IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 11102/2009

In the matter between:

BOWEN EQUIPMENT CC Applicant
T/A BRIGGS & STRATTON HIRE
REG NO 2005/015283/23

and

BALLPROP THIRTY THREE (PTY) LTD Respondent
REG MP 2002/004461/07

(For the liquidation of the Respondent)

JUDGMENT DELIVERED ON 2 JUNE 2010

GAMBLE J:

[1] The Applicant seeks a provisional winding up order of the Respondent, basing its claim on the provisions of section 344(f) read with section 345 of the Companies Act, 1973.

[2] The Applicant alleges that during early 2008 it rented out building equipment to the Respondent from its premises in Centurion, Gauteng, and that as of July 2008 the Respondent was indebted to it in the sum of R84 412,00.

[3] On 21 July 2008 the Applicant's attorneys sent a letter by registered post to the registered offices of the Respondent in Heathfield, Cape in purported compliance with section 345 as aforesaid. In that letter the Applicant's attorneys made the following allegation:

> *"According to our client ... an amount of R84 412,00 is owed and payable for rental of goods to Ballprop Thirty Three (Pty) Ltd."*

Liquidation was threatened in the event of non-payment within 21 days.

[4] On 31 July 2008 the Respondent's attorneys responded on behalf of their client and denied "the correctness of your client's claim." They went on to say the following:

> *"In view of a possible settlement, we would appreciate to receive copies of all delivery notes, duly signed by our client. Kindly note that our client was not the only company that operated at the site and thus our client was very specific to ensure that all delivery notes were to be duly signed by a representative of our client. Furthermore our client needs to be able to verify the prices charged for the rental of the goods.*
>
> *To enable us to reply in full to your letter, we would appreciate to receive the requested documents as a matter of urgency. In the*

light hereof we wish to record that your client's claim is, for purposes of section 345, denied until our client has been furnished with full particulars regarding the claim."

[5] There then ensued an exchange of correspondence between the attorneys in terms whereof the Applicant's attorneys attempted to clarify the balance allegedly due to their client and, in response thereto, the Respondent's attorneys sought details establishing delivery of equipment to the building sites on which it was working.

[6] In a letter dated 2 September 2008 the Respondent's attorneys conceded that their client had "accepted goods to hire for approximately R13 000,00." They went on to say that "our client duly paid that account. We do not see any credit in the statement that we received."

[7] The Applicant's derisory response to this allegation on 4 September 2008 was to question how the Respondent could allege only having "accepted" equipment to hire for R13 000,00, when payment in excess of R24 000,00 had already been received by it. The Applicant's attorneys also furnished the Respondent's attorneys with a detailed account setting out how the indebtedness in the sum of R84 412,00 was calculated.

[8] In the founding affidavit in the winding up application the Applicant contented itself with the usual allegations. It went on to say that it:

> *"... engaged with discussions with Mr Fortune [of the Respondent] on a regular basis in order to avoid approaching court. These discussions ran on a continuous basis during October and November [2008] during which time Mr Fortune from the Respondent undertook to:*
>
> *12.1 pay the full amount due and payable once he received his money from Tshwane Municipality;*
>
> *12.2 He indicated to Mr G N Wentzel [of the Applicant] that he had approached court to obtain his money from third parties."*

[9] I am satisfied that the founding papers make out a case indicating the business' inability to pay its debts in the ordinary course of trading and they therefore call for a proper explanation from the Respondent.

[10] The opposing affidavit filed on behalf of the Respondent is a flimsy document which runs to no more than 9 pages including annexures.

