In regard to numbered paragraph 2, I am instructed to record that discussions were held and correspondence was exchanged regarding my client's alleged indebtedness to your client.

3. In regard to paragraph 3, I am instructed to advise that my client had previously requested your client to furnish it with various documents. This request was repeated from my offices. The documents sent were not those requested. My client has accordingly prepared the reconciliation to the best of its ability, considering the absence of documents. My client denies that it is attempting to delay the matter in any way or attempting to create a dispute herein. In fact your client, not having furnished the required documentation, is hampering this matter.

4. In regard to paragraph 4 I am instructed to advise that my client denies liability to your client in the amount claimed or any other amount whatsoever. A meeting was held on the 27th of March 2003 between my client and Ben Muller representing your client. Certain agreements were reached and a copy of the written portion is attached marked "A". The contents are self-explanatory.

    4.1 Considering the balance agreed upon between the parties on the 27th of March 2003, I am attaching hereto my client's reconciliation, attached marked "B", indicating that my client is not indebted to you client in any amount whatsoever.

In the event that you are instructed to proceed with legal proceedings against my client, kindly forward a copy of same to me immediately for my urgent attention."

6. The agreement referred to in paragraph 4 of the respondent's attorney's replying letter reads as follows:

> "It was irrevocably agreed upon by the parties that as at the 27th day of March 2003, the amount owing by Discount Toy Cash and Carry cc to Connoisseur Electronics (Pty) Limited is **R17,428.94** (Seventeen thousand four hundred and twenty eight Rand and ninety four cent) only.
>
> It was also agreed upon by the parties that Discount Toy Cash and Carry cc can deduct a rebate / advertising Discount of **9.5%** (Nine point five percent) amounting to **R1,655.82** (One thousand six hundred and fifty five Rand and eighty two cent).
>
> It was further agreed upon by the parties that Connoisseur Electronics (Pty) limited shall honour the guarantees on all its products should they be defective."

7. The director of the applicant who deposed to the founding affidavit on behalf of the applicant averred that he had never before had sight of the agreement entered into between the applicant, represented by Muller, and the respondent. Muller was a former employee of the applicant who was employed as its credit manager but who had left employment at the end of March 2003, prior to the deponent becoming a director of the applicant. Thus he states:

> "I was not a director of the applicant at the time of the conclusion of the alleged agreement. I have made a diligent search of the relevant records of the applicant and I cannot find any documentation of the nature of the alleged written agreement. I have also enquired of other directors of the applicant who have no

knowledge but who would have been told of any agreement concluded by Muller on behalf of the applicant. The fact that the alleged written agreement was not known about by any of the relevant directors of the applicant nor amongst the applicant's records confirms the fact that if Muller in fact purported to conclude such an agreement on behalf of the applicant, he did so without any authority and ....."

8. The applicant also denies the reconciliation annexed to the respondent's letter as annexure "B" which reflects that the respondent owes the applicant nothing.

9. Accordingly, the applicant is of the view that the respondent is deemed to be unable to pay its debts in accordance with the provisions of section 69(1)(a) of the Close Corporations Act of 1984 and that consequently it is entitled to an order that the close corporation be wound up in terms of section 68(c) because the corporation is unable to pay its debts.

10. Section 69(1)(a) provides:

"(1). 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."

11. The applicant also contends that it would be just and equitable and to the advantage of the respondent's creditors for the respondent to be wound up because a liquidator will be able to take control of the respondent's assets and thereby protect the interests of the respondent's creditors in that such liquidator would be able to realise the assets and distribute them amongst the creditors of the respondent, *pro rata* to the amounts of the claims.

12. The respondent in its answering affidavit sets out fully that a dispute exists between it and the applicant regarding the factoring in of the rebate of 9.5% with regard to the sales under the running account.

13. On 8 September 2005, as part of these proceedings, the respondent served a notice in terms of rule 35(12) and (14) calling upon the applicant to adduce for inspection copies of all the statements transmitted by the applicant to the respondent on a monthly basis from inception of the account between the applicant and the respondent, culminating in the final statement annexed to the founding affidavit in which the alleged outstanding balance is reflected. On 12 September 2005, the applicant filed a reply to the respondent's notice in which it essentially stated that it had provided all the documentation requested by the respondent.

