IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D5870/2019

In the matter between:

CAMOREW TRADING CC **APPLICANT**

And

ZEBRIWIZE CC **RESPONDENT**

ORDER

The application is dismissed with costs.

JUDGMENT

Delivered on:

Mngadi, J

[1] The applicant seeks a final winding-up order, alternatively, a provisional winding up order against the respondent. The applicant is Camore Trading CC a close corporation duly registered and incorporated in accordance with the provisions of the Close Corporations Act 69 of 1984 (the Act). The respondent is Zebriwize CC a duly registered and incorporated in accordance with the provisions of the Act. The applicant claims that it is a creditor of the respondent in the sum of R24 415 0000. It issued and served a statutory demand in terms of s 69(1) of the Act, which makes the respondent deemed both factually and commercially insolvent. The respondent opposes the application. It contends that it is not indebted to the applicant.

[2] The applicant carries on business, *inter alia,* as a wholesaler and distributor of grain products. The respondent is an importer and wholesaler of textiles. Mahomed Fahaad Osman (Mahomed) deposed to the founding affidavit and the replying affidavit. Hassan Ali Isaacs (Isaacs) deposed to the answering affidavit.

[3] The applicant contends that there is no real and genuine factual dispute. It is trite that liquidation may not be used to enforce payment of disputed debts. It is not suitable to resolve complex factual dispute. See *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017(12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) para 154. *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347-348. Probabilities may not be the basis for factual findings unless the court is satisfied that there is no real and genuine of factual dispute. Where the court finds that there is a real and genuine factual dispute incapable of resolution on papers, it can only dismiss the application if it finds that the applicant should have realized when launching the application that there was a factual dispute. See *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A.

[4] Mahomed states that he is a businessperson and the sole member of the applicant. During or about the beginning of September 2017 the applicant and the respondent

concluded an oral agreement. He represented the applicant and Isaacs represented the respondent. The terms of the contract were the following:

1. The respondent sold to the applicant and the applicant bought from the respondent seven thousand (7 0000) metric tons (mt) of a commodity described as 'premium 1121 sela rice' to be packed in 50 kg units (the merx).

2. In consideration for such purchase price the applicant would make payment to the respondent of the rand equivalent of USD 9 765 000.

3. The respondent would import the rice from the Far East, in particular Hongkong and the People's Republic of China.

4. The applicant would make an initial advance payment of R24 000 000. To the respondent on account of the purchase price over the three months period September 2017 to November 2017.

5. The balance of the purchase price would be paid to the respondent against delivery of the full consignment of the merx constituting the subject matter of the transaction.

6. The respondent would effect delivery of the merx to the applicant within a reasonable time but not later than 90 days after the payment of R24 415 000.

[5] Mahomed states that pursuant to the agreement the respondent furnished the applicant with copies of the pro forma invoices rendered to the respondent by its suppliers of the merx, namely; Fully Grace Limited of Hong Kong and Fareast Success International Limited of the People's Republic of China. The proma forma invoices attached to Mahomed's affidavit are the first invoice on a letterhead of Fully Grace Limited of Room 301, Kam On Building, 176 a Queens Road, Central Hong Kong, invoice FG 177/081 for 50 kg long grain premium sela rice, 30000 mt at USD 1 395 per mt, total amount USD 4 185 000. It has the bank details of Fully Grace Limited and the Buyer is shown to be Zebriwize CC. The second invoice is on the letterhead of Fareast Success International Limited and it is dated 8 September 2017 for 2 000 mt in 50 kg premium sela rice at USD 1 395 per unit in total is USD 2 790 000 and the bank details are furnished. The last pro forma invoice is dated 15 September 2017 also from Fareast Success International Limited for the same quantity and price as the one dated 8 September 2017.

[6] Mahomed states that in the pursuance of its obligations under the agreement the applicant over a period 8 September 2017 to 2 November 2017 paid to the respondent of diverse sums of money aggregating R24 415 000. He attached proof of payments reflecting Mr. Mohamed F Osman as the payer bank account and Zebriwize as the payee bank account except one dated 8 September 2017 for R12 000 which reflects H Isaacs as the payee bank account.

[7] Mahomed states that in breach of the agreement, the respondent failed to deliver the merx or any part of it within the 90 days' period. Despite oral demands and promises to effect delivery of the merx no delivery has been made up to date. In consequence the applicant cancelled the contract and demanded repayment of the sum of R24 415 000. The respondent has failed to pay the said amount or any part thereof. On 29 May 2019 a letter of demand in terms of s 69 of the Act read with s 344(f) of the Companies Act 61 of 1973 and part 9 of schedule 5 to the Companies Act 71 0f 2008 was issued and served on the respondent. He states that the demand erroneously stated R24 415 000 as the full purchase price and that the delivery of the merx was to be effected upon payment of the full purchase price. He states that 21 days elapsed and the respondent has not repaid the sum of R24 415 000 or any part thereof, or to secure or compound for it to the reasonable satisfaction of the applicant. In the circumstances, he states, the applicant is deemed unable to pay its debts and it falls to be wound –up.

