**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

**Case No. : 958/2012**

In the matter between:-

**SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD** Applicant

and

**THOMI-GEE ROAD CARRIERS CC** Respondent

**Case No. : 4841/2012**

In the matter between:-

**ABSA BANK LIMITED** Applicant

and

**FERNOFIRE BETHLEHEM CC** Respondent

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**DELIVERED BY:** SNELLENBURG, AJ

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**HEARD ON:** 26 APRIL 2012

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**ORDERS:** 7 JUNE 2012

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**REASONS DELIVERED:** 19 JULY 2012

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[1] This judgment concerns two unopposed motions for provisional orders of liquidation on the ground that the respective respondents failed to pay debts owed to the applicants notwithstanding a written

demand (by the respective applicants) in terms of the provisions of section 69 of the Close Corporation Act 69 of 1984 [the Close Corporations Act], read with the provisions of Schedule 5 of the Companies Act 71 of 2008 [the 2008 Act].

[2] It is necessary to deal with the delay from date of hearing of the matters to date of this judgment. The provisional orders were subsequently granted and I indicated that my written reasons would follow. In light of the fact that both applications involves the adjudication of the same legal principle, which had formed the subject of the judgment in this division of Zietsman AJ in **HBT CONSTRUCTION AND PLANT HIRE CC v UNIPLANT HIRE CC (case number** 5083/2011 FSB [**HBT**], unreported), I requested that the motions be argued simultaneously at the end of the motion court roll. Subsequent to the initial arguments, I entertained further submissions from both counsel on various occasions. I am indebted to counsel for their submissions. The further submissions mainly relate to reported and unreported judgments dealing with the same issue that I need to adjudicate, which were delivered or became available in this and other divisions. It will suffice to say that both Mr Tsangarakis on behalf of Scania Finance Southern

Africa (Pty) Ltd [Scania] and Mr Zietsman on behalf of Absa Bank Ltd [Absa] submits that notwithstanding the provisions of the current Companies Act, section 69 of the Close Corporation Act still constitutes a deeming provision and consequently that the winding-up of a close corporation (or company) can be sought and granted on that basis alone which, as will appear, is contrary to the findings in **HBT**.

[3] In **HBT**, Zietsman AJ held that in light of the provisions of the new Companies Act, and the interrelation with the provisions of the Close Corporation Act, that if a company cannot prove just and equity in an application for winding-up, it shall be imperative for such an applicant to prove insolvency of the company before the whole of section 14 of the 1973 Act will be applicable. The effect of the judgment is that section 69 of the Close Corporation Act is held to no longer constitute a deeming provision, in the sense that an applicant can no longer rely solely on a debtor's failure to respond to such demand, for the winding-up of the close corporation.

[4] It is apposite to evaluate the existing legislative framework in order to consider the *ratio decidendi* of the **HBT** judgment as well as the other judgments dealing with this question, which judgments are not in harmony.

[5] The 2008 Act commenced on 11 May 2011. In terms of section 224 of the 2008 Act the Companies Act 61 of 1973 ['the previous Act'] is repealed, subject to subsection (3) which provides that the repeal does not affect the transitional arrangements, which are set out in Schedule 5. Section 9 of Schedule 5 in turn provides that:

> '(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if the Act had not been repealed subject to sub-items (2) and (3).
>
> (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.
>
> (3) 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.'

[6] Part G, Sections 78(1)(b) and 81 of the 2008 Act deals with the winding-up of *solvent* companies by court order. The provisions of the relevant sections provide:

'79 Winding-up of solvent companies

(1) A solvent company may be dissolved by-

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either-

(i) by the company; or

(ii) by the company's creditors, as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that

the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5.

81 Winding-up of solvent companies by court order-

(1) A court may order a solvent company to be wound up if-

(a) the company has-

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141 (2) (a), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that-

(i) the company's 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 for the company to be wound up; or

(ii) it is otherwise just and equitable for the company to be wound up;

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and-

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that-

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the company's assets are being misapplied or wasted; or

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that-

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal,

the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act 69 or 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

(2) . . .

(3) . . .

(4) A winding-up of a company by a court begins when-

(a) an application has been made to the court in terms of subsection (1) (a) or (b); or

(b) the court has made an order applied for in terms of subsection (1) (c), (d), (e) or (f).

