Reportable:	**YES** / NO
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M506/19B

In the matter between:

IMOBRITE (PTY) LTD **APPLICANT**

(Reg. No: 2012/080796/07

and

DTL BOERDERY CC **RESPONDENT**

(Reg. No: 1996/064398/23)

(For its liquidation)

OPPOSED MOTION

JUDGMENT

NOBANDA AJ

Introduction

[1] The applicant brought an application seeking the final winding up order, alternatively a provisional winding up order of the respondent with a suitable return date and directions regarding the service of the rule *nisi*. The respondent is opposing the application.

Summary of factual background

[2] The applicant loaned and advanced an amount of R2 750,000.00 to the respondent and the respondent's sole member Mr Tielman Kotze (Kotze). On 15 May 2018, the respondent and Kotze signed an acknowledgement of debt agreement (the agreement) binding themselves towards the applicant for the repayment of that amount at the interest rate of twenty-three percent *per annum*. As security for the repayment of the loan, the respondent caused a special and general notarial bond to be registered in favour of the applicant over the respondent's movable assets and a first mortgage bond over its immovable property in the amount of the principal debt together with an additional amount of R540,000.00 in respect of costs.

[3] The respondent failed to pay the loan in accordance with the terms of the AOD. On 17 July 2019, the applicant delivered a letter of demand in terms of section 69 of the Close Corporations Act (the Act)[1]. The respondent failed to make payment within the statutory allowed period of twenty one days. The applicant contends that the respondent is not only deemed to be unable to pay its debts as envisaged in section

[1] 69 of 1984.

69(1)(a) of the Act but the respondent is also factually unable to pay its debts in the absence of alternative finance.

[4] In its defence, the respondent raised two points *in limine*. Firstly, the respondent disputes that it is a debtor of the applicant and consequently contends that the applicant has no *locus standi* to bring these proceedings against it individually. Secondly, the respondent contended that the credit extended by the applicant amounted to reckless credit as contemplated in the National Credit Act[2]. In addition, the respondent contended that the applicant is abusing the process by using liquidation proceedings to enforce a debt since the applicant holds securities for the debt and should have therefore called on the securities.

Applicable legal framework and legal principles

[5] Section 69 of the Act provides that a corporation is deemed to be unable to pay its debts if a creditor to whom the corporation is indebted in the sum of R200 has served on the corporation a demand requiring it to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor[3].

Points in limine

Locus standi

[2] 34 of 2005.
[3] Section 69(1)(a).

[6] For the applicant to succeed in the application, the applicant has to *inter alia*, prove that it is a creditor of the respondent. The respondent does not dispute the validity of the agreement. However, the respondent contends that in terms of clause 2 of the agreement, the debtor comprises of the respondent and Kotze which is a *'sui generis*' debtor comprising of a juristic and a natural person. As such, the debtor in terms of the agreement is not a close corporation in terms of the Act. Accordingly, sections 68 and 69 of the Act does not find application.

[7] In the alternative, the respondent contends that the '*sui generis* entity' was borne out of a common mistake by the parties. Since such an entity is not recognised in law, the entity lacked contractual capacity to enter into the agreement. As such, the court should *mero motu* vitiate the agreement. In the event that the court does not find that the debtor is *sui generis* as contended by the respondent, *Mr Smit* on behalf of the respondent contended that the respondent and Kotze are co-debtors. As such, since the presumption of *in solidum* liability was not excluded by the parties, the respondent and Kotze cannot be held liable for performance in their own names but jointly. Accordingly, *Mr Smit* argued that the respondent and Kotze are inseparable simple co-debtors in an indivisible co-debtorship. As such, the applicant cannot sue one without the other and there is no application for the sequestration of Kotze.

