IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CIV APP FULL BENCH 8/14

In the matter between:-

THAW TRADING AND INVESTMENTS 005 CC Appellant

And

CENTRAL LAKE TRADING 214 (PTY) LTD Respondent

FULL BENCH APPEAL

HENDRICKS J; GURA J; DJAJE AJ

DATE OF HEARING	:	13 FEBRUARY 2015
DATE OF JUDGMENT	:	12 MARCH 2015
COUNSEL FOR THE APPELLANT	:	ADV SWANEPOEL
COUNSEL FOR THE RESPONDENTS	:	ADV PISTOR SC with ADV SILVER

JUDGMENT

HENDRICKS J

[1] The Appellant instituted an application for the winding-up of the Respondent. The cause of action is based upon the fact that the Appellant was a creditor of the Respondent. A written demand was served upon the Respondent in terms of the provisions of section 345 of the Companies Act 61 of 1973 which entails that the Respondent is deemed to be unable to pay its debts. On 25 April 2013 a provisional winding-up order was granted (per Gutta J). On 23 January 2014 the provisional order for the liquidation of the Respondent was discharged (per Landman J) and the Appellant (who was the Applicant) was ordered to pay the costs, including the costs of the intervening party, the reserved costs and where applicable the costs of two counsel. It is this order of Landman J that is the subject matter of the present appeal.

[2] The facts can be succinctly summarized as follows:-

The Appellant contends that during June 2012 at Rustenburg, the Appellant and the Respondent verbally agreed, at the Respondent's business premises, that the construction of low cost housing for a certain phase 2 of the so-called Ga-Seganyana building project in Kuruman, would be performed by the Appellant. This would happen

on the instructions and for and on behalf of the Respondent. It was further the Appellant's case that pursuant to compliance with its obligations in terms of the verbal agreement reached between it and the Respondent, the Appellant duly invoiced the Respondent on or about 18 September 2012, for payment in the amount of R2 309 033.31

[3] The Respondent's defence to the winding-up application during the court ***a quo*** proceedings was that the Appellant did not contract with the Respondent but rather with the entity known as Aobakwe Louw Properties (Pty) Ltd ("Aobakwe"). In a letter addressed by the Respondent's sole director and shareholder, Mr Aobakwe Louw to the Municipal Manager of the Ga-Segonyana Local Municipality of Kuruman dated 30 June 2012, the Respondent informed the client on whose behalf the Respondent was responsible for construction of the said low cost housing, as follows:-

> *"We are currently restructuring Aobakwe Louw Properties, splitting properties business from construction business. From the 1st July 2011 all our construction business will be done under Central Lake 214 t/a Mosa Construction. We therefore wish to have the contract for the 1000 units (Ga-Segonyana Project) reflecting the changes. We have attached a copy of the CM29 document to confirm registration number.*
> *The banking details are as follows:*
> *[A…..] Bank*
> *Account No [4……..]*
> *Branch code [6……..]*

I hope you find this in order …..”

In my view, the Respondent could not furnish any comprehensive and/or persuasive answer to the contents of the aforesaid letter that was addressed by the Respondent’s representative to the municipality.

[4] Furthermore, the Appellant produced the confirmatory affidavit of Mr TSC Ncapedi-Mokwena, who is employed with the Appellant, who confirmed that in July 2012 Mr Paul Masimong confirmed that the Respondent was in fact the entity that performed the building project for the said municipality at Kuruman. The Appellant also produced a copy of the Respondent’s own tax invoice addressed to the municipality in respect of the Ga-Segonyana Building Project at Kuruman. This served as confirmation thereof that the Respondent itself invoiced the client (the municipality) in respect of the relevant low cost housing work that was performed by the Appellant. The Appellant furthermore referred to the municipality’s electronic transfer requisition for payment to be made to the Respondent (and not to Aobakwe) towards the completion of houses in terms of the project.

[5] In her reasons for judgment, Gutta J when granting the provisional order stated:-

“I am not persuaded that the respondent, who purports to raise the dispute that it was Aobakwe and not the respondent who contracted with the applicant, has in its affidavit addressed the

facts said to be disputed. What the respondent has raised, in my view, constitutes bare denial. The facts pertaining to the denial rest solely with the knowledge of the respondent and no basis is laid for disputing the veracity or accuracy of the averment that the respondent is indebted to the applicant."

In addition Gutta J held as follows:-

"The respondent's denial that it had not contracted with the applicant in respect of phase 2 of the Kuruman project confronted with the evidence presented by the applicant, is in my view, bold and unsubstantiated.

I am accordingly of the view that the respondent's version is inherently and seriously unconvincing and it is averred in a manner which is, in the circumstances, 'needlessly bold, vague and sketchy'. See ***Breitenbach v Fiat SA (Edms) Bpk*** *1976 (2) SA 226."*

Although this provisional order is not the subject of this appeal, I can do no better than to echo the same sentiments.

