Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 11151/2013

In the matter between:

ABSA BANK LTD **Applicant**

v

TAMSUI EMPIRE PARK 1 CC **Respondent**

Court: Judge J Cloete

Heard: 18 November 2013

Delivered: 3 December 2013

JUDGMENT

CLOETE J:

Introduction

[1] This is an opposed application for the provisional liquidation of the respondent, a property owning entity.

[2] It is common cause that the applicant is a creditor of the respondent and that it accordingly has the necessary *locus standi*; and that all of the formal requirements for the winding up of the respondent as contemplated in s 346(4A) of the Companies Act 61 of 1973 (*'the old Act'*) have been met.

[3] There are two issues in dispute, namely: (a) whether the ground for winding up relied upon by the applicant is competent; and (b) whether the debts relied upon by the applicant are due by the respondent. The respondent also contends that even if both of these issues are determined in favour of the applicant, the court should nonetheless, in the exercise of its residual discretion, refuse a provisional winding up order.

Background

[4] The respondent admits that it is indebted to the applicant, as principal debtor, for monies lent and advanced in terms of a commercial property finance account bearing no 7…….. in the sum of R1 378 465.70. It also admits that it is

indebted to the applicant, as surety and co-principal debtor for the obligations of the JR Trust, for monies lent and advanced to the Trust in terms of a commercial property finance account bearing no 7…… in a maximum sum of R1 082 000. It is not in dispute that both of these accounts are underpinned by written loan agreements and a written deed of suretyship. The respondent denies however that either of the aforementioned sums are due by it to the applicant.

[5] On 29 May 2013 the applicant's attorneys, on its instructions, addressed two letters of demand to the respondent, the first relating to the principal debt and the second relating to the suretyship. Each letter contained the averments that: (a) the amounts reflected therein were *'due, owing and payable'* to the applicant by the respondent; (b) unless payment was received within 10 days of delivery of the letter, summons would be issued; and (c) failure to pay within 21 days from date of delivery of the letter *'…in terms of section 69 of the Close Corporations Act, 69 of 1984… will result in you being deemed to be unable to pay your debts as envisaged in terms of the aforesaid section and our client reserves the right to make application to the High Court for a liquidation order'.*

[6] It is common cause that the applicant demanded payment from the respondent in its capacity as surety of the amount of R3 693 112.77, being the alleged total indebtedness of the JR Trust, and not the maximum amount of R1 082 000 stipulated in the written deed of suretyship.

[7] The letters were served by the sheriff on the respondent's registered address on 12 June 2013. The 21 day period for payment expired on 3 July 2013. The respondent did not make payment as demanded.

[8] On 15 July 2013 the applicant launched the present application. The sole ground for liquidation relied upon reads as follows:

> *'11. As will more fully appear from* [the letters of demand] *the respondent's attention was specifically directed to the provisions of Section 69 of the Close Corporations Act and in particular that failure to effect payment of the amounts due within a period of 21 days from the date of delivery of* [the letters] *will result in it being deemed unable to pay its debts.*
>
> *12. It is accordingly submitted that the respondent is deemed unable to pay its debts as provided for in the aforesaid Section 69, read with section 68(c), of the Close Corporations Act as the respondent has failed to effect payment of the said amounts and should accordingly be wound up by this honourable court.'*

[9] There is no specific averment in the applicant's founding papers that the debts are due by the respondent, save for the allegations incorporated by reference in the two letters aforementioned; as well as two certificates of balance annexed to the deponent's affidavit, both of which contain the averment that the amounts reflected therein are *'due and payable'.* The certificate of balance provided in support of the respondent's indebtedness as surety and co-principal debtor is defective, in that it: (a) refers interchangeably to the respondent as being the principal debtor and the surety; and (b) reflects the amount of the principal debt

and not the maximum amount for which the respondent bound itself in terms of the written deed of suretyship.

[10] The defences raised by the respondent in its answering affidavit are that: (a) the applicant's reliance on s 69 read with s 68(c) of the Close Corporations Act 69 of 1984 (*'the CC Act'*) is fatally flawed, given that s 68 was repealed by the Companies Act 71 of 2008 (*'the new Act'*); (b) the sum claimed from the respondent as principal debtor has at all relevant times not been due, which is also confirmed in a letter dated 8 August 2013 from the applicant's Southern Cape Retail and Business Banking Commercial Business Division, reflecting that the account is paid and up to date; (c) the respondent is not indebted to the applicant in terms of the suretyship for the amount claimed by it; and (d) the deponent to the applicant's founding affidavit himself failed to allege, in terms, that the amount relied upon under the suretyship is due and payable, and indeed failed to advance any grounds or reasons as to why it is due by the respondent. It is common cause that none of the written agreements underpinning the respondent's liability were annexed to the founding papers; and that only certain extracts were annexed to the applicant's replying affidavit, and pertained solely to the principal debt.

