IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 3651/2022

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

30/05/2024
DATE SIGNATURE

In the matter between:

MINE GUNITING CC **APPLICANT**

AND

REKA TRADE 1075 CC **RESPONDENT**

JUDGMENT

LANGA J:

Introduction and Facts

[1] This is an application brought by the Applicant Mine Guniting CC in terms of the provisions of Section 66 read with 69(1) of the Close Corporation Act, Act 69 of 1984 ("the Close Corporation Act"), Item 9 of Schedule 5 of the Companies Act, Act 71 of 2008 as well as Section 346 of the Companies Act, Act 61 of 1973, ("the old companies Act"). The Applicant seeks the final or alternatively, the provisional the winding up of the Respondent Reka Trade 1075 CC.

[2] It is common cause that the parties had concluded an agreement in terms of which the Respondent would hire certain mining equipment from the Applicant subject to the payment of an agreed rental. Given the defence raised by the Respondent, it appears not to be disputed that the latter did not pay all that was due to the Applicant in terms of the agreement. Consequently, on 12 September 2022 the Applicant issued a demand for the payment of the amount of R5 542 734.37 in terms of Section 69(1)(a) of the Close Corporation Act.

[3] When the Respondent failed to pay the Applicant launched an application for the winding up of the Respondent alleging that the Respondent is indebted to it in the amount of R5 542 734.37. The Applicant further alleged that it had the necessary *locus standi* as the Respondent was indebted to it for an amount of not less than R200 as provided for in Section 69(1)(a) of the Close Corporation Act.

Respondent's case

[4] Over and above the argument on the merits, the Respondent raised a point *in limine* challenging the authority of Respondent's attorneys to act on its behalf. The Respondent however did not do so in terms of Rule 7 of the Uniform Rules.

[5] The Respondent further contended as a point of law that the application was defective as there had been no compliance with the National Credit Act 34 of 2005 (*"the NCA"*) whereas the hire agreement between the parties is subject to the said Act. The Respondent contended therefore that the NCA is applicable and that the failure by the Applicant to comply therewith was fatal.

[6] On the merits the Respondent contended that that the Applicant is not entitled to payment because it allegedly overcharged the Respondent. The Respondent further contended that the application for winding up is flawed as the Applicant failed to reciprocate on its obligations in terms of the agreement between the parties. The Respondent argued that Applicant and the Respondent entered into a bilateral lease agreement in terms of which the Applicant leased mining equipment to the Respondent. It submitted further that the lease agreement placed a reciprocal duty on the Applicant to fulfil its obligations in accordance with certain clauses to *inter alia* to maintain and repair the hired equipment. The Respondent alleged that that the Applicant had failed to fulfil its obligations with the result that the Respondent could not perform its obligation in terms of the agreement.

[7] In essence the Respondent does not deny its indebtedness to the Applicant. The nub of its argument is that the Applicant, by failing to maintain the equipment, caused the Respondent to be in a position where it could not operate and consequently could not pay. The Respondent therefore relies on the principle of reciprocity and relies on a number of court decisions *inter alia Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd. t/a Dorbyl Transport Products and Busaf* (38/03) [2004 ZASCA 8; [2004 2 ALL SA 113 9SCA) 25 March 2004.

The Applicant's written submissions

[8] On the first point *in limine* the Applicant argued that if the Respondent wished to question the authority of the Applicant's attorneys to act on behalf of the Applicant, it should have invoked the provisions of Rule 7. It contended therefore that this point should is meritless and should accordingly be dismissed.

[9] On the second point *in limine*, the Applicant contended that the NCA was not applicable as the agreement was concluded between two companies and not with a

natural person. It argued further that in addition the NCA is not applicable as the Respondent's annual turnover is in excess of the threshold prescribed in section 7(1) of the NCA.

[10] On the merits the Applicant contended that the Respondent is indebted to it in the amount of R5,542,734.37 for plant equipment rented by the Applicant to the Respondent. The Applicant argued that the existence of the debt is not disputed by the Respondent which disputes only part of the outstanding balance, which also remains unpaid and due. The Applicant therefore contended that by implication the Respondent has thus conceded its indebtedness to the Applicant for at least more than R200.00. The Applicant submitted that therefore where a case for the winding-up of a close corporation has been established, it is immaterial that only part of the indebtedness is disputed by the respondent close corporation.[2]

[11] The Applicant further contended that the application conforms with the legislative requirement as the Respondent failed to pay the sum due to the Applicant (or secure or compound for it) within 21 days after delivery of the Applicant's Section 69(1)(a) demand served on the Respondent on 12 September 2022 at its registered address.

[12] The Applicant contended that as no payment or positive response was received from the Respondent, the latter is accordingly deemed to be unable to pay all its debts and that in such an event the Respondent ought to prove that it is, in fact, solvent in order to evade winding up.