[6] In his judgment, Landman J stated:-

"[21] Central Lake says that it has a ***bona fide*** *defence to the claim. It is simply this. Central Lake did not have a contract to build houses for the Ga-Segonyana Local Municipality. Central Lake did not enter into a contract with the applicant for it to build houses. Central Lake did not receive any payment. Central Lake says that Aobakwe concluded the contract with the Ga-Segonyana*

Local Municipality and that Aobakwe engaged the applicant to build the houses.

*[22] If this is a **bona fide** defence then the application should fail. It is to that question that I turn. Central Lake which has the same director or controlling mind as Aobakwe could have produced the contract between Aobakwe and the Ga-Segonyana Local Municipality. It has not done so.*

[23] Central Lake says it has not received payment from the municipality. But it has invoiced the municipality for work allegedly done by it. Central Lake says this was an error made by an employee who has since died. However, payments were made because the director wrote to the municipality explaining that it should pay what is due to Central Lake and provided details of Central Lake's bank account. Mr Louw says that the arrangement set out in the letter was not put into operation. However, Central Lake's bank statements were produced. They show that it has received payments from the municipality. It has paid over to Aobakwe.

*[24] The arrangements set out in the letter were in fact implemented. It is inconceivable that a municipality would pay monies to an entity with which it does not have a contractual agreement. The defence is one which would succeed were it not for the fact that it is unsupported by the facts. <u>It is therefore not a **bona fide** and reasonable defence</u>.*

(my underlining.)

[25] On 16 October 2012 a written demand in terms of section 345 of the Companies Act 16 of 1973 was served by the Sheriff on Central Lake at its registered address. No reply was received to the written demand from the respondent. Central Lake is deemed to be unable to pay its debt."

(my underlining.)

These findings by the court ***a quo*** cannot be faulted. However, it did not end there. Landman J, in the exercise of his discretion, states the following:-

"[27] Are there sufficient factors for me to deny the relief to which the applicant would be entitled were it not for the discretion vested in this court? I have decided to exercise my discretion in favour of Central Lake. I do so because:-

(a) There is credible evidence to the effect that Central Lake is solvent;
(b) It would be beneficial to the economy to preserve such a company instead of liquidating it; and
(c) The action turns on a limited point namely did Aobakwe and not Central Lake contract with the applicant and therefore it is capable of being resolved in a short time."

[7] These findings are the core of the present appeal. It was contended on behalf of the Appellant that Landman J erred in discharging the

provisional winding-up order and by not granting a final order for the winding-up of the Respondent for the following reasons:-

> *"From a factual perspective, regard being had to the record of the proceedings, there was no credible evidence to the effect that the Respondent is solvent;*
>
> *To the contrary, the correct position, from a statutory viewpoint, was that in terms of section 345 of the Companies Act the Respondent was deemed unable to pay its debts;*
>
> *The consideration that "it would be beneficial to the economy to preserve such a company instead of liquidating it" does not constitute a legally tenable consideration;*
>
> *The fact that the dispute between the parties was "on a limited point namely did Aobakwe and not Central Lake contracted with the applicant" – could sufficiently be decided on the affidavits of record (as was done by Her Ladyship Madam Justice Gutta at the stage when the provisional winding-up order was granted) and the Respondent produced no further evidence to upset the finding made by Gutta J."*

I am in full agreement with these contentions on behalf of the Appellant. What is contained in par [27] of the judgment of Landman J is in sharp contrast to what is contained in paragraphs [21] to [25] thereof. Especially the last sentences of paragraph [24] and [25] which reads:-

*"It is therefore not a **bona** fide and reasonable defence* and *Central Lake is deemed to be unable to pay its debt"*.

[8] There is in my view no room for the exercise of a discretion in contrast to the finding in accordance with the deeming provision of the Act. Once a company is deemed to be unable to pay its debt and no satisfactory proof to the contrary is provided, then the resultant liquidation should follow.

See:- **Ter Beek v United Resources** 1997 (3) SA 315 (C);

Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W).

Henochsberg on the Companies Act 71 of 2008 Vol 2 APPI – 51 [issue 1].

[9] In my view, the court ***a quo*** should have granted a final winding-up order in respect of the Respondent and should have ordered that the costs of the winding-up application are to be costs in the liquidation of the insolvent company. The costs of the appeal (and leave to appeal) should, in my view, also be included therein.

Order

[10] Consequently, the following order is made:-

(a) The appeal is upheld.

(b) The order of the court ***a quo*** discharging the provisional liquidation of Central Lake as well as the costs order is set aside and is substituted with the following order:-

> *"[i] The provisional winding-up order of the Respondent (Central Lake) issued out of this Court on 25 April 2013 is made final.*
>
> *[ii] The costs of the winding-up application are to be costs in the administration of the Respondent company (Central Lake) in liquidation."*

(c) The costs of the appeal is to be costs in the liquidation of Central Lake.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA
JUDGE OF THE HIGH COURT

I agree.

T DJAJE
ACTING JUDGE OF THE HIGH COURT