IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**
(3) **REVISED**

2017-02-03
DATE

[redacted]
SIGNATURE

CASE NUMBER: 34139/14

DATE: 3 February 2017

BRITS VLEIS (PTY) LTD Applicant

V

SOFT & GENTLE SUPPLY & PROJECTS CC Respondent

JUDGMENT

MABUSE J:

[1] This is an application for the winding-up of the respondent. The application is brought in terms of the provisions of s 69 of the Close Corporations Act 69 of 1984 ("the Close Corporations Act"), as read with subsection 344(f) and 346(1)(2)(3) and 4A of the Old Companies Act 61 of 1973 ("the Old Companies Act"), read with item 9 of Schedule 5 of the Companies Act 71 of 2008 ("the Companies Act").

[2] The applicant, Brits Vleis (Pty) Ltd ("Brits Vleis") seeks an order in terms of which the respondent, Soft & Gentle Supply and Project CC, a Close Corporation registered as such in terms of the Close Corporation Act and which conducts business at shop number 4, 265 Botha Street, Northam, Limpopo Province is wound-up.

[3] THE FACTUAL BACKGROUND

It is contended by the applicant that it has *locus standi* to launch this application by reason of the fact that the applicant is the creditor of the respondent as envisaged by s 346 of the Old Companies Act, which applies to the Close Corporations by reason of the provisions of schedule 5 of the Companies Act. Section 346(1)(a) of the Companies Act provides that:

"An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made:

(b) by one or more of the creditors (including contingent or prospective creditors)."

Section 68 of the Close Corporations Act provides that:

"A corporation may be wound up by a Court, if-

(c) the corporation is unable to pay its debts; or

(d) it appears on application to the Court that it is just and equitable that the corporation be wound up."

Section 69 of the Close Corporations Act provides that:

(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;

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts."

The applicant's case is predicated on the contention that the respondent is indebted to it in the sum of R200,000.00 together with interest thereon and costs: that the respondent be deemed to be unable to pay its debts by reason of its failure to respond to the notice in terms of s 69 of the Close Corporations Act, within a period of 21 days after delivery thereof.

[4] On 7 December 2013, the respondent drew a cheque for R200,000.00 in favour of the applicant. This fact is not in dispute. On 9 December 2013, the applicant deposited the said cheque into its bank account at Standard Bank of South Africa. The said cheque was dishonoured by the bank due to non-payment.

[5] The amount of R200,000.00 represented the indebtedness of a legal entity by the name of Roots Butchery owned by the same members as the respondent and the amount of the cheque on which the applicant's claim is founded represented payment to the applicants for the reduction of the debts of Roots Butchery to the applicant. The applicant held no security for the debt of R200,000.00.

[6] During January 2014, the applicant took a decision to claim payment of the respondent's indebtedness. This was done in terms of the provisions of s 69 of the Close Corporations Act. Notice in terms of the said section was sent to the respondent and its sister companies. On 3 February 2014, a notice in terms of s 69 of the Close Corporations Act in respect of the sum of the dishonoured cheque was sent to the respondent. The said notice was sent by the applicant's attorneys. It states in paragraph 2:

"Dit is ons instruksies dat u aan ons kliënte die bedrag van R200,000.00 (twee honderd duisend rand) plus rente daarop verskuldig is ten opsigte van 'n tjek gedatteer 7 Desember 2013 wat u aan ons kliënt gelewer het vir betaling, welke tjek deur u finansiële instelling terug verwys 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 dae (21 dae) aan ons kantore te betaal."

The aforegoing notices were delivered on behalf of the applicant by the Sheriff of the High Court on 12 February 2014 at Roots Butchery, Shop 4, 265 Botha Street, Northam. Such service of the said notice by the Sheriff as set out in the Sheriff's return of service and as testified in the founding affidavit is not in dispute. This application was launched by the applicant following the respondent's failure to respond to the said notice within a 21 day period set out in the said notice.

[7] The applicant contends that the respondent is either insolvent or may be deemed as such as it failed to respond to the section 69 notice within 21 days after it had been served on it. This is because of the provisions of s 69(1)(a) of the Close Corporation Act.

