IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No : 1597/2013

In the matter between:

PEARL CONSTRUCTION (PTY) LTD Applicant

and

SEABO CONSTRUCTION, PLUMBING AND BUSINESS VENTURES CC Respondent

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HEARD ON: 15 NOVEMBER 2013

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 19 NOVEMBER 2013

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[1] This is an application for leave to appeal against the judgment of Thamage AJ delivered on 26 September 2013 in terms whereof applicant's application for the winding-up of respondent was dismissed with costs. The application was referred to me to consider in accordance with the provisions of rule 49(1)(e) as the learned acting judge's acting stint came to an end at the end of the third term.

[2] I am acutely aware that I don't sit as a court of appeal in this matter, but confirm that I have requested counsel for the parties to address me on the issue as to whether Thamage

AJ was correct in finding that the correct legal *persona* was cited as respondent. It is common cause that a close corporation known as Seabo Construction, Plumbing & Business Ventures CC contracted with applicant, but that this close corporation was converted into a company on 11 July 2012 and before the winding-up proceedings were instituted. Section 2 of Schedule 2 of the Companies Act, 71 of 2008 provides that any enforcement procedures that could have been commenced with in respect of the close corporation in terms of the Close Corporations Act, 1984 for conduct occurring before date of registration of the conversion, may be brought against the company on the same basis as if the conversation had not occurred. It is also true that the juristic person that existed as a close corporation before such conversion continues to exist as a juristic person, albeit in the form of a company. In terms of s 1(4)(a) of the Schedule the Commission must cancel the registration of the close corporation upon conversion. The close corporation has been cited as respondent instead of the company. *Ex facie* the judgment of Thamage AJ no application for substitution was made and there was also no such application when counsel addressed arguments to me in the application for leave to appeal. Although I am of the view that Thamage AJ should have upheld the point taken on behalf of respondent, it is immaterial at this stage insofar as he dismissed the winding-up application on different grounds. Therefore these comments are merely made in passing.

[3] The real bone of contention in the application for leave to appeal is whether Thamage AJ was correct in finding that applicant's claim was *bona fide* disputed on reasonable grounds. Adv Zietsman SC, acting for applicant, argued that it was clear that applicant has a valid claim against respondent, even though there is a dispute as to the exact amount due and payable. He submitted that although the total amount of applicant's claim in the amount of R180 976.29 is in dispute, it is apparent that only certain amounts are really in dispute and if these are deducted it will still lead us to the inevitable conclusion that respondent admitted reliability in the amounts of R40 296.06 in respect of air-conditioning works and R45 285.40 in respect of electrical works. In his argument Adv Snellenburg, on behalf of respondent, submitted that respondent had indeed shown that applicant's claim was *bona fide* disputed on reasonable grounds. He relied on two submissions in this regard, first, the fact that as he put it, applicant tried to make out a case in its replying affidavit with particular reference to the allegations in paragraph 1 on pages 113 – 116 thereof to show that respondent was indebted to applicant, which applicant was not entitled to do as it had to make out its case in its founding affidavit, and secondly, respondent relies on the confirmatory affidavit of Mr Mapoe, a qualified quantity surveyor in the employ of the Department of Public Works, appointed for the particular project, to the effect that all amounts that were due, owing and payable by respondent to applicant had indeed been paid by way of direct payments

from respondent or by way of payments by the Departement of Public Works made in terms of a cession.

[4] It is not for the court hearing the winding-up application to come to a final conclusion as to whether respondent indeed owes certain amounts to applicant or not. The test is merely whether sufficient facts have been put forward to show that the debt is *bona fide* disputed on reasonable grounds.