Discussion and analysis

[13] I will first deal with the points raised *in limine* before traversing the merits. On the question of the authority of the attorney to act on behalf of the Applicant it must be stated

from the onset that the Respondent did not raise this challenge in terms Rule 7 of the Uniform Rules as should have been done. The Respondent having failed comply with the rules of court by not invoking the provisions of Rule 7 cannot at this stage raise this challenge. This point is accordingly meritless and ought to be dismissed.

[14] Concerning the alleged applicability of the NCA to the agreement, it was in my view correctly pointed out by the Applicant that this Act does not apply for two reasons. The first is that as the agreement was concluded between two juristic persons and not with a natural person, the NCA does not apply. See section 4(1)(a)(i). The courts rejected a constitutional challenge of the exclusion of juristic persons from the ambit of the NCA. See *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd* 2010 (1) SA 634 (WCC) and *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 (1) SA 627 (C). The second, and correct reason I might add, is that due to the Respondent's annual turnover, which is in excess of the threshold prescribed in section 7(1) of the NCA, the NCA does not apply to this dispute. I am therefore also satisfied that this point too is meritless and ought to be dismissed.

[15] On the merits it is evident that this court is not asked to determine whether the Respondent is indebted to the Applicant but whether the Respondent is entitled to evade winding up on account of the dispute over part of the indebtedness. As stated above the nub of the Respondent's argument is that it was unable to comply with its obligations because the Applicant failed to comply. Nowhere does the Respondent allege that it is not indebted to the Applicant. All that was raised was that the amount owed cannot be correct as the Applicant allegedly overcharged the Respondent. In the light of the Respondent's own contentions, one can therefore safely accept that the Respondent is indebted to the Applicant.

[16] Further, the Respondent does not dispute that it has received the demand in terms of Section 69(1)(a) which was allegedly served on it by the Applicant. Likewise, it can therefore safely be concluded that the demand was properly served on the Respondent as required by the Act. It is further common cause that despite this demand the Respondent did not pay the debt or make any positive arrangements with the Applicant. The Respondent does not deny that it owes the Applicant more than R200.00, but only that a portion thereof is allegedly incorrectly calculated. The Respondent further failed to tender any payment or security of the undisputed amount of the indebtedness. There is in my view no dispute relating to the indebtedness and is the Applicant entitled to the relief sought. In this event, where there is evidence that the Respondent is indebted to the Applicant for at least not less than R200 and that it has failed to pay after a lawful demand, the deeming provision of Section 69(3) is triggered.

[17] Concerning the Respondent's allegations that the Applicant overcharged it, there is no evidence placed before court to sustain the overcharging claims. What emerges from the papers is that the Respondent concluded an agreement to hire machines from the Applicant at an agreed rate, irrespective of whether it had work for the machines or not. Apart from the fact that the alleged overcharging is not liquidated, even if it is assumed to be correct, the overcharging unfortunately does not impact on the existence of the Applicant's claims as the Respondent, on its own version, is still indebted to the Applicant at the very least in excess of R2 million. I am satisfied that in this case the Respondent has failed to demonstrate that it is disputing the Applicant's claim on *bona fide* grounds. The Applicant submits that there is no basis for the alleged "overcharging" to preclude the granting of the winding-up order.

[18] Lastly, I turn to the Respondent's insinuation that this is a matter of reckless credit. The Respondent contended that because of the credit the Applicant extended to it

apparently by concluding the hire agreement, the Respondent is rendered over-indebted and unable to meet its financial commitments. By raising this aspect, the Respondent, unfortunately, unwittingly conceded its insolvency and based on this alone the Respondent ought to be wound-up.

[19] In conclusion it is trite that an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged a debt. In such circumstances the discretionary power of the court not grant such an order is very narrow. See *Afgri Operations Ltd v Hamba Fleet (Pty)* Ltd 2022 (1) AA 91 (SCA). The Respondent in this case deliberately chose not to place evidence before court to prove its solvency or that it is able to pay its debts as they become due. The Respondent further chose not to expressly deny that it is insolvent. The Respondent is thus not able to escape the deeming provision in circumstances where it did not comply or satisfactorily comply with the statutory demand and ought to be found to be insolvent.

[20] In the light of the above I am satisfied that the Applicant has complied with the provisions of Section 69(1)(a) of the Act. The Respondent having conceded insolvency and having failed to make any payments, I am satisfied that it has been sufficiently established that the Respondent is insolvent. This justifies the granting of at least a provisional winding up order which is the order I intend granting.

[21] I accordingly make the following order:

1. The Respondent is placed under provisional winding up in the hands of the Master of the High Court;

2. The Respondent or any interested person is called upon to show cause on 22 July 2024 at 10h00 or as soon thereafter as the matter may be heard, why the provisional order should not be made final;

3. The costs of the application to be the costs in the winding up.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Advocate GJ Lotter
For the Respondent:	Advocate X Ngcobo
Date heard:	13 February 2024
Date delivered:	30 May 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 30 May 2024 at 14h00.