[11] In its replying affidavit the applicant, in response to these defences, averred that: (a) the full amount of the principal debt is due because of the respondent's default on payment in breach of the loan agreement, as a consequence of which the agreement *'was cancelled'*; and (b) the respondent's admission of liability for

the maximum sum of R1 082 000 under the suretyship, coupled with the applicant's allegation in the letter and certificate of balance that the full amount of the principal debt owed (by the JR Trust) is due, is sufficient for the court to conclude that the debt is due. The issue raised by the respondent relating to s 69 of the Close Corporations Act would, the applicant advised, be dealt with in argument.

[12] The applicant annexed clauses 20.1 and 21.1.7 of the loan agreement pertaining to the principal debt in support of its allegation of cancellation. Clause 20.1 provides that a default occurs where the respondent breaches any payment obligation. Clause 21.1.7 stipulates that in the event of default the applicant may, in addition to any other rights it may have, cancel the agreement and institute action for damages. Also annexed are statements reflecting that the respondent had defaulted on its payment obligations during the period December 2011 to April 2012 (i.e. more than a year before the letters of demand were despatched) but also that, of the arrears accumulated as a result of the default of R117 524.20 the respondent had, by 19 May 2012, made payments totalling R94 024.84, and that the respondent had not again defaulted on its payments up to and including 7 March 2013.

[13] Clause 21.1.7 of the loan agreement does not afford the applicant the right to cancel without notice to the respondent. There is no indication in the applicant's papers of a clear and unambiguous act of cancellation, nor that clear and unequivocal notice of the cancellation was conveyed to the respondent. The

respondent did not have the opportunity to deal with the issue of cancellation, given that it was raised by the applicant for the first time in reply. There is furthermore no indication that the applicant's claim for payment of the principal debt is a damages claim: indeed, the applicant relied on an extant agreement for its claim based on the principal debt, coupled with *mora* interest from date of demand; and did not take issue with the contents of the letter provided by its own Southern Cape division to the respondent of 8 August 2013 in which it was recorded that payments on the account were up to date. Unfortunately the applicant elected not to annex statements relating to the account for the period subsequent to 7 March 2013 and as such it has not placed any direct evidence before the court as to whether the account was in arrears at May 2013 when the relevant letter of demand was despatched.

The ground for winding up relied upon by the applicant

[14] During argument the applicant accepted that s 68 of the CC Act was repealed by s 224(2) of the new Act which came into effect on 1 May 2011. S 68(c) of the CC Act had provided that a close corporation may be wound up by a court if the corporation is unable to pay its debts.

[15] S 69 of the CC Act, which was not repealed by the new Act, provides that for the purposes of s 68(c) a corporation shall be deemed to be unable to pay its debts if, *inter alia*, a creditor *'to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due,*

and the corporation has for 21 days thereafter neglected to pay the sum…'. S 69 is accordingly the deeming provision for purposes of the now repealed s 68(c).

[16] S 66(1) of the CC Act was amended by s 224(2) of the new Act and provides that:

> *'The laws mentioned or contemplated in Item 9 of Schedule 5 of* [the new Act] *read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.'* (emphasis supplied)

[17] Item 9 of Schedule 5 of the new Act states that, despite the repeal of the old Act, Chapter 14 of the old Act (which contains ss 337 to 426 and which deals with the winding up of companies) continues to apply to the winding up and liquidation of companies as if the old Act had not been repealed, until the Minister determines otherwise by notice in the Government Gazette. This is one of the so-called transitional provisions.

[18] S 344(f) in Chapter 14 of the old Act stipulates that a company may be wound up by the court if it is unable to pay its debts as described in s 345 of Chapter 14; and s 345 provides that a company or body corporate shall be deemed to be unable to pay its debts if, *inter alia*, a creditor to whom the company is indebted in a sum of not less than R100 then due has served a demand for payment on the company at its registered office and that, despite the elapse of three weeks thereafter, payment has not been made.

[19] S 68(c) read with s 69 of the CC Act, and s 344(f) read with s 345 of the old Act, are thus substantially similar provisions. Both s 69 of the CC Act and s 345 of the old Act are deeming provisions, and are dependent for their validity upon s 68(c) and s 344(f) respectively. They are commonly referred to as the statutory grounds for commercial insolvency. The difference of course is that s 68 has been repealed while s 344 still exists by virtue of Item 9 of Schedule 5 of the new Act.