[5] If an applicant's claim is *bona fide* disputed by the respondent on reasonable grounds, an application for a sequestration or winding-up order cannot succeed. In terms of the so-called **Badenhorst** Rule (**Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T) at 347H – 348C) accepted by the Appeal Court in **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (AD) at 980C, the respondent must show the existence of a *bona fide* dispute on reasonable grounds. Corbett JA (as he then was) puts it as follows in **Kalil v Decotex** at 980B – D:

> "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." (emphasis added)

[6] Brand, J (as he then was) summarised the approach to be adopted in applications for provisional winding-up where a

respondent disputes its liability to the applicant, with reliance on the guidelines laid down in **Kalil v Decotex** *loc cit* and I quote:

> "Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, *inter alia*, the strength of the respondent's case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general. "(emphasis added)

See **Payslip Investment Holdings CC v Y2K Tec Ltd** 2001 (4) SA 781 (C) at 783 G – I.

[7] The following dictum of Thring J in **Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)** 1998 (2) SA 208 (C) at 219F –

220A demonstrates the current position of the law in my respectful submission:

> "Apart from the fact that they dispute the applicants' 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 that 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 would rely at such a trial... 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." (emphasis added)

[8] The issue was more recently considered again by Griesel J in **Investec Bank Ltd v Lewis** 2002 (2) SA 111 (C) insofar as a defence was raised that the bank's restructuring of a financial transaction prejudiced the sureties and the respondent in the sequestration proceedings in particular. The learned judge was not prepared to grant a provisional sequestration order and remarked *inter alia* as follows at 119F - H:

> "…there appears to be merit in the argument on behalf of the respondents, namely that Investec, in breach of its contractual obligations, acted in a way that prejudiced the sureties. However, bearing in mind the test to be applied at this stage, it is both unnecessary and undesirable to come to any final conclusion as to the legal validity of the defence……It is sufficient to find …that the debt … is disputed on *bona fide* and reasonable grounds."

[9] It is also apposite to refer to the following *dictum* of the Full Bench in **Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd** 2008 (2) SA 627 (C) at para [23] p 634 F:

> "[23] I am in respectful agreement with the aforesaid dictum of Milne J, which has been approved by the Appellate Division in *Kalil v Decotex (Pty) Ltd and Another* (*supra*) at 980E. It therefore appears to me that it would be preferable to refer to this duty, of a respondent to show that the alleged debt is disputed on bona fide and reasonable grounds, as an evidential burden and not an onus. Be that as it may, it should be borne in mind, as explained by Thring J in the Hülse-Reutter case (*supra*) at 219F - G, that a respondent merely has to satisfy the court that the grounds which are advanced for its disputing the debt are not unreasonable. The learned judge further emphasised that it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it would rely at a trial. It is sufficient if the respondent bona fide alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it." (emphasis added)

[10] I have considered Mr Zietsman's arguments, but I am unable to find that respondent has unequivocally admitted its indebtedness in respect of the above two amounts. In order to arrive at the conclusion to which Mr Zietsman has arrived, one has to rely on inferential reasoning based on the applicant's invoices and handwritten notes thereon, together with the explanation set out in the replying affidavit and the annexures thereto which annexures cannot be regarded as evidence as these have not been confirmed under oath as true and correct. I have followed Mr Zietsman's explanation how to arrive at the amounts allegedly due and payable and although I have my doubt as to whether respondent is correct in averring that nothing is due and payable by it to applicant that is not the test to be applied in winding-up applications.

[11] I am not convinced that there is a reasonable possibility that another court may come to a different conclusion as Thamage AJ. In order to establish its *locus standi* to bring the application, applicant did not show, on a balance of probabilities, that it is a creditor insofar as the alleged debt is disputed on *bona fide* and reasonable grounds.

[12] Therefore the following order is granted:

1. The application for leave to appeal is dismissed with costs.

J.P. DAFFUE, J

On behalf of applicant:	Adv P. Zietsman SC Instructed by: Lovius Block BLOEMFONTEIN
On behalf of respondent:	Adv N. Snellenburg Instructed by: Honey Attorneys BLOEMFONTEIN

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