[8] The application is opposed by the respondent. For that purpose the respondent relies on the affidavit of one, Gabriel de Sousa ("de Sousa"), its main member. In his testimony de Sousa states that the respondent traded as supplier of toilet papers to the mines in the North-West district. During the years 2013 and 2014, due to strikes at Northern Platz, which lasted from 2013 to 2014 and also at Anglo American which lasted from January 2014 to July 2014, the respondent suffered losses and had reduced monthly turnover. As a consequence of the

abovementioned two factors, it stopped to trade completely. According to de Sousa's further testimony, as at 8 December 2014, the respondent was not conducting any business at all.

[9] Of paramount importance de Sousa contends that as at 8 December 2014, save for an overdraft of R44,166.67, with its bankers, the respondent had no creditors and therefore did not owe even the applicant. It is important to point out that notwithstanding its contention that it had no creditors, as at 8 December 2014, in its replying affidavit the applicant was persistent that the respondent, which had not generated income for a period of a year on 8 August 2014, was indebted to it.

[10] The respondent has raised several defences against the application. Firstly the respondent denied that it had any dealings with the applicant; secondly it denied vehemently that it was in any way indebted to the applicant; thirdly it contended that there existed no underlying contractual relationship or liability to the applicant at all; and fourthly and finally it contended that as the amount of the dishonoured cheque was made good by subsequent payments, the applicant could not bring an application for its liquidation based on the said dishonoured cheque.

[11] With regard to the cheque of R200,000.00 de Sousa admitted that a cheque in the sum of R200,000.00 issued on the respondent's bank account was indeed given to the applicant on 7 December 2013 and that the said cheque was dishonoured. The said cheque was merely given to a certain Cobus, a representative of the applicant. The reason for doing so was that Aspigon 175 CC had run out of cheques. Even if the said cheque was dishonoured, Aspigon 175 CC made the said cheque good by making the following payments to liquidate the amount for which the cheque was issued:

11.1 R10,000.00 on 12/12/2013;

11.2 R160,000.00 on 12/12/2013;

11.3 R51,050.00 on 13/12/2013:

Total: R 221,050.00

It is accordingly contended by de Sousa that any debt with regards to the said cheque was therefore extinguished. For this reason the respondent was never indebted to the applicant and therefore no reason existed for the liquidation of the respondent. According to de Sousa, the amount of the dishonoured cheque was the very debt upon which the applicant relied in its application, was extinguished long before the applicant brought this application in April 2014.

[12] THE ISSUES TO BE DECIDED

The Court was called upon to decide the following three issues:

12.1 whether the respondent was indebted to the applicant in the amount claimed as at April 2014;

12.2 whether or not the respondent was or is unable to pay its debts; and

12.3 whether the respondent should be wound-up.

[13] THE LAW

The applicant's *locus standi* is predicated on it being the creditor of the respondent for the sum of R200,000.00. This disputed amount which was confirmed and admitted by the respondent, represented the amount due in favour of the applicant. That the applicant's application is grounded on such amount of R 200,000.00 is proved by the second paragraph of the notice in terms of s 69 of the Close Corporations Act. It is also supported by paragraphs 5 and 6 of the founding affidavit. This application was launched on 19 May 2014. The applicant was in law obliged to satisfy the Court that as at 19 May 2014 it had *locus standi* to bring this application.

[14] The applicant contended that the respondent was indebted to it in the sum of R200,000.00. Quite clearly the said indebtedness arose from a debt of Roots Butchery, a business owned by the same member as the respondent. No further details relating to the said legal entity nor the debt were forthcoming. No proof of the indebtedness of Roots Butchery was placed before the Court. It will be recalled that the respondent admitted having given the cheque which was subsequently dishonoured, to the applicant. It was the respondent's case that the said cheque was given to settle the debt of Aspigon175 CC. It is of paramount importance to point out that according to the evidence of the respondent, within days after the said cheque was dishonoured Aspigon 175 CC, in any event, made payment to the applicant in excess of R200,000.00. That this is correct is clear from the manner in which the applicant pleaded its case with regard to the respondent's case that the dishonoured cheque was made good by the respondent's subsequent payments.

[15] In paragraph 8.5 of its answering affidavit De Sousa states as follows:

"8.5 Aspigon 175 CC in any event made payment of R10,000.00 and R160,000.00 on 12 December 2013 and R51,050.00 on 13 December 2013 ...

