



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

Case No:

8771/2020

In the matter between:

ALBARAKA BANK LIMITED

APPLICANT

and

CECITA CC

RESPONDENT

ORDER

The application is dismissed with costs on a party and party scale.

JUDGMENT

Delivered on: 15 June 2022

Masipa J:

Background

[1] The applicant is a registered commercial bank, which instituted winding up proceedings against the respondent. The proceedings are opposed. The respondent, a registered Close Corporation, is not a trading entity but owns an undeveloped land situated at Ballitoville ('the immovable property'). This property is bonded to the applicant as security for the loan. The applicant and respondent are jointly referred to as 'the parties'. All procedural requirements as set out in the Companies Act, 1973 ('the Companies Act') were complied with prior to the hearing of the matter.

Issue

[2] The issue to be determined is whether the applicant is entitled to bring this application having instituted an action, which the respondent defended, prior to launching this application, i.e. whether the application is bona fide or an abuse of process.

The facts

[3] The parties in this matter concluded Musharaka agreements (agreements similar to joint venture agreements) during 2015. In terms of these agreements, the applicant lent various sums of money to the respondent. The respondent undertook to repay the loan monthly as prescribed in each agreement. The respondent used part of the money loaned to acquire the immovable property.

[4] The applicant contends that the respondent breached the agreements by failing to pay the monthly instalments. As at the institution of the proceedings, reference is made to two accounts. The arrears in both accounts is R446 570.25 and R832 140.20 with the last payment being made during November 2017.

[5] During 2018, the applicant launched an action against the respondent referred to earlier in this judgment. The applicant avers that the respondent denied liability and has made no efforts to comply with pre-trial preparations.

[6] On 20 July 2020, the applicant issued a notice in terms of s 69 of the close Corporations Act 69 of 1984 calling upon the respondent to pay the arrears totalling R167 247.40. The Sherriff served the letter. There was no payment by the respondent in response to the notice. The applicant contends that the only

reasonable inference to draw is that the respondent is unable to pay its debts as defined by the Insolvency Act, 1936 and the Companies Act. Further, that the respondent is commercially insolvent. In view of this, the applicant elected to proceed by way of winding up proceedings.

[7] The respondent denies that it is insolvent or that it is indebted to the applicant as alleged. The respondent avers also that the action between the parties is still pending and that after delivering its plea, the applicant did not apply for summary judgment. It accordingly contended that in the absence of a summary judgment application, the applicant's conduct was tantamount to an admission that the respondent has a bona fide defence to the action. The respondent contends that the current application constitutes an abuse of process.

[8] The respondent avers that it is able to pay its debts. This is because the property is leased and the tenant pays rental in the sum of R36 750 which payment was to commence during March 2021. The lease provides the lessee with an option to purchase the property, which has been developed for an amount of R6.5 million. A representative of the lessee has indicated that he is exercising the option to purchase the property as soon as his vehicle business he is erecting on it is up and running which was to be around April 2021. Accordingly, it contends that there is no doubt that the respondent is solvent both commercially and financially.

[9] The respondent contends that the applicant does not set out which pre-trial preparations have not been complied with in respect of the action. Further, that the applicant sat back and took no steps for the furtherance of the action and then seeks to destroy it through liquidation proceedings in the face of a disputed debt. According to the respondent, the facts set out in the application are inconsistent with the conduct of the applicant in respect of the action; are not justified and lack bona fides.

[10] The respondent denies that the accounts are in arrears. It contends that it has two accounts with the applicant and that the applicant failed to appropriate the payments it made since the opening of the accounts. In addition to this, that the applicant has accounts with SA Demolishers CC which has the same members as the respondent. Mr Aboobaker Joosab, the deponent to the respondent's affidavit

and one of its other members are involved in the management of the two Close Corporations. It was likely that the payments by the respondent were appropriated to SA Demolishers. This error/dispute and debasements would be canvassed during the trial.

[11] The issue of the sale of the property was discussed by Joosab and a representative of the applicant in 2017 and it was agreed that the respondent would pay R100 000 which would be sufficient until the property was sold and the bond would be settled in full. It is common cause that this payment was made on 6 October 2017.

[12] According to the respondent, the applicant is inconsistent on the amount it is owed since it initially gave a figure of R2.1 million. As at 26 October 2020, twelve months later, it was R877 074. On 20 July 2020, in the s 69 notice, the amount due is reflected as R840 077.20. This showed that the figures were wrong. The amount on the request for balance dated 26 October 2020 shows the amount as R832 140.20 as the entire amount of arrears. This, despite the applicant asserting that there has been no payment received from the respondent since November 2017. The respondent contends that the applicant fails to clearly and satisfactorily set out the debts due and owing by the respondent. Accordingly, these proceedings are an abuse of process and falls to be dismissed.

[13] Additionally, the respondent contends that it has a valid defence as set out earlier and that the applicant is using these proceedings as a weapon in terrorem, which is unjustified. According to the respondent, the applicant was not entitled to issue the s 69 notice and that it is of no legal effect. This is because the initiation of liquidation proceedings were void ab initio because of the action based on the same causa, which was launched prior to the liquidation proceedings. The respondent prays for the dismissal of the application with costs on an attorney and client scale.