[8] Isaacs in the answering affidavit states he is authorized to deposed to an affidavit on behalf of the respondent. He allowed Mohamed to do one (1) import transaction whilst he was overseas. Mohamed during or about the beginning of September 2017 approached him. He asked him to assist him to import one load of rice. He (Isaacs) had an import and wholesaler of textiles licence. He was prepared to use the licence for Mohamed. He states that he was leaving for Portugal. He left and thereafter he had no dealings with the applicant until the letter of demand was brought to his attention.

[9] Isaacs states that he dealt with Mohamed in his personal capacity not on behalf of the applicant. The payment made to the bank account of the respondent show that were

made by Mohamed not the applicant. He did not contract with the applicant and the respondent is not the creditor of the applicant. The respondent has no relationship with the applicant. Isaacs states that whilst he was overseas he advised Mohamed to deal with Don Moodley, an employee of the respondent. He at the instance and request of Mahomed allowed Mahomed to do one transaction. When he returned to South Africa he discovered that Mahomed had concluded seven imports totaling R24 293 9879 as reflected in the deposits referred to in the founding affidavit.

[10] Isaacs states that in essence he acted as a conduit or agent for Mahomed to import one load of rice. He had no dealings with Full Grace Limited or Fareast Success Internal Limited. Mahomed prepared the transactional documentation at the respondent's offices to complete seven imports. The pro forma invoices referred to in the founding affidavit are duplicated invoices. He tried to confirm the transactions and he discovered that the invoices are fraudulent, fabricated and different payments from FNB yet same invoices with different amounts. Mahomed could not provide any Bill of lading for the imports. He was allowed four months by FNB and the Reserve Bank to produce Bills of lading, if he fails, his account would be frozen. FNB has blocked import payments for the respondent.

[11] Isaacs states that the amounts paid into the respondent's bank account by Mahomed equal the payouts from the bank account. The respondent, therefore, owes no money to the applicant. He attaches bank statements for the period 14 September 2017 to 14 October 2017 together with a schedule. They show that on 20 September 2017 an amount of R3 337 500 was paid into the bank account and on the same date an amount of R3 342 500 was paid over to Fully Grace Limited. On 29 September 2017 an amount of R1 630 000 was paid into the account and on the same date R1 630 044 was transferred to Fully Grace Limited. On 6 October 2017 an amount of R4 837 000 was received into the account and on the same date it was paid over to Fareast Success International Limited. On 13 October 2017 an amount of R 5 420 000 was received into the account and on the same date an amount of R5 360 000 was paid to Fareast Success International Limited. On 23 October 2017 R2 763 000 was received into the account and R2 762 120 paid over to Fully Grace Limited. On 26 October 2017 R2 860 000 and

R716 000 were received and R3 553 725 was paid over to Fareast Success International Limited. On 2 November 2017 R2 785 000 was received into the bank account.

[12] Isaacs states that the applicant has not brought the imports to South Africa yet as he has no Bills of lading. The applicant's imports is a disguise to transport money out of South Africa. Mohamed has acted in terms of Hawala transaction. He states that he holds in the bank approximately R2 300 000 to cover the VAT as the transactions are sales and VAT in the amount of R3 401 158-46 is payable.

[13] In my view, it is significant that Mahomed is the sole member of the applicant. He states that he acted on behalf of the applicant. He states that he transferred the money from the bank account of the applicant to the bank account of the respondent by him. He indicated him as a reference, which appears in the bank statements of the respondent. Isaacs has no basis to deny that Mohamed transacted with him on behalf of the applicant. In my view, it is established on the preponderance of probabilities that Mohamed acted on behalf of the applicant. In the circumstances, the applicant has *locus standi* in the proceedings. Similarly, Isaacs states that he acted on behalf of the respondent. He on behalf of the respondent allowed Mohamed to make a transaction through the assistance of the respondent. The assistance entailed Don Moodley the employee with the guidance of Mohamed processing the import transaction. The import transaction was processed at the offices of the respondent, the import documentation bore the name of the respondent since the import licence was in the name of the respondent and the payments to the suppliers were made from the bank account of the respondent.