14. A dispute continues to exist as to whether the documents provided by the applicant to the respondent constitute all the documents previously requested. The respondent's attorneys therefore directed a letter to the applicant on 15 September 2005 in which it was stated:

> "I acknowledge receipt of the Applicant's Reply to Respondent's Notice in terms of Rule 35(12) and (14) served on my client's Pretoria correspondents on the 12th of September 2005.
>
> Your client furnished a reconciliation of my client's account with your client and copies of the invoices undercover of your letter dated 1st June 2005. The reconciliation may constitute a response to numbered paragraph 1 of Respondent's Notice in terms of Rule 35(12) and (14). The documents however do not constitute a response to numbered items 2 and 3 of Respondent's Notice in terms of Rule 35(12) and (14). Employees in the employ of my client recall that the monthly statements/remittances transmitted by your client to my client monthly during the currency of the agreement between our respective clients', indicated the calculation of the discount. These discounts (9.5%) are not reflected on the reconciliation or the invoices. The statements are required for this purpose.
>
> In the circumstances I look forward to receiving Applicant's Reply to Respondent's Notice in terms of Rule 35(12) and (14) within 2 (two) days of the date hereof, failing which I am instructed to proceed with an Application to Compel."

15. The respondent contends that the applicant failed to factor in the 9.5% discount to which the respondent was entitled but limited the rebate intermittently to a 5% discount.

16. The ongoing problems related to the factoring in of the rebate had earlier resulted in a meeting between employees of the respondent and Muller, at that time the credit manager of the applicant,on 27 March 2003 at the respondent's offices at which the applicant's invoices were discussed and debated. The agreement referred to above was concluded to the effect that the amount of R17 428,94 was owing as at 27 March 2003. Mr Muller has filed a confirmatory affidavit in support of the respondent's contention that such an agreement was indeed reached.

17. If one compares the agreement with the statement of account upon which the applicant relies for the purposes of the demand made in terms of section 69(1)(a) of the Close Corporations Act, it is immediately clear that there is a discrepancy in that the balance as at the end of March 2003 in the statement is stated to be R64 101,10 as opposed to the amount of R17 428,94, being the figure in the memorandum of agreement.

18. The applicant has not filed a replying affidavit. Accordingly, on the respondent's version there is a dispute of fact about the amount actually owing. And discrepancies exist in the accounting records of both parties. The respondent contends that it has sought to resolve the matter through correspondence, but the applicant and its attorneys have been uncooperative in resolving what are essentially accounting queries. From this, it alleges that notwithstanding the memorandum of agreement and Muller's averments in that regard, the applicant prefers to abuse the

liquidation process by attempting to coerce the respondent to pay an amount to the applicant which is disputed.

19. Regarding the applicant's averments that Muller was not authorised, I tend to agree with counsel for the respondent that the deponent's testimony amounts to double hearsay. However, to the extent that Muller did not have actual authority, as contended by applicant, Muller may have had ostensible authority and accordingly the applicant should be estopped from denying his authority since Muller represented that he was duly authorised and the respondent has relied on that representation. In his confirmatory affidavit, Muller states that he was indeed authorised to conclude the agreement which he did.

20. The respondent has supplied its financial statements. As at 29 February 2004 it had assets in the amount of R35 million and liabilities of R25 million. Accordingly, it was not factually insolvent at that time, nor it would appear subsequently. The applicant's reliance upon fluctuations in accounts receivable and the stock at hand are unconvincing. The fact that there have been fluctuations in income and tax liability are also inconclusive.

21. The fact of the matter is that both the memorandum of agreement and the documentary evidence regarding the various attempts at reconciling the running account provide a clear indication that there is a *bona fide* dispute

about the amount alleged by the applicant to be due and owing, upon which the application is premised.

22. Liquidation proceedings ought not as a general rule to be resorted to in order to enforce the payment of a debt, the existence of which is disputed by the relevant corporate entity. The deeming provisions of section 69 have no place where the debt in question is disputed on reasonable grounds. The procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt - *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348. This is particularly the case where the evidence demonstrates that the company is in fact solvent.

23. Accordingly, I am not persuaded that the applicant has made out a proper basis for the liquidation of the respondent. Moreover, I am in agreement with the respondent that the applicant has indeed abused the process by persisting with an application when it has become manifestly evident that the debt is in dispute. In such a case, the court is justified in making a punitive costs award.

24. Accordingly, the application is dismissed and the applicant is ordered to pay the respondent's costs on an attorney and client scale.

**J MURPHY**
**JUDGE OF THE HIGH COURT**

Counsel for the applicant, Adv CD Roux, Johannesburg and counsel for the respondent, adv JA Babamia, Johannesburg.
Attorney for applicant, Israel Goldberg & Associates c/o Friedland Hart Inc.,Pretoria and attorney for respondent, Yousha Tayob c/o Findlay & Niemeyer Inc., Pretoria.