[20] The applicant's argument is essentially that it does not matter that it relied, in terms, on s 69 read with s 68(c) of the CC Act as the ground for the winding up of the respondent. It argues that s 66(1) of the CC Act expressly provides that Chapter 14 of the old Act will apply to the winding up of close corporations. It contends that s 69 of the CC Act was probably retained by mistake, but whether s 69 or s 345 are applied to the present matter is immaterial, because the applicant has made out a case under either section.

[21] S 66(1) of the CC Act makes it clear that Chapter 14 of the old Act applies to the liquidation of a close corporation where there is no specific provision therefor in the CC Act. Put differently, if the CC Act contains a specific provision relating to the liquidation of a close corporation, then that provision applies to the exclusion of any section in the old Act. Conversely, if there is no provision in the CC Act then the relevant section or sections of the old Act are the only sections that are applicable. This includes the aforementioned deeming provisions.

[22] The question that arises is whether s 69 can still apply even though s 68(c), which is the basis for its existence, has been repealed.

[23] There have been conflicting decisions on this issue, although it seems to me that the debate has centred around whether the deeming provision in s 69 of the CC Act can be relied upon under the new statutory scheme when considering the meaning of the expression *'solvent company'*. In *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 (5) SA 197 (FB) and *Herman and Another v Set-Mak Civils CC* 2013 (1) SA 386 (FB) it was held that it was not sufficient for an applicant, under the new statutory scheme, to rely on s 69 only, and that it was necessary for an applicant to go further and to prove actual insolvency and/or that it was just and equitable for the respondent close corporation to be wound up.

[24] However in *FirstRand Bank Ltd v Bunker Hills Investments 499 CC* 2012 JDR 0755 (GSJ), *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another* 2013 (2) SA 439 (FB), *Standard Bank of South Africa Ltd v R-Bay Logistics CC* 2013 (2) SA 295 (KZD) and *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) it was held that (notwithstanding the repeal of s 68(c) of the CC Act), commercial insolvency remains a ground for the liquidation of a close corporation on the basis that the expression *'solvent company'* in item 9(2) of Schedule 5 of the new Act means an entity that is neither factually nor commercially insolvent. In *Scania Finance* the court held as follows at para [13]:

'What the legislature has in effect brought about by the repeal of s 68 and the amendment of s 66 (as set out above of the Close Corporations Act), is that the grounds for winding-up "insolvent" close corporations by order of court are now the same as the grounds for winding-up of "insolvent" companies. Professor Delport submits that, if the application for the winding-up of an "insolvent" company were made on the basis of s 344(f)*, then the applicant may (obviously) rely on the deeming provisions of s 345. Regarding close corporations, the same ground will be used, to wit, s 344* (f) *read with s 69 of the Close Corporations Act.*

[14] As matters stand, to my mind, both s 69 of the Close Corporations Act and s 345 of the previous Act are still deeming provisions. I will henceforth refer only to s 345, and that must be read to include s 69 of the Close Corporations Act. If any of the statutory elements are satisfied, for example the non-payment after being duly served with a demand in terms of s 345, the company is deemed to be unable to pay its debts and the company may, as in the previous disposition, be wound up solely on this ground. Such applicant is entitled to seek a winding-up order on that basis.'

[25] In Blackman: Commentary on the Companies Act Vol 3 at 14-20, the author writes:

' "Deemed" is sometimes used in statutes merely to put beyond doubt a particular construction that might otherwise be uncertain. But it is also sometimes used to impose, for the purposes of the statute, an artificial construction of a word or phrase that would not otherwise prevail, i.e. to create a statutory fiction: a "statutory conclusion which peremptorily follows from the proof of some basic fact, independent of any connective reasoning" ' (emphasis supplied)

[referring to *St Aubyn v Attorney-General* [1952] AC 15 53, per Lord Radcliffe; Re *Pardoo Nominees (Pty) Ltd* (1987) 11 ACLR 573 574 SC (Tas)]

[26] In the present matter the specific *'statutory fiction'* relied upon by the applicant is that the respondent is deemed to be unable to pay its debts in terms of s 69 as read with s 68(c) of the CC Act. That statutory fiction has been repealed and thus no longer exists. In my view this situation is distinguishable from those cases where, despite the existence of an empowering statutory provision, an official exercising that power omitted to refer to that provision, or referred to the incorrect provision of the self-same statute, and our courts have held that this does not affect the validity of the exercise of that power: see for example *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (TPD) at 190B-191A. There is a difference between an empowering provision and a deeming provision.