...

7.1 I once again confirm the facts as set out in the founding affidavit and deny the content of the paragraphs and the reply.

7.2 The respondent admits giving the applicant the cheque which was in order to effect payment to the applicant, which cheque was dishonoured. The respondent knew that there were no funds in its account.

7.3 It cannot be said that three payments extinguished the debt. Aspigon owes the applicant far more than the amount of the cheque.

7.4 Despite all these payments, the account remained in arrears."

[16] From the above it is as clear as crystal that:

16.1 The applicant did not deny that the respondent made three payments that are referred to in paragraph 8.5 of the answering affidavit;

16.2 secondly, the applicant was unable to deny or has not denied that these three payments were intended to make good the amount of the respondent's cheque;

16.3 if anything by using such words as "*it cannot be said that the three payments extinguished the debt*" and "*despite all these payments*" it is clear that indirectly the applicant admits that the respondent made payment as set out in paragraph 8.5 of the answering affidavit.

16.4 Aspigon 175 CC, and not the Respondent, was indebted to the applicant.

[17] It is, in my view, not sufficient to base the application on a dishonoured cheque. It behoves the applicant to satisfy the Court that not only was the cheque dishonoured but that the amount of the cheque still has not been settled by the respondent. The applicant must still satisfy the Court that apart from the dishonoured cheque the underlying liability between the applicant and the respondent for which the cheque payment was designed to cover has not been paid.

18. The liability of the respondent on the said sum of R200,000.00 is, in my view, disputed on *bona fide* and reasonable grounds. It is clear that on the Plascon Evans Rule, the applicant has not succeeded to prove its *locus standi*. Counsel for the applicant referred, in his heads of argument, to LAWSA Vol.4 AD 3 paragraph 113 which dealt with the meaning of "*bona fide* dispute" on reasonable grounds. In this book it was stated that:

"A debt is not bona fide disputed simply because the respondent company says that it is in dispute. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression "genuine dispute", connotes a plausible contention

requiring the same sort of consideration as a 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis of an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context means not fabricated for the purposes of the proceedings or not just thought up or brought forward without genuine belief. There can be no genuine dispute if there are not substantial grounds for disputing the debt."

[19] *In casu* on evidence before Court it is clear that the debt is not simply disputed because the respondent claims so. The dispute is not only *bona fide* but, in my view, good and reasonable and founded on substantial grounds.

[20] Finally, counsel for the applicant, relying on a paragraph cited from **Kalil v Decotex (Pty) Ltd 1988(1) SA 943 A** argues that the respondent has failed to establish the existence of a *bona fide* dispute in relation to the applicant's claim. The said paragraph states that:

"Where the respondent shows on a balance of probability that its indebtedness to the applicant was disputed on bona fide and reasonable grounds, the Court will refuse the 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."

In my view the respondent has succeeded to show that its dispute for its indebtedness is based on good and reasonable grounds.

[21] I am satisfied that de Sousa has tendered evidence that has established that the respondent was never indebted to the applicant at all and furthermore that there was never any underlying liability between the applicant and the respondent. The target of this winding-up

application is Soft & Gentle Supply & Projects CC. In paragraph 6 of the founding affidavit Tjaart Johannes Janse van Rensburg ("van Rensburg") stated it clearly that:

"Hierdie R200,000.00 verteenwoordig 'n verskuldigheid van 'n regsentiteit by name van Roots Butchery, besit deur dieselfde lede as die van die respondent en is die tjek waarop die applikant steun gegee aan die applikant ter vermindering van die skuld van Roots Butchery teenoor die applikant." Quite clearly the respondent has nothing to do with the amount of R200,000.00. The applicant itself has placed evidence before the Court to show that Roots Butchery was the legal *persona* and that the amount so tendered by way of a cheque was for the debts of Roots Butchery and not of the respondent. Accordingly I accept De Sousa's evidence that the respondent was never indebted to the applicant and that this application should not have been launched against the respondent.

[22] There seems to be a veiled attempt by the applicant to seek the liquidation of the respondent on grounds not set out in the notice in terms of s 69 of the Close Corporations Act. This is done in the replying affidavit, something which is not permissible. The implication by the applicant is that *"it cannot be said that the three payments extinguished the debt. Aspigon owed the applicant far more than the amount of the cheque."*

Van Rensburg proceeded with his evidence and stated the following in paragraph 7.4 of his replying affidavit:

"Despite all three payments the account remained in arrears."