[7] The salient provisions relating to winding-up of companies in the previous Act provided as follows:

'**s343(1) A company may be wound up-**

(a) by the Court; or

*(b)* voluntarily.

(2) . . .

**344 A company may be wound up by the Court if-**

. . .

*(f)* the company is unable to pay its debts as described in section 345;

*(g)* .. .;

*(h)* it appears to the Court that it is just and equitable that the company should be wound up.

**345 When company deemed unable to pay its debts**

1) A company or body corporate shall be deemed to be unable to pay its debts if-

*(a)* a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,

and the company or body corporate has for three weeks

thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

*(b)* any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

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

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.'

[8] Section 66 of the Close Corporations Act provides that the laws mentioned or contemplated in item 9 of Schedule 5 of the 2008 Act, read with the changes required by the context, apply to the liquidation of a close corporation in respect of any matter not specifically provided for in that part or in any other provision of the Close Corporations Act. The now repealed section 68(c) provided that a close corporation may be wound-up if it was unable to pay its debts as described in section 69 which contains similar provisions as section 345 of the previous Act.

[9] In **HBT** Zietsman AJ held that the grounds set out in section 81 only apply to solvent companies. As stated, he held that in order to rely on the grounds in chapter 14 of the 1973 Act, the applicant must first (and as *sine quo non*) prove insolvency, in other words that the company is not solvent and therefore that section 81 is not applicable. It follows that, should an applicant be unable to prove insolvency, such applicant must then make out a case for winding-up in terms of section 81. The failure to respond to the demand in terms of section 69 will in such event constitute a factor that may, or may not, assist such an applicant to rely on the ground that it is just and equitable to liquidate.

[10] In another judgment in this division Daffue J, in **KRUGER HERMAN UTOPIA CONSTRUCTION CC v SET-MAK CIVILS** (case number 5495/2011 FSB, unreported) had to consider, *inter alia*, whether it was still possible, in terms of the provisions of the current Companies Act to obtain a winding-up order based (solely) on the deeming provisions of section 69 of the CC Act, particularly if the respondent is a solvent close corporation. Daffue J was also called upon to decide whether the applicant in that matter had

made out a case that the respondent should be wound up based on the just and equitable ground.

[11] Daffue J followed the **HBT** *ratio decidendi* and came to the conclusion that if the 2008 Act be 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. According to the learned Judge a solvent company can only be wound up by an order of court if business rescue proceedings have ended and it is just and equitable, alternatively if it is otherwise just and equitable to be wound up. Daffue J further held that an applicant who cannot satisfy the requirements in section 81(1)(c) will probably have to prove factual insolvency, although factual insolvency is not a ground for winding-up in terms of section 344 of the 1973 Act. Daffue J concludes that in so far as neither factual insolvency, nor inability to pay debts is a ground for winding-up [in terms of the **2008** Act], the just and equitable ground should be construed more widely, otherwise the retention of sections 345 of the Companies Act (and section 69 of the Close Corporations Act will be superfluous. The Judge

concludes that mere inability of a solvent company to settle debts is not sufficient for winding-up purposes.

[12] I respectfully disagree with the *ratio decidendi*, in so far as it relates to the issue at hand, in both the well reasoned judgments in **HBT** and **SET-MAK CIVILS**. The misconception of requiring a creditor to prove insolvency before being able to rely on Chapter 14 of the previous Act is apparent merely from the provisions of section 345, read with 344 of the 1973 Act, which clearly does not provide for factual insolvency, merely a deemed inability to pay its debts (and also if it is proved to the satisfaction of the court that the company is unable to pay its debts). The section has always brought about a peculiar consequence, namely that the debtor was deemed to be unable to pay its debts, although it may well be able to pay other debts. One of the grounds available to such debtor to oppose the application for winding-up on this basis was to prove solvency. Then the court still retained its discretion.