[27] In *S v Rosenthal* 1980 (1) SA 65 (AD) at 75G Trollip JA said the following:

> *'The words "shall be deemed…" are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind, whether or not the subject-matter is ordinarily of that kind.'* (emphasis supplied)

[28] However, that is not the end of the matter, given that legislation must be interpreted in such a way so as to avoid rendering a statutory provision meaningless or nugatory. In choosing to retain s 69 of the CC Act the legislature must have intended for it to have some purpose. The only manner in which this can be achieved is by following the approach of the court in *Scania Finance*, namely that, s 69 of the CC Act must, despite its reference to s 68, be construed

as referring to s 344(f) of the old Act. This makes sense because, at the same time that s 68(c) was repealed, s 66(1) was amended and the transitional provisions of the new Act came into force. The reference in s 69 to s 68(c) can thus be construed as a reference to a repealed provision which has nonetheless been substantially re-enacted, in relation to close corporations, by way of the transitional provisions in the new Act read with s 344(f) of the old Act.

[29] It is accordingly my view that the applicant's sole reliance on s 69 as read with s 68(c) of the CC Act is a sufficient ground for the winding up of the respondent, provided however that the applicant has shown that the debts are due.

Whether the debts are due

[30] S 345 of the old Act as well as s 69 of the CC Act make it clear that the statutory demand is only competent if the debt relied upon is *'then due'*. In other words, the demand itself does not render the debt due; the only effect of failure to comply with the demand, if the debt is due, is that the deeming provision of an inability to pay debts becomes the ground for winding up.

[31] For the reasons that follow I am not persuaded that the applicant has established, in accordance with the test set out in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (AD) at 976C-I, that at the time of despatch of its letters of demand the debts were in fact then due.

[32] First, a mere allegation that a debt is due does not of itself render the debt due. Second, there is not a single averment in the applicant's founding papers that the respondent was in default of its payment obligations at that date, or indeed that it was in breach of any of the other provisions of the agreement relating to the principal debt, which would or could have resulted in the full amount becoming due.

[33] Third, it was only in reply that the applicant relied upon a breach followed by a purported cancellation of the agreement. The breach relied upon had occurred over a year before despatch of the relevant letter of demand. I have already dealt with the absence of any evidence to indicate that the applicant exercised an election to cancel; any evidence of a clear and unambiguous act of cancellation; any evidence of a clear and unequivocal notice of cancellation being conveyed to the respondent; any evidence that at the date of demand the respondent was in breach; and that, on the appellant's own version as reflected in its letter dated 8 August 2013, no monies were due by the respondent. Contrary to what the applicant belatedly alleged about cancellation, all of the indications are that, notwithstanding the earlier default on payment, the applicant elected not to cancel, because for a year thereafter it took no steps against the respondent and then ultimately relied on an extant agreement to enforce payment.

[34] Fourth, and insofar as the suretyship is concerned, the applicant has failed to set out any basis at all for why the debt is due. It contented itself with a bare allegation to that effect, and has not even averred that the JR Trust as principal

debtor is in default. The certificate of balance is defective, and the best that the applicant could proffer in reply was that the amount admitted by the respondent as owing by it *'remains unpaid'*.

Residual discretion

[35] Even if I am wrong in my findings relating to whether the debts are due, I do not believe, in the exercise of the narrow discretion which I nonetheless retain, that the granting of a provisional winding up order in the particular circumstances of this matter will be just, fair and equitable: see *Commissioner, SARS v Hawker Aviation Services Partnership* 2005 (2) SA 283 (TPD) at para [74].

[36] First, in respect of the principal debt, the undisputed evidence is that the applicant holds security of R2 million for the amount owed of R1 378 465.70. The valuation produced by the respondent shows that the immovable property over which the mortgage bond is registered as security for the applicant's claim is worth R4.4 million. The rental income easily covers the loan repayments. The gross monthly income is R40 027.62 inclusive of VAT of R5 603. Rates and taxes amount to R6 897.05 and the monthly instalment due to the applicant is R23 566.82, leaving a net monthly residue to cover other running costs of just under R4 000.

[37] Second, in respect of the suretyship, the undisputed evidence is that the applicant has a first mortgage bond registered over the JR Trust property situated at 96 Meade Street, George, as security for its loan to the Trust. The

valuation obtained by the applicant itself in December 2010 set the market value of the property, which was only partly developed at that stage, at R7.9 million. A recent valuation obtained by the respondent of the units which are not yet sold is R5 525 000, which more than covers the principal debt owed by the Trust of R3 693 112.77.

[38] In both instances therefore there are readily realisable assets available to settle the sums owing to the applicant.

Costs

[39] In its opposing affidavit the respondent merely sought an order that the application be dismissed with costs. In argument a punitive costs order was sought. I am not persuaded that a punitive costs order is warranted. First, the applicant was not put on notice when the respondent filed its opposing affidavit that a punitive costs order would be sought. Second, it was open to the respondent to have responded to the statutory demands served on it within the stipulated period. It failed to do so. Had it done so, the application may well not have even been brought.

[40] **In the result I make the following order:**

The application is dismissed with costs.

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J I CLOETE