[14] Isaacs states that he allowed Mahomed to make one import transaction. He does not state whether the transaction was for USD 9 765 000 and 7 000 mt of premium sela rice or not. It appears the various payments related to one transaction for 7 000 mt of premium sela rice divided into batches. In which case, Isaacs allowed the transaction. Therefore, in my view, there is no significance to Isaacs' contention that he allowed Mohamed to make one import transaction through the respondent. In any case, Isaacs

does not deny that the other imports were processed in the same manner through his office with the involvement of Don Moodley.

[15] In the replying affidavit, Mahomed states that the applicant is one of several companies in a group of companies constituting part of the Osman Spice Works group of companies. Within that stable, several companies enjoy the right of importing merchandise including the commodity rice from abroad. He states that the applicant was in no need of any accommodation by the respondent for the importation of rice in the respondent's name. However, the applicant does not explain why it had to buy rice from the importer and wholesaler of textiles. The movement of funds through the bank account of the respondent indicates that the payer knew that the money was being paid over to the 'supplier'. Mohamed concedes that he was involved in the preparation of the importation documentation. He received pro forma invoices with the details of the supplies, suppliers and bank account details of the suppliers. He together with other employees of the applicant assisted Don Moodley who was inexperienced in preparing the necessary import documentation and in processing the transactions. Since Mohamed was familiar with importation of rice, and it was his rice, which was imported, it may be inferred that he identified the suppliers and he attended to the payment of the suppliers albeit through the bank account of the respondent.

[16] Mahomed conducts transactions on behalf of the applicant. The applicant is part of a large group of companies. It is inconceivable that Mohamed would be contend with an oral agreement involving a transaction with a significant amount of money concluded at arm's length with an entity he was not associated with. The total consignment was 7 000 metric tons at USD 9 765 000. The applicant on payment of fraction of the full purchase price states that it was entitled delivery of the full consignment against payment of the full balance of the purchase price. It is difficult to understand how the respondent could agree to import the full consignment without any cover for the balance of the purchase price. The foreign suppliers would not have parted with the full consignment with no security for the payment of the full purchase price. Further, it would appear that the applicant was obliged to pay the price charged by the foreign supplier without any compensation to the

respondent. In my view, the above are strong indications, which render the respondent's contention that it acted as a mere conduit probable and that of the applicant that it was a purchase and sale agreement improbable. The rule in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at p634 applies. It is to the effect the applicant shall be entitled to the relief if the facts as stated by the respondent taken together with the facts admitted from the facts stated by the applicant justify the granting of the relief. The respondent's version is, in my view, is not of such a nature that it is farfetched or clearly untenable to justify its rejection on the papers whereas that of the applicant is. See *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 ALL SA 185 (SCA)

[17] Therefore, I find that the respondent was not the seller of the consignment but it assisted the applicant to import the consignment from an overseas supplier. The applicant's case based on a contract of purchase and sale between the applicant and the respondent fails. The respondent understood its involvement in the transaction as that of a conduit and based on what happened it was, in my view, entitled to do so. Parties to a contract must reach consensus, if there is no consensus, namely; meeting of minds, it means there was no contract. See *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 698B. The respondent for acting as a conduit is not liable to repay the purchase price on cancellation of the contract of purchase and sale wherein it had already paid over the part of the purchase price it received to the seller.

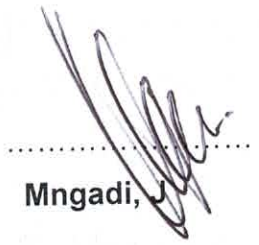
[18] The respondent has admitted that it has retained R2 300 000 of the money as cover for the liability for VAT. The respondent contends that it is exposed for VAT liability for the transaction conducted through it. The applicant contends that the transaction does not attract VAT charge. The respondent, further, contends that it was used by the applicant. The transaction was in reality the sending of the money outside the country without compliance with the Exchange Regulations. It was a mere disguise that the transaction was a purchase and sale. Immediately, the respondent forms a suspicion that the money in its possession was part of an unlawful scheme it is obliged to report the matter to the authorities. It may only release the money once it has been granted authority

to release the money. In the circumstances, the respondent presently has not been shown to a debtor in relation to the money it has retained. It is ordered that the copy of this judgment be furnished to the Commissioner, South African Revenue Services.

[19] The applicant has failed to prove on the balance of probabilities that it is the creditor of the respondent. The application falls to be dismissed with costs.

[20] I, accordingly, make the following order.

The application is dismissed with costs



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Mngadi, J

APPEARANCES

Case Number	:	D5870/2019
For the Applicants	:	RG Cohen
Instructed by	:	Ayoub Kadwa & Company Durban
For the first respondents	:	BS Osborne
Instructed by	:	Norman Shippings Attorney. Durban
Matter argued on	:	16 October 2020
Judgement delivered on	:	22 OCTOBER 2020