OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

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

CASE NO:699/2019

In the matter between:

KERSEY PETER BLOFIELD N.O APPLICANT

and

BUSICOR 201 CC RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application for the liquidation of the respondent launched by the applicant in his capacity of trustee of the Blofield Ontwikkelings Trust IT 1355/11.

[2] The applicant relies on section 345 of the old Companies Act, retained in the schedules to the New (2008) Companies Act.

[3] As background the applicant alleges that the applicant is indebted to the plaintiff an amount of R166 000.00 which the respondent admitted to be indebted and despite various promises, proposals and various undertakings failed to pay.

[4] On 23 October 2018 the applicant served a notice in terms of section 345(1) of the Companies Act, Act 61 of 1973 (the Act) on the respondent's registered address. In terms of the said letter of demand the applicant claimed the following:

"*You are indebted to our client BLOFIELD ONTWIKKELINGS TRUST, in the amount of R166,000.00 (ONE HUNDRED AND SIXTY SIX THOUSAND RAND)*

the amount referred to consisting of goods bought and never received during December 2016 that amounted to R136,000.00 (ONE HUNDRED AND THIRTY SIX THOUSAND RAND) and a further R30,000.00 (THIRTY THOUSAND RAND) for services rendered during November/December 2017."

[5] The respondent was afforded 21 days to pay the said amount or to compound payment thereof failing which a liquidation application would be launched. Respondent failed to pay the amount or arrange for payment thereof, therefore applicant launched this application.

[6] The respondent in its opposing affidavit, raised two points in limine which do not constitute points in limine. However the nub of the respondent's opposition to the application is that it denied that it owed the applicant an amount of R166,000.00. It further stated that the applicant failed to attach any documentary proof of the alleged monetary claim against the respondent. Respondent's case is further that respondent cannot be forced to guess the nature and circumstances of the alleged amount claimed in the applicant's application. As such it denied that it owed the applicant any amount.

[7] The applicant had a further claim against the respondent for payment of an amount of R345,000.00. This claim was abandoned in the applicant's heads of argument. In terms of the respondents opposing affidavit it stated that the amount of R345,000.00 could be made up by coal that was delivered or made available to the applicant.

[8] Interesting to note is that in the annexures to the respondent's opposing affidavit and more specifically in Annexure BSC2 thereto reference is made to order number BC215. BC215 is also referred to in annexure KB4 to the applicant's founding affidavit. In the annexure KB4, which is a string of emails the following email is sent by the applicant on Friday 8 December 2017 to the respondent the following is stated:

"Kindly urgently confirm when we will receive payment of our invoice, same is already overdue.

Kindly advise.

Kind regards".

The respondent then replies on 8 December 2017 as follows:

"Hi Monet

Sodra ek die weegbrugverslae soos deur Glenk aan Kersey gevra ontvang, maak ek die betaling onmiddelik."

On the same day Kersey Blofiled, the CFO of the applicant, directs a mail to the respondent stating as follows:

"*Hi ek neem aan dit is die BC 215. Monet kan jy ook net bevestig dit is reg, thanks*."

[9] The document referred to as BC215 is referred to in annexure BC2 to the respondent's opposing affidavit and reads as follows: "*(client) Rubor marketing (date pd in) 10 October 2017 (date pd out 11 October 2017) (product fine discard) (tonnage PD for Westcoal) 5.000.00) (Tonnage In Rietfontein 4,168.50) (Tonnage Out client 1,478.65)*". (Own emphasis). No reference is made to goods sold, but not delivered or services rendered by applicant to respondent.

[10] There are other emails also annexed to the opposing affidavits which does not take the matter any further.

[11] In the applicant's replying affidavit, despite being made aware of the respondent's defence, the applicant failed to provide any further information pertaining to the alleged indebtedness of R166 000.00.

[12] In the applicant's heads of argument the applicant tried to make out its case and tried to establish a link between BC215 and the alleged indebtedness by stating that the respondent was well aware of what the amount of R166.000.00 was for.

[13] I cannot agree with the applicant. As referred to above BC215 has no reference of bearing on any of the allegations in the founding affidavit or in the letter of demand with respect to "good bought and never received" and "services rendered".

[14] It is clear that the applicant has not made out its case as required in its founding affidavit. This court cannot guess, or speculate, what the applicant's case is.

[15] The respondents' denial of indebtedness is clear. The respondent deals in his opposing affidavit with the lack of documentation annexed to the founding affidavit in no uncertain terms.

[16] The applicant cannot simply rely on section 345 of the Companies Act to have the respondent liquidated.

[17] The first thing the court must establish is whether the respondent is unable to pay its debts. Before the court can determine whether the respondent can pay its debts the debt must be proven by the applicant. In casu the applicant failed to proof the respondents' alleged indebtedness.

[18] The respondent's version does not consist of bald or uncreditworthy denials. It does not raise fictitious disputes of fact which is implausible, farfetched or clearly untenable as stated in National Director of Public Prosecutions vs Zuma[1].

[19] In motion proceedings, unless where its concerned with interim relief, it is all about the resolution of legal issues based on common cause facts. Unless the circumstances were special they could not be used to resolve factual issues because they were not designed to determine the probabilities. It was well established under the Plascon Evans Rule[2] that where disputes of facts in motion proceedings arose on the affidavits, final order could be granted only if the facts avert in the applicant's affidavits and admitted by the respondent, together with the facts alleged by the latter, justify such an order.

[1] 2009(2) SA 277 (SCA).
[2] 1984(3) SA 623 (A).

[20] In casu the applicant failed to respond to the respondent's opposing affidavit and failed to clear up the indebtedness, even in its replying affidavit. I must therefore accept that what is stated in respondents opposing affidavit is correct as per the law in Plascon-Evans.

[21] This court can only grant a provisional order of liquidation if it is satisfied that the applicant is a creditor of the respondent and that the respondent does not have a bona fide and reasonable defence to the applicant's claim. A lack of bona fides is not readily inreferred.

[22] In the event that a reasonable and bone fide defence is disclosed the court cannot grant a provisional order[3].

[23] I am satisfied that the respondent did not oppose this application without the necessary bona fides or without a reasonable defence.

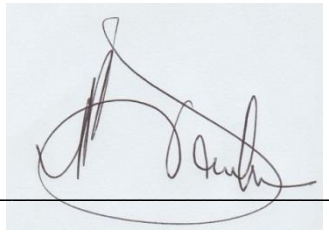
[24] The applicant further simply failed to disclose any cause of action or that it has locus standi at all.

[25] I accordingly make the following order:

[3] Badenhorst vs Northern Construction Enterprises (Pty) Ltd 1956(2) SA 346 and Kalil vs Decotex (Pty) Ltd and Another 1988(1) SA 943 (A)

1. The application is dismissed.

2. The applicant is ordered to pay the costs.



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: ADV JUNGBLUTH

INSTRUCTED BY: TERBLANCHE – PISTORIUS INC.

REPRESENTATIVE FOR THE RESPONDENT: ADV J.B CILLIERS

INSTRUCTED BY: MABHENA MADUBANYA INC

DATE OF HEARING: 19 NOVEMBER 2019

DATE OF JUDGMENT: 28 NOVEMBER 2019