[14] In reply, the applicant contends that the respondent only delivered its discovery affidavit in the action after it was compelled to do so. Also, that the respondents erstwhile attorneys refused to attend the initial rule 37 conference. At a

subsequent rule 37, the respondent's counsel undertook to revert on issues raised and no response has been forthcoming.

[15] According to the applicant, the only issue in dispute is whether the respondent breached its obligations to the applicant and whether there was an extension of time in respect of its claim. The applicant denies there was a moratorium arising from the purported suspension of instalment payment agreement pending the sale of the immovable property. It was therefore entitled to launch these proceedings, as there has never been a bona fide dispute about the indebtedness. The last payment by the respondent was during 2017 which is not the conduct of a solvent company

[16] Also, that in terms of the mortgage bond, the respondent may not sell the property without the applicant's consent which was not sought. The applicant contends that the fact that it has not applied for summary judgment should not be construed as an acknowledgment of a bona fide defence. While the applicant concedes that the respondent and SA Demolishers have common shareholders, it denies that payment by the respondent could have been appropriated for SA Demolishers indebtedness. As regards inconsistency in the total debt due, the applicant avers that the respondent seeks to conflate figures, as there are various Musharaka agreements.

[17] The moratorium alleged by the respondent was oral and was precluded by the non-variation clause in the Musharaka agreements. Accordingly, the applicant contends that the respondent's conduct is that of a party seeking to delay payment of its obligations as long as possible. The applicant contended therefore that the respondent lacks any bona fides.

[18] It is common cause that the respondent loaned monies from the applicant. In order for the court to grant a provisional order, it must be satisfied that the applicant demonstrated prima facie that it is a creditor of the respondent and that the respondent is unable to pay its debt. See s 346(1)(b) of the Companies Action, 1973 and s 69 of the Close Corporations Act, 1984.

[19] While the loan is not in dispute and a s 69 notice was issued, the respondent avers, and it is common cause, that the applicant instituted an action prior to launching this application based on the same debts. As set out earlier, the action is still pending. It is correct that the applicant's conduct in not applying for summary judgment may not be inferred as an acceptance of a bona fide defence. I however agree with the respondent that there is no reasonable explanation why this avenue was not explored when it could have resulted in the applicant obtaining judgment much sooner than following a lengthy protracted trial process.

[20] Indeed, the trial process seems not to be beneficial to the applicant hence a decision to launch this application. However, the applicants launched this application without withdrawing the action. Accordingly, there was a pending lis between the parties. While it is common cause that the respondent failed to pay the debt on demand, it is because as appears earlier in this judgment, the debt is disputed. Accordingly, I agree with the respondent that the applicant has not shown that it is entitled to an order it seeks or judgment on the action without the matter going to trial.

[21] Since the action was launched, the s 69 notice can be said to reflect the lack of bona fides on the applicant. The applicant's conduct constitutes an attempt to enforce payment of a disputed debt. The irresistible fact is that this application is intended to put an end to the action, which has been defended.

[29] It is trite that winding up proceedings should not be used to enforce payment of a debt, which is reasonably, and bona fide disputed. See *Badenhorst v Northern Construction Enterprise (Pty) Ltd* 1956 (2) SA 346 (T) and *Freshvest Investments (Proprietary) Limited v Marabeng (Proprietary) Limited* [2016] JOL 36911 (SCA).

[30] As submitted by Mr *Eades* for the applicant, the question arises whether the respondent demonstrated that the claim is disputed on reasonable and bona fide grounds. See *GAP Merchant Recycling CC v Goal Reach Trading 55 CC* 2016 (1) SA 261 (WCC) para 20. Mr *Eades* argues that this is determined by looking at the defence to the action being that the applicant granted the respondent AN extension of time in respect of its claim and accordingly a moratorium applies. He submitted

that the applicant relies on the non-variation clause. Accordingly, any attempt to vary the terms of the agreement as envisaged by the respondent is of no force or effect.

[31] Mr *Pitman* for the respondent argued that the applicant fails to appreciate the respondent's defence being the applicant's failure to appropriate payments made to the correct account together with the inconsistency in the debt due. The appropriation is part of the dispute in the action. Also, that the applicant admits the payment of R100 000 without explaining how this came to be.

[32] I agree with Mr *Eades* that the issue of appropriation of payments, and the arrangement leading to the payment of the R100 000 raises new disputes. It cannot be said in respect of the appropriation of payment that the respondent is indebted to the plaintiff. Accordingly, in my view, the respondent raised defences which are reasonable. The issues would be best resolved at trial.

[33] In respect of costs, I am of the view that the issues raised in the matter do not call for an order for costs as sought on an attorney and client scale by the respondent.

Order

[34] The application is dismissed with costs on a party and party scale.

MASIPA J

APPEARANCE DETAILS:

For the Applicant:	Mr S Eades
Instructed by:	Shepstone & Wyle
For the Defendant:	Mr M Pitman

Instructed by: Amith Luckan and Company

Matter heard on: 3 March 2022

Judgment delivered on: 15 June 2022