[13] Professor P A Delport, co-author of amongst other publications, **Henochsberg on the Companies Act**, 2008 [Lexis Nexis,

Durban] concludes in an opinion of 15 May 2012 on this subject that the legislature intended Part G of Chapter 3 of the 2008 Act to apply to winding-up of 'solvent' companies and Chapter XIV of the previous Act to apply to 'insolvent' companies, subject to certain exceptions that are not relevant for purposes hereof. Therefore sections 344 and 345 of the previous Act still applies to companies and if a company is to be wound up due to inability to pay debts, sections 344(*f*) and 345 can still be used. What the legislator has in effect brought about, by the repeal of section 68 and the amendment of section 66 (as set out above of the Close Corporations Act), is that the grounds for winding-up 'insolvent' close corporations by order of court are now the same as the grounds for winding-up of 'insolvent' companies. Professor Delport submits that if the application for the winding-up of an 'insolvent' company is made on the basis of section 344(f), then the applicant may (obviously) rely on the deeming provisions of section 345. Regarding close corporations, the same ground will be used, to wit section 344(f) read with section 69 of the Close Corporations Act.

[14] As matters stand, to my mind, both section 69 of the Close Corporations Act and section 345 of the previous Act are still

deeming provisions. I will henceforth refer only to section 345 and that must be read to include section 69 of the Close Corporations Act. If any of the statutory elements are satisfied, for example the non payment after being duly served with a demand in terms of section 345, the company is deemed to be unable to pay its debts and the company may, as in the previous disposition, be wound up solely on this ground. Such applicant is entitled to seek a winding-up order on that basis. The court retains its discretion. Should the respondent however prove that it is solvent, then (and only then) the applicant will obviously have to satisfy the requirements of sections 79(2) and 81 of the 2008 Act. But the onus on proving solvency means satisfying the requirements of section 4(1) of the 2008 Act. In such event the applicant may well have only the just and equitable ground if no other grounds in terms of Section 81 are available. The onus is however on the respondent (debtor) to satisfy the solvency test. Obviously the applicant will act to his own peril if he approaches the court solely on the grounds of sections 344(f) and 345 and the debtor proves that it is solvent. Debatably, the fact that a company does not make use of business rescue and similarly ignores its obligations owed to its debtors may very well constitute valid grounds in terms of the 2008 Act, to hold that it is just and equitable that the company be wound up. To this

end I agree with Daffue J that just and equitable will, in terms of the 2008 Act, have a wider meaning.

[15] I am fortified in my view in light of the following considerations.

[16] In the **SET-MAK CIVILS** judgment at para [15], Daffue J correctly holds that factual insolvency has never been a ground for insolvency, although it may be considered in general when exercising its discretion. See **EX PARTE DE VILLIERS AND ANOTHER NNO v IN RE CARBON DEVELOPMENTS** 1993 (1) SA 493 (AD) at 502C - E. The converse has applied, namely factual insolvency may be indicative of the debtor companies inability to pay. **JOHNSON v HIROTEC (PTY) LTD** 2000 (4) SA 930 SCA at para [6].

[17] Professor JJ Henning's publication prior to commencement of the 2008 Act (referred to in par 9 of the **SET-MAK CIVILS** judgment) confirms that in order to avoid future conflict, the 2008 Act provides for transitional arrangements that retain the current disposition, as provided for in Chapter XIV of the previous Act for liquidation and

winding-up 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.

[18] In unopposed proceedings for winding-up, the court's discretion is very narrow where the applicant is an unpaid creditor who cannot obtain payment and who brings his claim within the Act. Such creditor is entitled, *ex debitio justitiae*, to a winding-up order. He is not bound to give the creditor time to effect payment. See **SAMMEL v PRESIDENT BRAND GOLD MINING CO LTD** 1969 (3) SA 629 (A) at 662E.

[19] In **FIRSTRAND BANK LTD v LODHI PROPERTIES INVESTMENT CC AND OTHERS** (case number 38326/2011 NGP, unreported) [**LODHI]**, Van der Byl AJ held at p29 par 30:

(a) that in absence of an express provision, there is no indication in the 2008 Act that the legislator intended, particularly, in so far as it left section 345 of the previous Act intact, to do away with the

principle that a company (or close corporation) may be liquidated on the grounds of its 'commercial insolvency'.

(b) that the 2008 Act refers to a 'solvent company' as a company that is either not actually (factually) or commercially insolvent to which Part G of Chapter 2 (of the 2008 Act) will apply. Chapter XIV of the previous Act (still) applies to 'commercially or actually (factually) insolvent companies'.