In other words, despite the fact that Aspigon had made payments in respect of the dishonoured cheque, there remained a balance outstanding and payable by the respondent. It was argued by counsel for the applicant that if it should be found that the amount of the dishonoured cheque was fully paid, the Court could still grant the liquidation order against the respondent if it can be found that the respondent was indebted to the applicant in another amount and was unable to pay its debts.

[23] The normal rule is that an applicant must stand or fall by its founding affidavit. See in this regard **Director of Hospital Services v. Mistery 1979(4) SA 626 (A).** The applicant may therefore not apply for the liquidation of the respondent on grounds not raised in both its s 69 notice or in the founding affidavit. The only issue raised in the s 69 notice was the amount of R200,000.00 of the dishonoured cheque. As set out in the afore going the applicant *"could not extend the issue by making fresh allegations in the replying affidavit."*

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which the Judge will look to determine what the complaint is. As was pointed out by Krause J in Pounta's Trustee and Lehanas 1924 WLD at 68 and has been said in many other cases:

"An applicant must stand or fall by its petition and the facts alleged therein as that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation or facts stated therein because those are the facts which the respondent is called upon either to confirm or deny."

The applicant was obviously in possession of these facts when it launched the current application. No reason has been furnished by the applicant why it failed to disclose these facts or to include as its grounds for the liquidation of the respondent the fact that the respondent, apart from the amount of R200,000.00, was indebted to it in a certain amount and was unable to liquidate the said debt.

[24] It is correct that all that is required of the applicant is to show that the respondent is unable to pay its debt and as and when they fall due. In this regard reliance can be placed on **Rosebach & Co. Pty Ltd v Singh's Bazaars Pty Ltd 1962(4) SA 593 at page 597 C-D** where the Court had the following to say:

"If it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency."

The facts stated by the respondent and admitted by the applicant show quite convincingly that the respondent did not owe the applicant; that it was Roots Butchery, a separate legal entity that owed the applicant; that the dishonoured cheque was made good; there was no evidence that either the respondent was unable to pay its debts. In my view, on the evidence before the Court on the application for the liquidation of the respondent cannot succeed.

[25] CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVIT

The respondent has applied for condonation of the late filing of the answering affidavit. This is an indulgence that the Court, after consideration of all the relevant factors, may exercise either in favour or against the respondent. The respondent has furnished three reasons why this application should be granted. The first of such given reasons is that its attorneys of record, without admitting liability, tried to settle the matter with the applicant's attorneys. The said attempts were unsuccessful but it was not for want of trying. The second reason was that even during the negotiations for settlement Aspigon 175 CC continued to make payments of its debts to the applicant. It is also contended that the application should be granted by reason of the fact that the respondent has an unassailable *bona fide* defence. This is one of the considerations the Court must look into in deciding whether to grant the application for the late filing of the answering affidavit. I am satisfied that the respondent has satisfied these requirements and that the affidavit should be allowed. The respondent's application for the condonation for the late filing of its answering affidavit is hereby granted.

[26] Finally, the respondent delivered a supplementary answering affidavit in terms of Rule 6(5)(e) of the Uniform Rules of Court. The said Rule provides that the Court may, in its discretion permit the filing of further affidavits. The Court will only permit the filing of further affidavits if there is an explanation for doing so. A Court may also exercise its discretion in favour of the respondent if there is a point raised in the replying affidavit like is the case in this matter. It is clear, in my view, that the respondent wanted to address an issue raised by the applicant in

the replying affidavit. That issue was the persistence by the applicant that the respondent was indebted to it. Furthermore, the respondent's intention was to place proof before the Court of the payments it had made to contradict the statement by the applicant that it was still indebted to it. The supplementary affidavit was therefore made *bona fide* and was accompanied by an acceptable explanation. Accordingly leave to file the supplementary affidavit is hereby granted to the respondent.

1. **In the result the application for 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:	*Gerneke & Potgieter*
Date Heard:	*23 August 2016*
Date of Judgment:	*3 February 2017*