[8] Clause 2 of the agreement provides:

"Dit word geboekstaaf dat die SKULDENAAR bestaan uit 'n regspersoon sowel as 'n natuurlike person end at die bepalings van

die Nationale Kredietwet nie van toepssing is nie en verdermeer dat die regspersoon se bate waarde of jaarslikse omset tydens die aangaan van hierdie oorenkoms die bedrag van R1 000 000,00 (EEN MILJOEN RAND) oorskry, laasgenoemde soos vasgestel deur die Minister;"

(In translation)

"It is recorded that the DEBTOR consists of a juristic entity as well as a natural person and that the provisions of the National Credit Act are not applicable and furthermore that the juristic entity's assert value or annual turnover, at the time of the conclusion of this agreement exceeds the amount of R1 000 000,00 (ONE MILLION RAND), the latter as fixed by the Minister;"

[9] The applicant contends that clause 2 related to the applicability or inapplicability of the National Credit Act and nothing more. *Mr Wessels* on behalf of the applicant contended that money was advanced and the agreement was signed to acknowledge that money was advanced. Therefore, to accord any other interpretation to clause 2 would lead to insensible and unbusinesslike results warned against by the Supreme Court of Appeal in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[4] ***(Endumeni)***.

[10] *Mr Wessels* argued that a '*sui generis* entity' or 'a single debtor' as opposed to two debtors who are jointly and severally liable towards the applicant simply does not exist in our law. Our law currently provides for *'simple joint debtorship, solidary co-debtorship or indivisible debtorship'*. The agreement envisaged a joint and several liability of the respondent and Kotze where any one of the two would

[4] 2012 (4) SA 593 (SCA) at [18]-[23].

be liable for the full performance and allow the applicant to select either one of them for payment in the event of a default. *Mr Wessels* relied on ***Boyce NO v Bloem and Others***[5] in this regard. *Mr Wessels* further contended that even if the agreement established a simple joint debtorship relationship between the respondent and Kotze where each joint debtor would be liable only for its *pro rata* share of the performance, the respondent would still be liable for its *pro rata* share of performance. As such, the respondent would still be the applicant's debtor and the applicant would still possess the necessary *locus standi* as its creditor to institute the winding up proceedings against it.

[11] *Mr Wessels* further argued that the contention of a *sui generis* 'entity' by the respondent is negated further by the securities that were registered in favour of the applicant against the respondent's movable and immovable properties. Accordingly, *Mr Wessels* submitted that the respondent's contentions and submissions of a '*sui generis* entity' and common mistake by the parties are without merit.

[12] A contract is normally concluded by two persons, one from each side of the obligation. However, not all contracts fall into a simple pattern of one party on each side. There may be more than one person on either side of the contract, that is, plurality or multiplicity of parties[6]. Simply, a debtor is a party who is under a duty to render the performance to which the obligation relates while a creditor is a party who has a corresponding right to that performance. Our law recognizes co-debtorship and co-creditorship. Co-debtorship can either be simple

[5] 1960 (3) SA 855 (T) at 857D.
[6] Christie, *The Law of Contract in South Africa*, 5ed p252.

joint liability or joint and several liability (solidary co-debtorship)[7] or inseparable or indivisible co-debtors[8].

[13] The general principle is that an ambiguous contract will be interpreted so as to impose the least burden to the debtor[9]. The presumption is that co-debtors are jointly liable unless the contract provides otherwise. This presumption that liability is joint as opposed to joint and several is a strong one[10]. As such, a joint debtor is liable for his *pro rata* share performance only, unless the contract provides otherwise. This presumption however is not applicable to ordinary partners and co-signatories of a bill of exchange[11]. Accordingly, unless the contract expressly or by necessary implication imposes liability *in solidum*, the joint and several liability of co-debtors will not be imposed[12].

[14] Accordingly, the *'sui generis entity'* contended by *Mr Smit* does not exist in our law. I agree with *Mr Wessels* that the respondent and Kotze are co-debtors. *Mr Smit* further contended that the respondent and Kotze are indivisible co-debtors. *Mr Wessels* disputes this and contended instead that the agreement envisaged that the respondent and Kotze will be jointly and severally liable for the debt. In support for his contention, *Mr Wessels* referred to the mortgage bond that the respondent registered in favour of the applicant against its immovable property for the payment of the full amount of the debt.