I agree, subject to what has been said regarding the fact that factual insolvency is neither required nor a ground for winding-up in terms of the previous Act. The reasoning corresponds with the views expressed by the learned Professors Delport and Henning, as dealt with in paragraphs [12] and [16] above, regarding the express intention to retain the previous disposition until uniform insolvency legislation is enacted.

[20] The findings in **LODHI** was confirmed by Van Oosten J in **FIRSTRAND BANK LTD v BUNKER HILLS INVESTMENTS 499 CC** (case number 32130/2011 SGJ, unreported), at par [8] to the extent that the legislator did not, in the 2008 Act, intend to do away with a liquidation on the grounds of commercial insolvency.

[21] I therefore hold that an applicant may, in terms of Section 9 of Schedule 5 of the 2008 Act, approach the court for the liquidation of a respondent company (or close corporation) on the ground of its inability to pay its debts in terms of section 344 (f) and that section 345 (and Section 69 of the Close Corporations Act) is still a deeming provision. Such an applicant need not prove that the respondent company is insolvent in order to rely on Chapter XIV of the previous Act.

[22] Insofar as necessary for the purposes of the present applications, I agree with the finding of Daffue J in the **SET–MAK CIVILS** judgment, that the ground of just and equitable as used in section 81 must be interpreted wider than was the case in the previous disposition. The legislator has specifically included grounds, which were traditionally considered grounds that made it just and equitable to grant a winding-up order, as substantial grounds on which a court may liquidate a solvent company. Section 81(1)(*d*) now specifically caters for directors that are deadlocked to apply for the winding-up of a solvent company. Section 81(1)(d)(iii) however provides, in addition to the directors deadlock that prejudices the company (irreparable harm as result of the

deadlock), that the court may grant a winding-up order if it is otherwise just and equitable for the company to be wound up. A similar provision, in addition to the provisions that only govern liquidation on application by one or more creditors on the ground that:

(a) business rescue proceedings have ended; and

(b) it appears that it is just and equitable in the circumstances to wind-up, appears in section 81(1)(c)(ii). This finding, to my mind, is not at odds with the finding in **HBT**. The use of the same words indicate that the legislator intended the same test to be applied, namely the term postulates a conclusion of law, on the grounds of justice and equity, as a ground for winding-up. See **RAND AIR (PTY) LTD v RAY BESTER INVESTMENTS (PTY) LTD** 1985 (2) SA 345 (W); **CUNINGHAME v FIRST READY DEVELOPMENT 249 (ASSOCIATION INCORPORATED IN TERMS OF SECTION 21)** 2010 (5) SA 325 (SCA); [2010] 1 All SA 473 (SCA) at par 14.

[23] In both applications the respective respondents' indebtedness has

been proven.

[24] In the SCANIA matter the respondent owes the applicant the amount of R1 089 659.34. This is a substantial amount which is due and owing. It appears that a certain payment was received during February 2012 from a debtor of the respondent, which was earmarked to be allocated on the respondent's arrears. This payment, not made directly by the respondent, significantly followed only after the section 69(1)(*a*) demand was duly served on the respondent. No other response has been forthcoming. I am satisfied that the respondent is unable to pay its debts and is in fact commercially insolvent. I am satisfied that the applicant has made out a proper case for the provisional liquidation of the respondent.

[25] In the ABSA matter the applicant relies, in addition to the section 69(1)(a) demand, also on factual insolvency, but that has to mind not been proven. The applicant's case in effect rests solely on the respondent's failure to secure or compound for its indebtedness after receipt of the said demand. As in the other matter, the

respondent owes the applicant a substantial amount of money. The respondent was initially represented by an attorney who subsequently withdrew. The respondent did not oppose the matter further (other than the notice of opposition that was filed). Notwithstanding that the section 69 demand was served approximately three months prior to the application, the respondent likewise failed to secure or compound its indebtedness to the applicant. In fact, the respondent has not responded in any manner after the demand was served. I am satisfied that this applicant has also made a proper case for the provisional liquidation of the respondent.

[26] For these reasons I granted the provisional orders of liquidation in both matters.

**SNELLENBURG, AJ**

**APPEARANCES:** On behalf of the applicant in Case 958/2012:

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Instructed by:

**Naudes**

**Bloemfontein**

On behalf of the applicant in case 4841/2011:

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