[11] In it Mr Fortune firstly challenges the authority of Mr Wentzel to bring the application in the absence of a resolution from the corporation. He then goes on to say that the Respondent denies that *"the equipment eventually delivered to site, was given to the Respondent."* He contends that there were various contractors on the site who were doing similar work and that he needed to see the relevant delivery notes to:

> *"... verify the correctness of the statements. It has not received signed delivery notes and thus Respondent denies liability, because it submits that the goods were not delivered to Respondent."*

[12] In relation to the allegation by the Applicant set out in paragraph 8 above Mr Fortune says the following:

> *"I confirm that I, on behalf of the Applicant consented that, in the event of (sic) all the payments is (sic) made by the Tshwane Municipality the Respondent will pay Applicant. I never admitted that the amount was due and payable, or even correct, but merely subject to the proof that the equipment was indeed used on the site in Shoshanguwe (sic) and that the said payment will be made on the receipt of the money from Tshwane Municipality. Until date hereof the Respondent has not received any money from the Tshwane Municipality and the dispute is still ongoing and will be referred to court ... I, in any event, confirm that the Applicant*

represented by Wentzel, accepted that payment will be made on receipt of the payment from Tshwane Municipality and thus the outstanding amount is not due and payable (sic) it is subject to the condition contained in para 12.1 and 12.2. The claim is thus lodged prematurely .... There was a settlement and a novation took place and for this reasons (sic) the amount is not due and payable."

[13] The defence then put up to the claim of indebtedness is to the following effect: "I am not sure whether I owe you anything but even if you can prove delivery of the equipment to me we have agreed that I will only pay you when one of my debtors (i.e. Tshwane Municipality) pays me." It is suggested that the Applicant agreed to this arrangement hence the claim of a novation by the Respondent.

[14] In the replying affidavit the Applicant points out that the Respondent was furnished with a number of "dispatch notes" and "collection slips" by its attorneys in August 2008. The relevant documents are annexed to the Applicant's reply. Any claim of an inability to ascertain delivery/collection is therefore disputed by the Applicant.

[15] In regard to the alleged novation of the debt, the Applicant denies the allegation and says that the suggestion is "laughable" – that no independent contractor would agree to wait *ad infinitum* while it's debtor attempted to extract payment from a third party.

[16] Implicit in the defence put up by the Respondent is an inability to pay what is due to the Applicant in the ordinary course of business. It can only pay, it says, when it recovers money due to it by a third party, and that obligation, it says, is the subject of on-going litigation between the Respondent and the third party.

[17] Novation involves the replacement of an existing obligation by a new one, the existing obligation thereby being discharged.[1] Like any other obligation it is consensual in nature.[2]

[18] One must be cautious too, to distinguish between a novation and an agreement to vary but one obligation of the old contract (such as the date for payment) leaving the remaining terms in place. The latter scenario usually constitutes a variation of the original agreement rather than a novation thereof.[3]

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[1] **Christie, Law of Contract in SA** (5th edition) p 449 *et seq.*
[2] **Swadif (Pty) Ltd v Dyke N O** 1978(1) SA 928(A) at 940G.
[3] **Christie** *op cit* at 451; **Christou v Christoudoulou** 1959(1) SA 586(T) at 587 – 8.

[19] In any event , the onus of establishing a novation (or, for that matter, a variation) rests on the party relying hereon – *in casu* the Respondent.[4]

[20] In this application the allegation in relation to the novation is as I have said, strenuously disputed by the Applicant. This being an application for a provincial winding-up order the approach followed in **Kalil v Decotex (Pty) Ltd and another**[5] is applicable.

[21] In **Payslip Investment Holdings CC v Y2K TEC Ltd**[6] **Brand J** (as he then was) summarized the ratio in **Kalil**'s case as follows:

> *"According to these guidelines [in **Kalil**'s case] 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*

[4] **Marendaz v Marendaz** 1953(4) SA 218(C) at 226 - 7
[5] 1988(1) SA 943(A) at 976 – 9.
[6] 2001(4) SA 781(C) at 783 G

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."

[22] The claim by the Respondent in the instant case of novation falls into the category of "other disputes" referred to **Brand J** above. In this regard I am of the view that the probabilities favour the Applicant's version herein.