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[7] LAWSA 9 (3) par 347-348.
[8] LAWSA 17 (2) para 349.
[9] Op Cit at p253
[10] Ibid.
[11] Ibid at p254; LAWSA 9 (3) at par 347.
[12] Ibid at p257; Ibid at par 348.

[15] I agree with *Mr Wessels*, one cannot read the agreement in isolation to the securities registered by the respondent in favour of the applicant wherein the respondent unequivocally admits to being indebted and liable to the applicant in the full loan amount and for the full repayment thereof. A mortgage bond incorporates an unqualified admission of liability by the mortgagor. Hence, a mortgage bond is a liquid document where the creditor can proceed by way of a provisional sentence procedure against the mortgagor in the event of default. The mortgagor does not even have to be the principal debtor for the creditor to call on the security.[13] Accordingly, *Mr Smit's* contention that the debt is indivisible is without merit. On the basis of the mortgage bond, the respondent bound itself to repay the applicant the full amount of the loan.

[16] Accordingly, the respondent is not an indivisible co-debtor with Kotze. On the contrary, in terms of the agreement read with the securities, the respondent as a co-debtor of the applicant, bound itself to repay the full amount of the loan. Accordingly, whether the respondent is solely liable or jointly and severally liable or only liable for its *pro rata* share of the debt is irrelevant for purposes of the liquidation proceedings. As submitted by *Mr Wessels*, which submission I agree with, either way, the respondent is a debtor of the applicant and inversely, the applicant its creditor for the purpose of liquidation proceedings. As such, I find that the respondent is a close corporation in terms of section 68 and 69 of the Act.

Reckless lending in terms of the National Credit Act

[13] LAWSA 17 (2) par 329 and 332.

[17] *Mr Smit* did not pursue this point during argument other than to concede, correctly so, that the provisions of the National Credit Act do not find application in these proceedings. I also agree with *Mr Wessel's* submissions, more particularly that the National Credit Act is not applicable as these proceedings are not for debt enforcement.

Merits

[18] It is common cause that the respondent failed to make payment within the statutory allowed period of twenty one days after it has been duly served with a notice in terms of section 69 of the Act. *Mr Wessels* contended that, as such, the respondent is deemed to be unable to pay its debts as envisaged in section 69(1)(a). In addition, *Mr Wessels* argued that in its own version, the respondent admits that it is unable to pay its debts in the absence of alternative finance. Relying on ***FirstRand Bank Limited v Normandie Restaurants Investments and Another***[14] ***(Normandie) and Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd (Boschpoort)***[15], *Mr Wessels* contended that that creates an inescapable inference that the respondent is commercially insolvent and that will justify an order for its winding up.

[19] The respondent contends that the applicant should have called on the securities to recover the debt. Instead, the applicant resorted to these proceedings which is an abuse of the process. *Mr Smith* contended that the applicant is using these proceedings to enforce a debt and the court should countenance that conduct by dismissing the application.

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[14] 2016 [JDR] 2212 at par 26.
[15] 2014 (2) SA 518 (SCA) at [17].

[20] The court has an inherent jurisdiction to prevent abuse of its processes. It is said that even where a ground for winding up is established, the court will not grant a winding up order where the sole or predominant purpose of the applicant is not to bring the company's liquidation for its own sake, but *inter alia*, for an improper purpose or to harass or oppress the company[16].

[21] In the applicant's own version, the applicant holds securities in the form of a special and general notarial bond over the respondent's movable assets for the full amount of the principal debt including an additional amount of R540,000.00 in respect of costs. In addition, the applicant holds a first ranking covering mortgage bond over the respondent's immovable property in the same amounts.

[22] The purpose of a real security is to afford the creditor some certainty that its claim or debt will be satisfied. The facts in *casu* are distinguishable from *Normandie* and *Boschpoort (supra)* relied upon by *Mr Wessels*. In both cases, the debtor was not only indebted to the applicant creditor but had numerous other creditors. In addition, there was no mention of security held by the applicant creditors in the amount of the principal debt. In *casu*, other than the one former creditor of the respondent Mr van Rensburg, who on the applicant's own version, the respondent has already paid, there are no other creditors of the respondent mentioned by the applicant. In addition, the applicant holds securities in the full amount of the principal debt and an additional amount for costs[17].

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[16] LAWSA 4 (3) at par 112.
[17] section 356(1) of the Act.

[23] In ***Wackrill v Sandton International Removals[18](Wackrill)***, *Margo J* stated thus:

> *"In the case of sequestration proceedings the principle is clearly established that the Court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a concursus creditorum and a distribution of the respondent's assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the Court…*
>
> *However, where proper grounds for a winding up are established, the Court ought not to exercise its discretion against the applicant unless it appears that the improper and ulterior motive is at least the predominant motive actuating the applicant…"*

[24] The essence of the principle is that it is wrong to allow the machinery designed for winding up orders to be used as a means of resolving disputes which ought to be settled in ordinary litigation[19]. Although the respondent is not disputing the debt, in my view, the same principle will apply where the applicant is utilising the winding up proceedings where the debt is secured by a security in the full amount of the debt or more, rather than call on the security, in the absence of other creditors, as in *casu*. In such circumstances, one is unable to avoid an inference, as contended by *Mr Smit*, that the applicant is trying to enforce a debt by bringing liquidation proceedings and accordingly abusing the process.

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[18] 1984 (1) SA 282 (W) at 293C-E.
[19] LAWSA 4 (3) at p162.

[25] Liquidation proceedings are drastic and accordingly, should be resorted to as a last option. More so now, especially with the introduction of section 131(1) and (4) including (6) of the new Companies Act for the supervision and commencing business rescue proceedings for companies in distress. As observed by the Supreme Court of Appeal in ***Normandie*** *(supra) per Tshiqi JA* writing for the full court, stating:

> *"I accept that in appropriate cases placing a company under supervision and in business rescue is preferable to the option of liquidation. I also align myself with the following dictum in Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd 2012 (2) SA 378 (WCC) para 14, where the court stated:*
>
> > *'It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with the attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible.'"*

[26] Accordingly, the applicant could have called on the securities it holds for the satisfaction of its debt rather than resort to liquidation proceedings. As such, on the facts in *casu*, the applicant has not brought these proceedings for the sole or predominant purpose of achieving a *concursus creditorum* and distribution of the respondent's assets but to enforce a debt as contended by *Mr Smit*. Accordingly, I

agree with *Mr Smit* that the applicant is abusing the liquidation proceedings.

[27] In any event, in terms of the provisions of section 69(1)(a) of the Act, a corporation is deemed to be unable to pay its debts if it has *'neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor…'**(my emphasis)***. The respondent has secured payment for the full amount of the debt by registering both the special and notarial bond over its movable assets and the first covering bond over its immovable property in favour of the applicant. On the applicant's own version, the applicant itself sought the registration of the first ranking mortgage bond over the respondent's immovable property in favour of the applicant. As such, the respondent had *'secured [the repayment of the debt] to the reasonable satisfaction of the [applicant] creditor'* as envisaged in section 69(1)(a). Accordingly, in my view, the applicant's application is contrary to the provisions of the Act.

Order

[28] In the premises, I make an order in the following terms:
The application is dismissed with costs.

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P.L. NOBANDA
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION: MAHIKENG

APPEARANCES

DATE OF HEARING	**:**	**20 March 2020**
DATE OF JUDGMENT	**:**	**11 June 2020**
COUNSEL FOR THE APPLICANT	**:**	**Adv AJ Wessels**
COUNSEL FOR THE RESPONDENT	**:**	**Adv P Smit**

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