[23] I am further of the view that the Applicant has made out a *prima facie* case on the papers before me establishing Respondent's liability to it. The Respondent has not set up a *bona fide* defence to that claim and I agree with the Applicant's contention that it is unlikely that a party would agree to wait for payment where the party obliged to pay still has unresolved issues with a third party that owes it money. This does not accord with commercial reality. It follows that the Applicant is entitled to a provisional winding up order.

[24] I turn lastly to the question of authority. In the founding affidavit signed on 1 December 2008, Ms Linda Moira Wentzel

says that she is the sole member of the Applicant. She goes on to confirm that the facts in the affidavit are true, correct and within her personal knowledge. She does not say however that she is authorised to bring the application nor does she attach a resolution to this effect to the affidavit.

[25] When the Respondent challenged her authority in the answering affidavit, Ms Wentzel attempted to shore up her founding papers by alleging in the replying affidavit dated 6 September 2009 that the position had been ratified. She presented a resolution dated 4 September 2009 to this effect.

[26] Undeterred the Respondent then suggested that Ms Wentzel was not the sole member of the Applicant and at a late stage of proceedings (in fact after the matter had been argued) produced a CIPRO search to show that Ms Wentzel's husband and daughter were also members of then Applicant. Some further to-ing and fro-ing took place in the form of an exchange of further affidavits and it eventually transpired that the change in membership of the Applicant in fact occurred in about December 2009.

[27] The undisputed facts remain: at the time that the founding and replying affidavits were signed, Ms Wentzel was the sole member of the Applicant. The ratification contained in the later resolution of 4 September 2009 is therefore in order.

[28] It was argued on behalf of the Respondent that the application ought to be regarded as a nullity in light of the absence of any allegations by Ms Wentzel to demonstrate that it was the Applicant and not she that was the litigant.

[29] I consider the approach adopted by the Respondent in that regard to be unduly technical and pedantic.[7] We are concerned here with a small, family-owned business in which, at the time this application was lodged, Ms Wentzel was the only member. Can there be any suggestion in those circumstances that there was the potential for a divergence of view between the deponent to the founding affidavit and the guiding mind of the corporation? Is it really necessary that Ms Wentzel should have invited herself to a meeting at which she was to table a resolution to authorise herself to initiate those proceedings? I think not.[8]

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[7] **Baeck and Co SA (Pty) Ltd v Van Zummeren and Another** 1982(2) SA 112(W) at 118G *et seq.*
[8] **Nahrungsmittel GmbH v Otto** 1991(4) SA 414 (C) at 418C.

[30] But in any event, a resolution by Ms Wentzel ratifying this step was filed in reply and the application has therefore been duly authorised.

CONCLUSION

[31] In the circumstances I am satisfied that:

31.1 The Applicant has adduced *prima facie* proof that it is a creditor within the ambit of section 345(1)(a)(i) of the Companies Act;

31.2 That the Respondent has not set up a *bona fide* defence to the Applicant's claim; and

31.3 The Applicant is entitled to the relief set forth hereunder to enforce payment of its claim.

ORDER

1. It is ordered that the Respondent be placed under Provisional Liquidation in the hands of the Master of the High Court (Cape Provincial Division);

2. A rule *nisi* is issued in terms whereof the Respondent and all other interested parties are called upon to show cause, if any, to this Honourable Court on Tuesday 27 July 2010 why:

   2.1 the Respondent should not be placed under final liquidation;

   2.2 the costs of this application should not be costs in the liquidation.

3. The order shall be served as follows:

   3.1 By the Sheriff of the High Court on the Respondent at its registered address being 11 Sunbury Road, Sunbury Estate, Heathfield;

3.2 By the Sheriff of the High Court on the South African Revenue Services;

3.3 Publication of this Order in one publication each of "Die Burger" and the "Cape Times" newspapers in the language in which this order is granted; and

3.4 On the employees of the Respondent, if applicable, and on all trade unions representing such employees.

pp **P A L GAMBLE**
Judge of the Western Cape High Court